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Is Your Furniture Spying on You?: Covert Use of GPS in Advertising

Brandy Worden

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Is Your Furniture Spying on You?: Covert Use of GPS in Advertising

by
BRANDY WORDEN*

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I. Introduction

The cross-pollination of technology and advertising has blossomed over the last several decades.¹ Armed with technology, advertisers can entice consumer audiences with personal, targeted messages about their products.² Software programs target code words in e-mails and social networking sites to tailor advertisements to a

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1. See, e.g., Don Corbett, *Virtual Espionage: Spyware and the Common Law Privacy Torts*, 36 U. BALT. L. REV. 1, 5 (2006) for an example of advertising and technology synthesis, discussing a marketing evolution via the Internet.

2. See *Targeted Ads in Gmail*, GMAIL, http://mail.google.com/mail/help/about_privacy.html#targeted_ads (last visited Apr. 2, 2011); *Scanning Email Content*, GMAIL, http://mail.google.com/mail/help/about_privacy.html#scanning_email (last visited Apr. 2, 2011); *Facebook Adverts*, FACEBOOK, http://www.facebook.com/advertising/?campaign_id=402047449186&placement=pflo&extra_1=0 (last visited Apr. 2, 2011).

person's presumed interests.³ Social networking and online shopping sites can learn or remember birthdays of loved ones to timely present consumers with gift ideas via e-mails or messages on social networking sites. The more advertising flourishes, the more invasive technology becomes. While this hybrid species benefits most business models, it might also be toxic to consumer privacy and property rights.

This Note focuses on a recent advertising campaign that covertly incorporated global positioning system ("GPS") technology into furniture that was essentially given away for advertising purposes. Superficially, tracking the location of furniture may appear unobtrusive. However, this Note is concerned with the intermingling of advertising with technology that does more than sit passively in a consumer's home, but actually communicates information about the consumer to the advertiser. Part II of this Note provides background on the advertising campaign for Blu Dot. Part III discusses potential legal causes of action Blu Dot's advertising agency could face, such as trespass and invasion of privacy. Finally, Part IV analyzes current legislation protecting consumer privacy and proposes creating new laws that will better protect consumers from these invasive advertising tactics.

II. Background on the "Real Good Experiment"

Blu Dot is a Minnesota-based company that designs and manufactures furniture with a modern flair.⁴ In the fall of 2009, Blu Dot hired Mono, an advertising agency, to run an innovative new advertising campaign.⁵ The campaign, entitled the "Real Good Experiment" ("Experiment") was described as "a study in human behavior, new forms of viral marketing and the recession friendly urban phenomenon of 'curb mining.'"⁶ According to Mono, the purpose of the Experiment was to discover what would happen to

3. See Harry Huai Wang, *Never Forget a Birthday*, FACEBOOK (Nov. 14, 2008, 5:01 PM), <http://www.facebook.com/blog.php?post=38780477130>; Sara Schonfeld, *Merge Between Online Shopping, Social Networking Yields Privacy Concerns*, THE DAILY PENNSYLVANIAN (Jan. 27, 2011, 11:00 PM), <http://www.dailypennsylvanian.com/article/merge-between-online-shopping-social-networking-yields-privacy-concerns>.

4. *Our Story*, BLU DOT, <http://www.bludot.com/about-bludot-dir/our-story> (last visited Jan. 28, 2010).

5. Rob Walker, *A Real Find*, N.Y. TIMES, Dec. 6, 2009, at MM26.

6. Andy Jordan, *Busted! New Yorkers Caught Nabbing Street Chairs*, WALL ST. J. (Dec. 14, 2009), <http://online.wsj.com/video/busted-new-yorkers-caught-nabbing-street-chairs/04BEC9BF-E56F-43CE-8293-6A9B2CC8A70E.html>.

designer chairs left on the street: “Where would they go? Who would pick them up? Where would they find their new homes.”⁷

Mono produced a short film based on the advertising campaign that promised to show “intrigue,” “love,” and “drama.”⁸ However, the film more accurately depicted Mono spying on the lives and property of twenty-five largely unsuspecting persons.⁹

Mono initiated the Experiment by scattering twenty-five stylish Blu Dot chairs throughout the streets of New York City.¹⁰ Mono created a surveillance perimeter around the chairs to watch what happened to them.¹¹ Mono employees were positioned with cameras on nearby rooftops and street corners.¹² They communicated through walkie talkies and used code names, working as a unit to monitor the furniture.¹³

Arbitrary persons then took the seemingly abandoned chairs into their homes under the watchful eyes (and cameras) of Mono’s agents.¹⁴ Mono filmed the chairs from the time they were dropped on the street, while they were inspected by potential unidentified new chair owners (code named “PUNCOs”), and until they had been whisked away by identified new chair owners (“INCOs”).¹⁵ Mono’s agents would follow the INCOs until losing visual contact.¹⁶

Unbeknownst to most of the INCOs, Mono had hidden GPS tracking devices inside several of these chairs.¹⁷ Mono posted a map of the city on Blu Dot’s website with markers indicating the locations of the furniture according to these GPS devices.¹⁸ The website encouraged viewers to watch the “journey” of the chairs until Mono

7. *Id.*

8. Realgoodchair, *The Blu Dot Real Good Experiment: Trailer*, YOUTUBE (Dec. 11, 2009), <http://www.youtube.com/watch?v=k0JHqGiHPo4>.

9. See Walker, *supra* note 5 (Walker classifies these persons as “largely” unsuspecting because Mono had advertised the experiment on various social networking sites such as Twitter. As such, some of the “curb miners” may have been aware of the experiment. At least one individual who found a chair located and removed the GPS device.).

10. *Id.*

11. *The Real Good Experiment Film*, BLU DOT, <http://www.bludot.com/bonus-tracks-dir/rge> (last visited March 5, 2010).

12. *Id.*

13. *Id.*

14. Walker, *supra* note 5.

15. *Real Good Experiment Film*, *supra* note 11.

16. *Id.*

17. *Id.*

18. Walker, *supra* note 5.

replaced the map with a short film based on the Experiment.¹⁹ The film also reveals that Mono used the GPS trackers to locate the chairs at the homes of the INCOs.²⁰ Mono agents knocked on the INCOs' doors and asked to speak to them about their decision to take the chairs in filmed interviews.²¹ In these interviews, the INCOs expressed surprise that Mono had been tracking the chairs.²²

III. Analysis of Potential Legal Causes of Action against Mono for the Covert Use of GPS in the Advertising Campaign

The integration of GPS technology in advertising is certainly innovative. The Experiment drew so much attention that details of the campaign made its way into premier publications such as the *Wall Street Journal* and the *New York Times*.²³ However, this innovative advertising may reach beyond the limits of the law by infringing consumer property rights and invading consumer privacy.

A. Infringement of Property Rights

Property rights are often analogized as a “bundle of rights.”²⁴ This bundle includes the rights to exclude, transfer, possess, and use property.²⁵ When the right to exclude is infringed upon, it typically takes the form of a trespass either to chattels or real property.²⁶ Thus, Mono may have trespassed when it knowingly maintained a GPS signal on its products after the INCOs had taken them.

1. Trespass to Chattels

Technology has resurrected the doctrine of trespass to chattels, “which had been largely relegated to a historical note in legal textbooks.”²⁷ Chattels are generally understood to be personal

19. *Real Good Experiment Film*, *supra* note 11.

20. *Id.*

21. *Id.*

22. *Id.*

23. Walker, *supra* note 5; Jordan, *supra* note 6.

24. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 4–5 (2000). For discussion on the right to exclude, see *Jacque v. Steenberg Homes*, 209 Wis. 2d 605, 617–18 (Wis. 1997). Accord *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)).

25. See SPRANKLING, *supra* note 24, at 4–5.

26. *Id.*

27. *Sotelo v. DirectRevenue, LLC*, 384 F. Supp. 2d 1219, 1230 (N.D. Ill. 2005). See also Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 27–28 (2000), stating:

property that is moveable and transferable, unlike the immovable land-based category of property known as real property.²⁸ The chattels at hand are the Blu Dot chairs equipped with GPS devices. Trespass to chattels may be committed when a person either: (1) intentionally dispossesses another of their property, or (2) uses or intermeddles with another's property.²⁹ This Part will determine if the actions taken by Blu Dot meet the requirements for trespass to chattels.

The comments provided in the Restatement (Second) of Torts ("Restatement") explain that a dispossession occurs when one takes or destroys another's property.³⁰ The film based on the Experiment shows the only physical contact with the chairs after being taken by the INCOs occurs through an electronic signal sent to the GPS device.³¹ There is no indication that Mono repossessed, destroyed, or even laid hand on the chairs.³² In the filmed interviews, the INCOs were seen using the chairs and expressing satisfaction with the chairs.³³ Without further evidence suggesting Mono committed such acts, this provision is not likely applicable.

However, although Mono did not physically dispossess property, they may have intermeddled with the INCOs' property. The Restatement defines intermeddling as "intentionally bringing about a physical contact with the chattel."³⁴

[T]respass to chattels, which seems to have become the darling of cyberspace lawyers. In a series of recent decisions, led by the opinion in *CompuServe v. Cyber Promotions*, courts have used this obscure nineteenth century claim to exclude unsolicited bulk e-mail or "spam" first from the computer systems of Internet subscription services, and more recently from corporate computer systems.

Burk also describes the reasoning courts have chosen to evaluate technological invasions as a trespass to chattels rather than conversion because it is unclear that intangible influences and properties can be converted. Further, conversion is a total dispossession while trespass to chattels may be a partial interference. *Id.* at 29–30 (citing *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996)).

28. *State v. Donahue*, 144 P. 755, 758 (Or. 1914)

29. *Sotelo*, 384 F. Supp. 2d at 1229 (citing RESTATEMENT (SECOND) OF TORTS § 217 (1965)).

30. RESTATEMENT (SECOND) OF TORTS § 217, cmt. & illus. (1965).

31. *The Real Good Experiment Film*, *supra* note 11.

32. *Id.*

33. *Id.*

34. RESTATEMENT (SECOND) OF TORTS § 217, Comments and Illustrations, cmt. (e) (1965).

The Restatement illustrates three ways in which a person might intermeddle with one's chattel. First, an actor may commit a trespass by intentionally touching another's chattel.³⁵ For example, "beat[ing] another's horse or dog, or by intentionally directing an object or missile against it, as when the actor throws a stone at another's automobile or intentionally drives his own car against it."³⁶ Second, an actor may also commit a trespass by inducing a third party to intermeddle with another's chattel through duress or fraud.³⁷ Finally, "[a]n actor may commit a trespass by so acting upon a chattel as intentionally to cause it to come in contact with some other object, as when a herd of sheep is deliberately driven or frightened down a declivity."³⁸

The Restatement further warns that "[i]f such intermeddling with another's chattel is done without his consent and without any other privilege, the actor is subject to liability for harm thus caused to the chattel."³⁹ Courts have interpreted this to mean that while "intermeddling" creates liability, there must also have been a harm in order to award damages.⁴⁰ However, the harm need not be a physical harm suffered by chattel so long as there is a proximate relationship between the trespass and the harm.⁴¹

A strong analogy to the potential trespass caused by the Experiment is electronic spam ("spam"). Spam is an "unsolicited commercial message often sent to "hundreds of thousands of Internet users at once."⁴² In *Compuserve Incorporated v. Cyber Promotions*, Cyber Promotions used Compuserve's e-mail networks to send "unsolicited e-mail advertisements on behalf of themselves and their

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* See also *Ebay, Inc. v. Bidder's Edge*, 100 F. Supp. 2d 1058, 1065 (N.D. Cal. 2000) (citing *Zaslow v. Kroenert*, 176 P.2d 1, 18 (Cal. 1946)) (stating:

Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.)

40. *Sotelo v. DirectRevenue, LLC*, 384 F. Supp. 2d 1219, 1230 (N.D. Ill. 2005); *Glidden v. Szybiak*, 63 A.2d 233 (N.H. 1949).

41. *Burk*, *supra* note 27, at 28.

42. *Compuserve Inc. v. Cyber Promotions*, 962 F. Supp. 1015, 1018 (S.D. Ohio 1997).

clients to hundreds of thousands of Internet users.”⁴³ The Ohio district court found “[e]lectronic signals generated and sent by computer. . . . sufficiently physically tangible to support a trespass cause of action.”⁴⁴ Furthermore, the court found that the spam e-mails harmed Compuserve’s property.⁴⁵ Though the spam did not cause direct physical harm to Compuserve’s hardware, the court found spam could diminish the value of equipment by draining computer processing power and taking up disk space.⁴⁶

One court has also held that unfavorable emotions caused by spyware can qualify as an actionable harm under trespass law.⁴⁷ Spyware is a “variety of software that operates covertly on personal computers to track user behavior and display advertising.”⁴⁸ In *Sotelo v. DirectRevenue*, the court applied trespass to chattels in the context of spyware.⁴⁹ The court recognized that spyware can create technical problems, such as causing:

[C]omputers to slow down, take up the bandwidth of the user’s Internet connection, incur increased Internet-use charges, deplete a computer’s memory, utilize pixels and screen-space on monitors, require more energy because slowed computers must be kept on for longer, and reduce a user’s productivity.⁵⁰

In addition to physical harms to the computers, the court also cited user frustration as a damage caused by spyware.⁵¹

The Experiment did make use of the chairs taken by the INCOs. Mono tracked the INCOs and advertised their locations online using the device installed into the chair.⁵² It is not clear whether a court would find that the INCOs incurred a tangible harm.⁵³ There is no

43. *Id.* at 1017.

44. *Id.* at 1021.

45. *Id.* at 1022.

46. *Id.*

47. *Sotelo v. DirectRevenue, LLC*, 384 F. Supp. 2d 1219, 1230 (N.D. Ill. 2005).

48. Jacob Kreutzer, *Somebody Has to Pay: Products Liability for Spyware*, 45 AM. BUS. L.J. 61, 105 n.1 (2008).

49. *Sotelo*, 384 F. Supp. 2d at 1230.

50. *Id.*

51. *Id.*

52. Walker, *supra* note 5.

53. See Susan M. Ballantine, *Computer Network Trespasses: Solving New Problems with Old Solutions*, 57 WASH. & LEE L. REV. 209, 212 (2000) (discussing the difficulty

indication that the operation of the GPS device had in any way diminished the ability to use the chair.⁵⁴ The film based on the advertising campaign shows that the GPS devices were merely attached to the bottom of the chairs and does not suggest Mono compromised the structural integrity of the chairs.⁵⁵ Even if the installation had caused any harm, it seems that those alterations would have occurred before the INCOs had come into possession of the chair and, as such, would not be a viable claim for the INCO.

However, the logic from the court in *Sotelo* indicates that negative emotions caused by trespass can be considered in an action for damages.⁵⁶ This rationale opens the door to possible claims for the INCOs against Blu Dot. For example, an INCO may have suffered emotional distress after finding out that a GPS tracker hidden in his or her chair had been publicly broadcasting its location to the world, raising a variety of privacy and security concerns. Indeed, these designer chairs had been widely publicized across the entire gamut of social media and had sent some fans wildly chasing after these chairs.⁵⁷ Or perhaps shame derived by having one's "curb-mining" propensities broadcasted in various forms of media could suffice as a harm proximately caused by the trespass.

Additionally, for policy reasons, a court could broadly consider the impact of GPS devices being used covertly under any circumstances in order to conjure scenarios with greater damages and avoid setting bad precedent. Imagine virtual databases that criminals might build or peruse, detailing exactly where they can find what they want and who to target. Placing GPS devices in a watch or a car could inform theft operations of when targets will be away from their homes. This could lead to a loss of privacy and a corresponding concern for security.

Even if a judge determines that the GPS devices caused an actual harm, the INCO must be able to prove that the chair was in fact its chattel. To determine the property rights of the INCOs over the chair, the ownership status of both the original (Mono) and new

suing under the trespass to chattels theory and identifying harm where an intruder accessed computer networks).

54. *The Real Good Experiment Film*, *supra* note 11.

55. *Id.*

56. In *Sotelo*, the court considered the emotional frustration involved in using a machine infected with Spyware in the discussion of harm. 384 F. Supp 2d at 1230.

57. Don Crossland, *Blu Dot's Real Good Experiment*, KONTAKTMAG (Nov. 5, 2009), <http://www.kontaktmag.com/blog/blu-dots-real-good-experiment/>.

57. Walker, *supra* note 5.

property holders (INCOs) must be evaluated. When property has been separated from its original owner it generally falls within three property categories: abandoned, lost, or mislaid.⁵⁸

Property is “abandoned” when the original property owner intends to relinquish all right, title, and interest in the property.⁵⁹ This triggers the aforementioned bundle of rights.⁶⁰ Where the owner intends to give up his right to exclude, transfer, or possess and use the property, abandonment has occurred. Consider this example:

[I]f O deposits a broken toy on the sidewalk so that it can be removed by garbage collectors, he has abandoned it. On the other hand, if O merely leaves the toy on the sidewalk overnight, intending to reclaim it in the morning, no abandonment has occurred.⁶¹

The act of abandoning the property means that the property becomes unowned.⁶² The first person to take possession of abandoned property thus gains exclusive rights to the property.⁶³ This means that neither the original owner nor other prospective property owners may exercise control over the property without the finder granting such rights.⁶⁴

Property will be categorized as lost where “the owner unintentionally and involuntarily parts with it through neglect or inadvertence and does not know where it is.”⁶⁵ To illustrate, lost property would include money that unintentionally falls out of one’s pocket.⁶⁶

Unlike abandoned property, when property is lost, the finder does not inherit original owner’s property rights with the finding.⁶⁷ Interestingly enough, this also does not mean that the possessor necessarily has no rights over the property.⁶⁸ Rather, the finder is

58. See SPRANKLING, *supra* note 24, at 35.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 38.

63. *Id.*

64. *Id.*

65. *Id.* at 36 (citing Benjamin v. Lindner Aviation, Inc., 534 N.W.2d 400 (Iowa 1995)).

66. *Id.*

67. *Id.* at 37–38 (“finder’s agent who mistakenly delivered found tools to third party claiming ownership, but failed to check claimant’s identity, held liable in damages to true owner.”).

68. *Id.*

frequently given constructive possession over the item that can be superseded only if the original owner claims the property.⁶⁹

Property is mislaid when the owner “voluntarily puts it in a particular place, intending to retain ownership, but then fails to reclaim it or forgets where it is.”⁷⁰ This would occur when, for example, a person “momentarily places his wallet on a store counter while paying for a purchase, and then leaves the store without it.”⁷¹

Similar to lost property, when a person takes possession of mislaid property, that person does not become the actual owner of the property.⁷² Rather, again, they assume constructive possession over the property that must be returned in full to the original property owner should they later claim the property.⁷³

Applying these standards, it is difficult to categorize the chairs left on the streets by Mono. Frequently, furniture left on the streets is abandoned. However, it is not clear Mono intended to relinquish all of the sticks in the bundle of property rights required for abandonment.

It seems that Mono intended to release at least some of its property rights. The point of the campaign was for the chairs to be taken and to follow where they went.⁷⁴ The film shows INCOs sitting in the chairs sewing or playing instruments without evident objection.⁷⁵ Thus, the right to use the property has been, at the very least, shared with the INCOs.⁷⁶

It also seems that the campaign gave the finder the right to exclude people or to sell the property.⁷⁷ Mono sent agents to the homes of the INCOs to conduct interviews.⁷⁸ In these interviews some INCOs revealed their intent to give the chairs to other people, without Mono or its agents contesting.⁷⁹

However, Mono may still be exercising at least one of the property rights to the chairs: its right to use the chairs.⁸⁰ These chairs

69. *Id.*

70. *Id.* at 36 (citations omitted).

71. *Id.*

72. *Id.* at 37–38.

73. *Id.*

74. *Real Good Experiment Film*, *supra* note 11.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

were not typical abandoned furniture, where the owners are unconcerned with whether they see their former possession again.⁸¹ In fact, before leaving the chairs on the streets, Mono publically announced that it intended to track the chairs in an ad campaign.⁸²

It is not clear whether Mono manifested the intent to abandon its right to use the chairs until after the ad campaign was completed, the GPS devices were turned off, and the camera crews sent home.⁸³ If this were the case, the INCO would have no property claims that would supersede the authority of Mono's exercise of rights. This would preclude any trespass cause of action against Mono so long as they continued to exercise these rights. Alas, by the time this intent to abandon becomes clear, vesting the finder with actual property rights over the original owner (rather than constructive right subordinate to the original owner), any actions that could have otherwise qualified as trespass arguably would have ended.

A counterargument does remain. It is possible to assert that Mono did not maintain use of the chair, but rather that it maintained use of the GPS device attached to it. However, it seems that this argument remains in the realm of possibility without passing the threshold of plausibility. Given the context of the advertising campaign inviting consumers to watch the "journey of the chairs" that carried their brand in an effort to advertise their furniture, it seems that Mono intended to exercise the right to use both the chair and the GPS device for profit, maintaining ownership rights over those of the INCOs.

Determining that Mono's operation of a GPS device attached to a chair qualifies as a trespass to chattels would likely require a policy-oriented judge. While not beyond the realm of legal precedent, it is certainly settled on the fringe. While the court in *Sotelo* acknowledged the frustration of a property owner in its discussion of what qualifies as a harm sufficient to warrant damages under trespass to chattels, it is unclear whether an emotional harm, standing alone, would be sufficient. *Sotelo* also included more tangible injuries, such as the spyware slowing down computer equipment and draining more energy.⁸⁴

81. *Id.*

82. *Id.*

83. While there is no direct knowledge that the devices have been disabled, it may be suggested through Blu Dot's deactivation of the online map that had previously been tracking the GPS devices on Blu Dot's website. See BLU DOT, <http://www.bludot.com/> (last visited Apr. 1, 2011).

84. *Sotelo v. DirectRevenue, LLC*, 384 F. Supp. 2d 1219, 1230 (N.D. Ill. 2005).

Furthermore, there is a strong argument that Mono had not abandoned the chairs while “intermeddling,” which, if applied, would eviscerate any case for trespass. The judge would need to be willing to separate the GPS device and the chair and find that Mono had only continued to maintain a property interest in the GPS device. The weaknesses in the claims of damage and ownership make a successful claim for trespass to chattels improbable under the current legal framework.

2. *Intentional Intrusion to Land*

Mono may have committed a separate form of trespass for intentional intrusion on land when it planted GPS devices to track the chairs’ locations. The chairs found homes in the living rooms of several INCOs. The Restatement explains:

One is subject to liability to another for trespass . . . if he intentionally (a). Enters land in the possession of the other, or causes a thing or a third person to do so, (b). Remains on the land, or (c). Fails to remove from the land a thing that he is under a duty to remove.⁸⁵

Courts have recognized that, unlike trespass to chattels, no physical harm to the property is required to justify a trespass action for intentional intrusion to land.⁸⁶ In *Jacque v. Steenberg Homes*, the Wisconsin Supreme Court recognized that an actual harm occurs when the right to property exclusion is infringed upon.⁸⁷ In *Jacque*, a housing company dragged a home across the plaintiff’s property without permission.⁸⁸ Though this act caused no physical damages to the plaintiff’s property, the court recognized that the “right to exclude others from his or her land is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”⁸⁹ Thus, by infringing on the legal right to exclude, “the law recognizes that actual harm occurs in every trespass.”⁹⁰

85. RESTATEMENT (SECOND) OF TORTS § 158 (1965).

86. 563 N.W.2d 154, 156 (Wis. 1997); See RESTATEMENT (SECOND) OF TORTS § 158 (1965) (a trespasser will be liable irrespective of any harm caused by the trespass).

87. *Jacque v. Steenberg Homes*, 563 N.W.2d 154, 160 (Wis. 1997).

88. *Id.*

89. *Id.* at 159–60 (quoting *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). *Accord Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)).

90. *Jacque*, 563 N.W.2d at 160.

“The action for intentional trespass to land is directed at vindication of the legal right.”⁹¹ In order to prevent a system of vigilante justice, the court recognized the value of providing legal remedies for infringements on property rights.⁹² As such, the court upheld an award of nominal actual damages and one hundred thousand dollars in punitive damages.⁹³

Not only is it unnecessary that the trespasser cause physical damages to be liable for trespass, the trespasser also need not physically enter the property of another.⁹⁴ Rather, the trespassing agent can arise from nonhuman sources such as light, sound or smoke.⁹⁵ The Restatement flushes out this aspect of trespass, noting that the trespasser must cause the trespassing agent to invade another’s property without consent, where the trespasser had substantial certainty that the trespass would occur.⁹⁶

Although consent is an affirmative defense to a claim of trespass, there is case law supporting the proposition that perceived “consent” based on fraud is not always a viable defense.⁹⁷ The court in *De May v. Roberts* found that consent could be nullified where the property owner gave it to someone assuming a false identity.⁹⁸ There, the

91. *Id.* (citing in part Felix S. Cohen, *Dialogue on Private Property*, IX RUTGERS L. REV. 357, 374 (1954) and W. PAGE KEETON, PROSSER AND KEETON ON TORTS, § 13 (5th ed. 1984)).

92. *Id.* at 160–61.

93. *Id.* at 163.

94. *Thrifty-Tel, Inc. v. Bezenek*, 64 Cal. Rptr. 2d 468, 473 n.6 (1996), holding:

At early common law, trespass required a physical touching of another’s chattel or entry onto another’s land. The modern rule recognizes an indirect touching or entry; e.g., dust particles from a cement plant that migrate onto another’s real and personal property may give rise to trespass. (See *Wilson v. Interlake Steel Co.* (1982) 32 Cal. 3d 229, 232–33 [185 Cal. Rptr. 280, 649 P.2d 922]; *Roberts v. Permanente Corp.* (1961) 188 Cal. App. 2d 526, 529 [10 Cal. Rptr. 519].) But the requirement of a tangible has been relaxed almost to the point of being discarded. Thus, some courts have held that microscopic particles (*Bradley v. American Smelting and Refining Co.* (1985) 104 Wn.2d 677 [709 P.2d 782, 788–89]) or smoke (*Ream v. Keen* (1992) 314 Or. 370 [838 P.2d 1073, 1075]) may give rise to trespass. And the California Supreme Court has intimated migrating intangibles (e.g., sound waves) may result in a trespass, provided they do not simply impede an owner’s use or enjoyment of property, but cause damage. (*Wilson v. Interlake Steel Co.*, *supra*, 32 Cal. 3d at pp. 233–34.)

95. *Id.*

96. RESTATEMENT (SECOND) OF TORTS § 158, cmt. (i) (1965).

97. *De May v. Roberts*, 9 N.W. 146, 166 (Mich. 1881).

98. *Id.* at 149.

plaintiff called a doctor to the plaintiff's home to deliver her baby.⁹⁹ A male who was not a medical doctor accompanied the doctor.¹⁰⁰ The property owner assumed the doctor's companion was a physician or student.¹⁰¹ Under this assumption, the landowner allowed the companion into the home and delivery room.¹⁰² The court found that though the plaintiff "consented to the presence of [the defendant] supposing him to be a physician, [it would] not preclude her from maintaining an action and recovering substantial damages [for trespass] upon afterwards ascertaining his true character."¹⁰³

Similarly, the court in *Miller v. Brooks* held that a person becomes a trespasser when he or she exceeds the scope of the property owner's consent.¹⁰⁴ In *Miller*, the plaintiff sued his wife, from whom he had been separated.¹⁰⁵ Upon separation, the plaintiff told his wife not to enter the property without his consent.¹⁰⁶ Subsequently, the couple attempted to reconcile but were still legally separated.¹⁰⁷ During the separation, the defendant hired a private investigator to install a surveillance camera in the plaintiff's bedroom while the plaintiff was not home.¹⁰⁸

The defendant argued that as the plaintiff's wife, she had permission to enter the premises and could give others that right.¹⁰⁹ The court found that, even if the defendant had consent to be on the plaintiff's property, the defendant could still exceed the scope of that consent.¹¹⁰ Thus, when the defendant installed the surveillance cameras, her actions potentially extended beyond the scope of the consent to constitute a trespass.¹¹¹

However, there has been inconsistency among courts as to whether fraudulently obtained consent may qualify as an affirmative defense to trespass.¹¹² In *Dresnick v. American Broadcasting*

99. *Id.* at 146.

100. *Id.*

101. *Id.* at 147.

102. *Id.*

103. *Id.* at 149.

104. *Miller v. Brooks*, 472 S.E.2d 350, 355 (N.C. Ct. App. 1996), *review denied*, 483 S.E.2d 172 (N.C. 1997).

105. *Id.* at 352.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 355.

110. *Id.* at 355-56.

111. *Id.*

112. *See Dresnick v. Am. Broad. Corp.*, 44 F.3d 1345, 1354 (7th Cir. 1995).

Corporation, the court held that fraudulent intent did not negate the defense of consent.¹¹³ The defendant was a broadcasting company.¹¹⁴ The defendant sent seven individuals undercover to investigate a cataract surgeon by posing as patients.¹¹⁵ The undercover actors were not interested in eye surgery, but had stated otherwise in the interview with the plaintiff.¹¹⁶ The plaintiff stated that he would not have allowed the undercover agent onto his property had he not been deceived.¹¹⁷

Despite these misrepresentations, the court found that the consent was valid. Accordingly, the court found the defendants were not liable for trespass.¹¹⁸ The court distinguished this case from other fraudulent consent cases, noting that the trespass occurred in a professional and not a personal setting, that the trespass did not disrupt the workplace, and that it did not occur in the plaintiff's home.¹¹⁹

Applying the logic from *Steenberg* and the fraudulent consent cases, there is an argument that the INCOs could maintain a trespass action against Mono. The INCOs brought the chair into their home, not knowing that there was an electronic signal granting Mono access into their homes. They were never aware that any parties were connected to the chair. Even if the INCOs' act of bringing the chair into the home could qualify as granting consent to the chair to enter, it was a misrepresentation for Mono to intentionally hide the device with the hopes that the INCOs would unknowingly bring it into their homes.

Furthermore, applying the logic from *Brookes*, the INCOs granted the chair entrance to function as a chair, and the GPS signal would have exceeded the scope of the intended consent. It would also not meet the *Dresnik* exception because the INCOs brought the chairs into homes, and not professional offices. Thus, even though there were no damages to the property, Mono may have entered without consent, creating trespass liability.

However, this again returns to the questions of ownership. If the INCOs had come to own the chair and the GPS device, there may not

113. *Id.*

114. *Id.*

115. *Id.* at 1348.

116. *Id.* at 1352.

117. *Id.* at 1351.

118. *Id.* at 1352–53.

119. *Id.*

have been a trespass because one cannot trespass onto their own property. Thus technology has outgrown the clear lines of precedent and it is unclear whether or not the entry of the GPS device would qualify as an intentional intrusion onto property trespass.

B. Invasion of Privacy

The Supreme Court has historically granted the highest level of privacy protection to the home.¹²⁰ Tort law has also recognized and protected the privacy of residences.¹²¹ This part considers whether Mono violated privacy laws by hiding a GPS device in a chair with the intent that another would adopt the chair and unknowingly bring a GPS signal into their homes.

The Restatement outlines causes of action for privacy invasions.¹²² Most relevantly, Section 652B “provides a remedy when one ‘intrudes upon the solitude or seclusion of another or his private affairs or concerns’ if the intrusion is ‘highly offensive to a reasonable person.’”

In *Nader v. General Motors*, the court developed minimum standards for an invasion of privacy claim.¹²³ The plaintiff sued for invasion of privacy after the defendant had investigated the plaintiff by interviewing his friends to discover his personal views and sexual proclivities, making harassing phone calls at odd hours, accosting the plaintiff with women to attempt to entrap the plaintiff into illicit relationships, and tapping the phone.¹²⁴ The court determined that liability for invasion of privacy requires that the information sought be confidential in nature and the defendant’s conduct unreasonably intrusive.¹²⁵ Additionally, the information must not be as readily available with normal observation and inquiry as to be publicly available.¹²⁶ Applying this logic, the court determined the defendant was only liable for invasion of privacy for tapping the plaintiff’s phone which went beyond mere observation.¹²⁷

The INCOs will unlikely be able to sustain an invasion of privacy action for intrusion on solitude. Mono’s method was likely intrusive. Hiding a surveillance device that the INCOs brought into their homes

120. See *Kyllo v. U.S.*, 533 U.S. 27, 40 (2001).

121. RESTATEMENT (SECOND) OF TORTS § 652B; SOLOVE, ROTENBERG & SCHWARTZ, INFORMATION AND PRIVACY LAW 30–31 (2d ed. 2006).

122. RESTATEMENT (SECOND) OF TORTS § 652B.

123. *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765 (N.Y. 1970).

124. *Id.* at 650.

125. *Id.* at 652.

126. *Id.*

127. *Id.* at 653–55.

seems more intrusive than questioning friends, or making a phone call. In terms of the technology, it is a close match to the phone tap that qualified as invasive in *Nader*. However, possession of the chair is not likely to be deemed information that would not otherwise be available with normal observation and inquiry. The chairs were found on a public street and were taken by the INCOs in the public view. The chairs were in no way concealed to prevent the acquisition of this knowledge from the general public. Thus, the INCOs would not likely be successful in an action for intrusion on solitude against Mono.

IV. Statutory Recommendation

Mono's covert use of GPS devices in their products for marketing purposes invited Internet viewers into the homes of others without the homeowners' consent. Although the location of a chair may not be sensitive enough to have sent the INCOs immediately to their lawyers, the idea of accepting such intrusive marketing gimmicks into our homes comes at the price of our privacy.

The current legal framework fails to provide a suitable course of action for the INCOs who unwittingly became the subjects of the Experiment. Trespass to chattels may be applicable by a judge who is willing to water down the damage requirement and sufficiently think "outside the box" to grant property rights in the chair to the INCOs. However, should an occasional policy-driven judge take this stance, because of these weaknesses in the legal logic, it is not likely to provide a consistently effective remedy for technological intrusions on privacy.

While intentional intrusion to land may provide legal recourse, it also fails to ensure consistent protection against electronic intrusions. The judge must be willing to interpret the use of the GPS device as a trespass, and must also find that the finder's act of bringing in the chair was not, in itself, consent. Although precedent regarding fraudulent intent might protect against an affirmative defense of consent, courts have failed to rule consistently on the sufficiency of fraudulent consent. Thus, although likely a stronger claim than trespass to chattels, this claim could also be denied by a judge.

Further, extending the trespass cause of action to electronic trespass has raised criticism.¹²⁸ One such criticism is that electronic trespass is overreaching.¹²⁹ For example:

128. Burk *supra* note 27, at 54-55.

[u]nwanted telephone callers would seem to be engaging in trespass to chattels; the telephone call sends signals to the instrument of the recipient. So, too, with fax machines that receive unwelcome transmissions. Radios and televisions that receive unwanted transmissions are impinged upon by electromagnetic waves that induce the movement of electrons within the receiver.¹³⁰

Forward-thinking minds have been working to draft remedies in Washington to protect Americans from other technological invasions of privacy.¹³¹ For example, the U.S. House of Representatives passed the I-SPY Act, or Internet Spyware Prevention Act of 2005.¹³² This Act creates criminal liability for the use of spyware to collect personal information without the user's knowledge.¹³³ Information protected as "personal" is defined as:

A first and last name; a home or other physical address; an electronic mail address; a telephone number; a Social Security number, tax identification number, driver's license number, passport numbers, or any other government-issued identification number; or a credit card or bank account number or any password or access code associated with a credit card or bank account.¹³⁴

Commission of these acts would be punishable by fine or imprisonment.¹³⁵ Unfortunately, the Act has not yet become a law.¹³⁶

While the I-SPY Act does not yet have the force of law, it provides a syllogism within which to frame a law that specifically and expressly creates legal liability for technological intrusions, including Mono's intrusion into the home of the INCOs with the GPS device.

129. *Id.* at 34.

130. *Id.*

131. Tim Mammadov, *Spyware Laws*, EHOW, http://www.ehow.com/about_5422099_spyware-laws.html (last visited Apr. 1, 2011).

132. *Internet Spyware (I-SPY) Prevention Act of 2007, and the Securing Air-Craft Cockpits Against Lasers Act of 2007: Hearing Before the Subcomm. On the Constitution of the H. Comm. on Crime, Terrorism, and Homeland Security Comm. on the Judiciary*, 110th Cong. 1 (2007), available at <http://judiciary.house.gov/hearings/printers/110th/35113.PDF>.

133. Internet Spyware (I-SPY) Prevention Act of 2005, H.R. 744, 109th Cong. § 2(b) (2005).

134. *Id.* at § 2(d)(2) (formatting omitted).

135. *Id.* at § 2(b).

136. See Mammadov, *supra* note 131.

Such a law should include both criminal and civil liability to not only deter corporations from using technology to take advantage of persons for their profit, but also to provide compensation to those who have fallen victim to such intrusions.

The law should be forward-looking, taking into account future technologies and seemingly minor intrusions. Mono's use of GPS technology to monitor a chair may, on its own, seem unobtrusive. However, the level of intrusion these technologies are capable of can be severe. One clear example would be if clothing companies marked their products with GPS devices. This could show a person's location at any given time, carving away significantly at the consumer's privacy. Thus, the legislation should forbid the use of tracking devices to collect information without clear consent.

V. Conclusion

"The Real Good Experiment" was an experiment in pushing the legal limits. The advertising campaign financed by Blue Dot brought Internet viewers into the INCOs' homes without their knowledge. Although the laws of trespass to chattels have more recently been invoked to protect against technological intrusions on property, the ambiguity regarding damages and title to the chairs makes it a weak claim. While the other trespass tort, intentional intrusion to land, may also be viable, the question of ownership over the chairs again arises, making the answer difficult to ascertain. So although the trespass laws may work as a weapon when wielded by an open-minded judge, the technology has largely outgrown the precedent.

Privacy laws also fail to protect against unwanted guests in the realm of private life. It is true the law against intrusion on seclusion would protect against information that was not otherwise available to the public. However, it ignores the intrusion caused by the mere act of sneaking onto another's property to obtain that information. Under this provision, it would seem even the most creative judges would have difficulty in applying this legal cause of action to Mono.

Mono may escape liability today, but this gap in privacy protection should be filled. By drafting a law that expressly addresses the issue of growing technology and provides clear limitations on use to protect the property and privacy rights of citizens, the legislature can create a more clear legal foundation for judges. This would create more consistent protection and remove judges from the role of being judicial legislators.
