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NOTES

ROCKING THE CRADLE WITH THE RIGHT TO PRIVACY: ENSURING FAMILY PROTECTION FROM THIRD-PARTY SURVEILLANCE

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I. INTRODUCTION

Imagine you are a new parent and it's time for your three-month-old daughter to sleep in her nursery. You are somewhat nervous about leaving her alone in the other room, so you purchase a video baby monitor. Having this by your bed eases your mind; if you worry during the night or hear the slightest noise, a quick glance at the screen will let you know whether your baby needs you.

Early one morning you wake up and roll over to check on your baby girl using the receiving unit of your video monitor. At first you are glad to see she is still sleeping peacefully, but then something catches your eye. Your daughter's sheets have flowers on them, but the sheets on the

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monitor are striped. As this realization hits, you hear an unfamiliar voice and see someone reaching into the crib. You frantically run the short distance to your baby's room, only to discover her safe and sound in her own crib with no one in sight. Relieved, you pick her up.

Upon returning to your own room, you hear a conversation between a man and a woman coming from your receiving unit. At closer look, you recognize the couple who lives in the apartment down the hall, and you begin listening for a minute. Suddenly, you feel like a creep for listening to their discussion about tight finances. You adjust the switch on the monitor and the familiar floral sheets pop up on the screen. You then begin to wonder whether this incident was a fluke. Or could it be a two-way street? Can your new neighbors view your baby or hear your personal conversations at the simple flip of a switch?

Technological advancements make it possible for parents to visually monitor their babies from another room. Encrypted monitors use digital technology, which is completely private. Unencrypted monitors, however, use public airwaves. This may expose audio and video footage of the child's room to anyone who has a receiving device within a few hundred feet of consumers' homes.

This Note addresses the potential violations of privacy when manufacturers or distributors of baby monitors fail to warn consumers that others may be able to view and hear inside their homes. Part II of this Note discusses the foundation and development of the right to privacy as well as the role it plays in human development. Part III describes the history and mechanics of baby monitors. Part IV summarizes invasion of privacy cases dealing with baby monitors. Finally, Part V presents the argument that transmitting images through public airwaves violates the purchaser's right to privacy within the home.

II. BACKGROUND LAW: THE FOUNDATION AND DEVELOPMENT OF THE RIGHT TO PRIVACY

A. Natural and Common Law Roots

"The concept of privacy has probably long been a value of humankind. As a sentiment—the wish not to be intruded upon—it very likely predates recorded history and was experienced before it was given a name."[1] Privacy is not a "distinctly modern notion,"[2] but innately and

1. Harold C. Relyea, *Personal Privacy Protection: The Legislative* Response, *in*

naturally understood by humankind. In the fourth century BCE, Aristotle first recognized privacy as a core human right within a higher natural law.[3] John Locke further developed this idea in 1690; he defined "natural rights" to include "'lives, liberties, and estates.'"[4] He believed these were rights granted by a creator rather than produced by the government, and that they should be fiercely protected.[5]

Locke's theories carried into colonial common law and influenced the development of American society.[6] Blackstone stated, "the law has 'so particular and tender a regard to the immunity of a man's house that it stiles it his castle, and will never suffer it to be violated with impunity.'"[7] The sanctity of the home was acknowledged in the common law, protecting citizens from third-party invasion including "unreasonable intrusion upon the solitude or seclusion of another."[8]

In 1881, the Michigan Supreme Court explicitly recognized the right to privacy. In *De May v. Roberts*, a doctor was held liable for bringing a man—posing as medical personnel—into the home of a patient during childbirth.[9] The court stated, "The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation."[10] This holding established "significant legal precedent" regarding the right to privacy against third-party invasion.[11]

In 1890, Samuel Warren and Louis Brandeis, two young attorneys, reinforced the common law acknowledgement of privacy in a co-authored *Harvard Law Review* article.[12] Warren, a product of prestigious Boston society,[13] hosted a beautiful breakfast to celebrate his daughter's

PERSONAL PRIVACY 1, 1 (Vita Cornelius ed., 2002).

2. ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967).

3. RICHARD A. GLENN, THE RIGHT TO PRIVACY: RIGHTS AND LIBERTIES UNDER THE LAW 15 (2003).

4. *See id.* at 17.

5. *Id.*

6. *See id.* at 17–18.

7. *See id.* at 47–48.

8. JEFFREY ROSEN, THE UNWANTED GAZE 45 (2000).

9. De May v. Roberts, 9 N.W. 146, 149 (Mich. 1881); RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW: CASES AND MATERIALS 42 (2d ed. 2002).

10. *De May*, 9 N.W. at 149.

11. TURKINGTON & ALLEN, *supra* note 9, at 42.

12. *Id.* at 29; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

13. TURKINGTON & ALLEN, *supra* note 9, at 47; GLENN, *supra* note 3, at 45.

upcoming marriage.[14] The local gossip column publicly disclosed details of the event.[15] Although the content of the newspaper's story was not "inherently salacious," its publication offended Warren.[16] In response, the article, entitled *The Right to Privacy*, redefined the scope of privacy protection in light of societal change.[17]

The core principles of the article included the "right 'to be let alone,'" echoing Judge Thomas Cooley's treatise on torts,[18] and an "inviolate personality."[19] In particular, Warren and Brandeis expressed concern that technological developments would erode the right to privacy by famously stating, "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"[20] They continued, "modern enterprise and invention have, through invasions upon [the individual's] privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."[21]

Prior to their publication, the violation of privacy was a tort, yet there were few available sources to reinforce this idea.[22] "Warren and Brandeis recognized that it was time for the legal system to expressly recognize and protect privacy rights which had long been valued in the moral and social relations."[23] In response, they created a concrete source, authoritatively communicating principles from common law and case law.[24] Moreover, their "article expressed deep concern about the advent of photography, new technologies, an intrusive society, and an invasive press as dangers to individual privacy."[25] Although a secondary source, the article is widely renowned and "has assumed a hallowed place in

14. GLENN, *supra* note 3, at 45.
15. ROSEN, *supra* note 8, at 7.
16. *Id.*
17. *See* GLENN, *supra* note 3, at 45.
18. Warren & Brandeis, *supra* note 12, at 195; THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888).
19. Warren & Brandeis, *supra* note 12, at 205.
20. *Id.* at 195.
21. *Id.* at 196.
22. *See* TURKINGTON & ALLEN, *supra* note 9, at 39.
23. *Id.*
24. *See id.*
25. JON L. MILLS, PRIVACY: THE LOST RIGHT 5 (2008).

legal circles."[26]

In 1905, Justice Andrew J. Cobb applied principles from the famous article and tied them to natural law.[27] "The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence."[28] Cobb stated:

> Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned. Each individual . . . instinctively resents any encroachment by the public upon his rights which are of a private nature . . . . A right of privacy in matters purely private is therefore derived from natural law.[29]

Humans naturally have feelings or aspects of relationships they prefer to keep personal; this innate desire should produce a respect for others' need for privacy as well.[30]

B. Implementation of Privacy Law: Restatements and Other Renowned Sources

In 1960, William Prosser wrote an article for the *California Law Review*, analyzing the motivation behind the Warren and Brandeis article and dividing the privacy tort into four categories of invasion: "1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."[31] Distinguishing between these causes of action is important because they often have different requirements.[32] The Second Restatement of Torts implemented Prosser's differentiations between the types of invasion; throughout the years, his article "ha[s] had

26. GLENN, *supra* note 3, at 46.
27. TURKINGTON & ALLEN, *supra* note 9, at 57.
28. Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 69 (Ga. 1905).
29. *Id.* at 69–70.
30. *See id.* at 68–69.
31. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).
32. *See id.*

a significant influence on the tort right to privacy," serving as a guideline for courts to follow in countless privacy disputes.[33]

Seven years after Prosser's categorization of privacy torts, Alan F. Westin authored *Privacy and Freedom*.[34] In the book, he defined privacy as "the voluntary and temporary withdrawal of a person from the general society through physical or psychological means."[35] He explained, "The individual's desire for privacy is never absolute, since participation in society is an equally powerful desire."[36] Thus, privacy is a balance between social interaction and personal space.[37] Even primitive societies recognized it in some form;[38] privacy is an innately understood value that supersedes cultural bounds.[39] Westin's concept of privacy "is considered a foundation[al] statement on privacy."[40]

"[B]y the mid-1970s common law protections of privacy were widespread within the American legal landscape."[41] By 1995, "[c]ourts in at least twenty-eight states [had] explicitly or implicitly accepted each of the four torts . . . [and v]irtually all states ha[d] recognized a tort cause of action for invasion of privacy in some form."[42]

C. The Functions of Privacy

Understanding and revering the role privacy plays in human existence is necessary to fully comprehend the protection of this right.[43]

33. TURKINGTON & ALLEN, *supra* note 9, at 60.
34. *See* WESTIN, *supra* note 2.
35. *Id.* at 7.
36. *Id.*
37. *See id.*
38. *See id.* at 12 ("One could compile a long list of societies, primitive and modern, that neither have nor would admire the norms of privacy found in American culture—norms which some Americans regard as 'natural' needs of all men living in society. Yet this circumstance does not prove that there are no universal needs for privacy and no universal processes for adjusting the values of privacy, disclosure, and surveillance within each society. It suggests only that each society must be studied in its own terms, focusing sensitively on social customs to see whether there are norms of privacy called by other names, and recognizing all the difficulties in making cross-cultural comparisons.").
39. *See id.* at 13.
40. TURKINGTON & ALLEN, *supra* note 9, at 427.
41. ADAM D. MOORE, PRIVACY RIGHTS: MORAL AND LEGAL FOUNDATIONS 101 (2010).
42. Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 998–99 (1995) (suggesting the right to privacy in tort law be expanded).
43. *See* GLENN, *supra* note 3, at 7.

This concept is often communicated through theatrical analogies. Erving Goffman encouraged backstage retreat to recompose[44] and Westin defined privacy as a chance to lay our masks aside.[45] As humans, many of us put forth our best daily, but this can be exhausting.[46] We must let our guard down and be vulnerable in close relationships and our homes in order to fully function.[47] As Jeffrey Rosen eloquently stated,

> [T]he ability to expose in some contexts parts of our identity that we conceal in other contexts is indispensable to freedom. Privacy is necessary for the formation of intimate relationships, allowing us to reveal parts of ourselves to friends, family members, and lovers that we withhold from the rest of the world. It is, therefore, a precondition for friendship, individuality, and even love.[48]

Westin explored the various functions of privacy in his book, *Privacy and Freedom*.[49] First, individuals must have personal autonomy and freedom to determine who they are.[50] Leontine Young noted that "[w]ithout privacy there is no individuality. . . . Who can know what he thinks and feels if he never has the opportunity to be alone with his thoughts and feelings."[51]

Second, privacy allows emotional release and "permissible deviations from social norms."[52] Expression behind closed doors guarantees us the opportunity to be our true selves.[53] Moreover, humans require downtime to relax and unwind.[54] We need time to vent or express frustration without fearing repercussion.[55] "[E]motional release through privacy [also] plays an important part in individual life at times of loss,

44. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 128 (1959); *see also* ROSEN, *supra* note 8, at 12.
45. WESTIN, *supra* note 2, at 33.
46. *See id.* at 32–39.
47. *See id.*
48. ROSEN, *supra* note 8, at 11.
49. *See* WESTIN, *supra* note 2, at 32–39.
50. *Id.* at 33.
51. LEONTINE YOUNG, LIFE AMONG THE GIANTS 130 (1956); *see also* WESTIN, *supra* note 2, at 34.
52. GLENN, *supra* note 3, at 8.
53. *See* WESTIN, *supra* note 2, at 35–36.
54. *See id.* at 36.
55. *See id.*

shock, or sorrow."[56] Time alone is crucial to grief and healing.[57] Westin summarized the need to escape and release by stating,

> For most persons the constant experiences and surprises of active life are what make it worth living; indeed, we all search for richer and more varied stimulation. But the whirlpool of active life must lead to some quiet waters, if only so that the appetite can be whetted for renewed social engagement. Privacy provides the change of pace that makes life worth savoring.[58]

Third, privacy grants time for "self-evaluation" and introspection.[59] Humans are "constantly bombard[ed]" with information through television, e-mail, and advertisements.[60] Privacy grants people the opportunity to process this endless information.[61] It also allows time for individuals to reflect on the past and set goals or prepare for the future.[62] Moreover, Westin articulated a "moral dimension" to this function of privacy[63]: "[I]t is primarily in periods of privacy that [people] take a moral inventory of ongoing conduct and measure current performance against personal ideals. . . . [P]rivacy serves to bring the conscience into play . . . ."[64]

Finally, privacy encourages us to nurture our most intimate relationships through "[l]imited and [p]rotected [c]ommunication."[65] Emerson may have put it best: "A friend is a person with whom I may be sincere. Before him I may think aloud."[66] Humans need to be able to express themselves without worrying others will pass judgment.[67] People often filter their expressions, except to a few close confidants; this exception is vital to emotional health.[68] Additionally, "privacy through

56. *Id.*
57. *See id.*
58. *Id.* at 35.
59. *See id.* at 36.
60. *Id.*
61. *Id.*
62. *Id.* at 37.
63. *Id.*
64. *Id.*
65. *Id.*
66. RALPH WALDO EMERSON, *Friendship*, in THE SELECTED WRITINGS OF RALPH WALDO EMERSON 201, 207 (Brooks Atkinson ed., Random House 1992); *see* WESTIN, *supra* note 2, at 38.
67. *See* WESTIN, *supra* note 2, at 38.
68. *See id.*

limited communication serves to set necessary boundaries of mental distance in interpersonal situations ranging from the most intimate to the most formal and public."[69]

Even the architecture of our society reinforces privacy as a necessity.[70] In his book, *Privacy Rights*, Adam D. Moore explains, "Privacy is built into the very fabric of social establishments. Doors, hallways, fences, window blinds, walls, as well as psychological withdrawal mechanisms each serve to separate individuals at appropriate times from their peers."[71] This separation contributes to identity development.[72] "The very act of placing a barrier between oneself and others is self-defining, for withdrawal entails a separation from a role and, tacitly, from an identity imposed upon oneself by others via that role."[73]

"In general . . . all individuals are constantly engaged in an attempt to find sufficient privacy to serve their general social roles as well as their individual needs of the moment."[74] Privacy is a tedious balance between introspection and interaction.[75] Charles Fried summed up the value of this right, "privacy is the necessary atmosphere for [respect, love, friendship, and trust], as oxygen is for combustion."[76] This value is crucial to human development; protecting it encourages introspection and relationships, thus ensuring a healthier society.[77]

D. Privacy and Technological Advancement

As predicted by Warren and Brandeis, technological advancements enabled violations of privacy:

69. *Id.* ("In marriage, for example, husbands and wives need to retain islands of privacy in the midst of their intimacy if they are to preserve a saving respect and mystery in the relation. . . . In work situations, mental distance is necessary so that the relations of superior and subordinate do not slip into an intimacy which would create a lack of respect and an impediment to directions and correction.").

70. *See* MOORE, *supra* note 41, at 53.

71. *Id.*

72. *Id.*

73. Barry Schwartz, *The Social Psychology of Privacy*, 73 AM. J. SOC. 741, 747 (1968) (illustrating privacy values of our society through architecture).

74. WESTIN, *supra* note 2, at 40.

75. *See id.*

76. Charles Fried, *Privacy*, 77 YALE L.J. 475, 477–78 (1968); *see also* GLENN, *supra* note 3, at 10.

77. *See* WESTIN, *supra* note 2, at 32–39.

> From the end of the nineteenth century on . . . the development of widespread communication . . . made informal methods of privacy protection both insufficient and ineffective. Development of the microphone and digital recorder, as well as the capacity to tap telephones, added to the technologies that made eavesdropping and electronic surveillance an increasing threat.[78]

Today, invasion through technology far exceeds the fears Jon L. Mills expressed in *Privacy: The Lost Right*.[79] "Available technologies, including CCTV, camera phones, GPS locators, national identification cards, identity chips, interactive television, and the Internet, represent an explosion of potential privacy intrusions."[80] Mills articulates current challenges to privacy and expresses a fear that the right is slowly receding.[81]

> Our intrusive society requires and keeps more information on individuals, and requires permits, licenses, and permission for a myriad of actions. There is apparently a hunger for more and more data. Information is available in photos, in videos, on DVDs, in audiotapes, in camera phones, over the Internet, over the airwaves, and through the written word on paper.[82]

Although these examples of technology have many advantages, unfortunately they are often used to intentionally invade others' privacy rights. This intrusion may simultaneously violate state statutes regarding eavesdropping.

In *Hamberger v. Eastman*, a New Hampshire couple was shocked to discover a hidden microphone in their bedroom[83] after renting from their landlord for a year.[84] The landlord argued that there was no proof of eavesdropping; however, the court found the microphone itself was offensive enough to violate the plaintiffs' right to privacy.[85]

78. JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 13 (1997).
79. *See* MILLS, *supra* note 25, at 36.
80. *Id.* at 29 (citations omitted).
81. *See id.* at 27.
82. *Id.* at 27–28 (citations omitted).
83. Hamberger v. Eastman, 206 A.2d 239, 239–40 (N.H. 1964).
84. *Id.* at 240.
85. *Id.* at 242.

> If the peeping Tom, the big ear and the electronic eavesdropper (whether ingenious or ingenuous) have a place in the hierarchy of social values, it ought not be at the expense of a married couple minding their own business in the seclusion of their bedroom who have never asked for or by their conduct deserved a potential projection of their private conversations and actions to their landlord or to others. Whether actual or potential such "publicity with respect to private matters of purely personal concern is an injury to personality. It impairs the mental peace and comfort of the individual and may produce suffering more acute than that produced by a mere bodily injury."[86]

In *State v. Martin*, the Supreme Court of Kansas prosecuted a photographer for using a two-way mirror to conceal a camera while he photographed women changing clothes before photo shoots.[87] The court emphasized the receding right to privacy and a need to protect it through the state's eavesdropping statute.[88] The defendant argued that he did not violate the statute; yet the court, defining the statute's language through ordinary meaning, decided otherwise.[89] When the defendant left the room and shut the door, the women assumed they were "safe from uninvited intrusion," qualifying as a "private place" under the statute.[90] Although the defendant was not directly watching the women while they were changing, he took photographs to look at later.[91] "The result is the same as if the defendant watched the models while they changed," and the

86. *Id.* (quoting 3 ROSCOE POUND, JURISPRUDENCE § 83(4), at 58 (1959)).

87. State v. Martin, 658 P.2d 1024, 1025 (Kan. 1983).

88. *Id.* at 1026 ("[Under] K.S.A. 21–4001: '(1) Eavesdropping is knowingly and without lawful authority: (*a*) Entering into a private place with intent to listen surreptitiously to private conversations or to observe the personal conduct of any other person or persons therein; or (*b*) Installing or using outside a private place any device for hearing, recording, amplifying, or broadcasting sounds originating in such place, which sounds would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy therein; or (*c*) Installing or using any device or equipment for the interception of any telephone, telegraph or other wire communication without the consent of the person in possession or control of the facilities for such wire communication. (2) A "private place" within the meaning of this section is a place where one may reasonably expect to be safe from uninvited intrusion or surveillance, but does not include a place to which the public has lawful access.'" (quoting KAN. STAT. ANN. § 21-4001 (1981))).

89. *Id.* at 1027.

90. *Id.*

91. *Id.*

court determined that the defendant met the observation requirement of the statute.[92] "Modern society exposes us to many examples of people suffering indignities. The essential dignity of women and men is strained, and sometimes forgotten, in such circumstances. We believe what defendant did is . . . immoral . . . ."[93]

Most recently, in *In re Marriage of Tigges*, the Supreme Court of Iowa affirmed a judgment against a husband who covertly videotaped his wife through a camera installed in the alarm clock in their bedroom.[94] The tape contained "nothing of a graphic or demeaning nature,"[95] but these actions, which would be highly offensive to a reasonable person, violated the wife's expectation of privacy.[96]

Technological developments result in various methods of invasion, some more offensive than others.[97] "The medium in which personal information is conveyed matters to and bears on the level of privacy protection given by courts."[98] In *New York Times Co. v. NASA*, the United States District Court for the District of Columbia permitted release of a transcript of the final words of *Challenger* astronauts but forbid release of the final voice recordings.[99] Likewise, visual depiction may also produce a heightened level of invasion.[100]

III. BABY MONITORS

A. Invention and Policy

The history of baby monitors is somewhat unclear, but it probably begins with Charles Lindbergh, who was nationally recognized in the United States after flying solo across the Atlantic Ocean.[101] In 1932, Lindbergh's young son was taken from his rural New Jersey home in the

92. *Id.*
93. *Id.*
94. *In re* Marriage of Tigges, 758 N.W.2d 824, 825 (Iowa 2008).
95. *Id.* at 826.
96. *Id.* at 830.
97. *See* MILLS, *supra* note 25, at 36.
98. *Id.*
99. *Id.*; N.Y. Times Co. v. NASA, 782 F. Supp. 628, 631 (D.D.C. 1991).
100. MILLS, *supra* note 25, at 37.
101. *See generally Charles A. Lindbergh Jr. Kidnapping, March 1, 1932*, CHARLESLINDBERGH.COM, http://charleslindbergh.com/kidnap/index.asp (last visited Oct. 13, 2012).

night.[102] Lindbergh paid the kidnappers the $50,000 ransom they demanded, but, despite efforts to keep his baby safe, his son's body was recovered two months later—a mere four miles from his home.[103] Following the tragedy, Norman Emerick of Fisher-Price invented the baby monitor to put apprehensive parents' minds at ease.[104] The "radio nurse" functioned much like a walkie-talkie and was used to transmit sounds near the child to wherever the parents were in the house.[105]

Baby monitors became increasingly popular in the late twentieth century as technology developed; most parents today consider them a nursery staple.[106] Using the device to monitor babies is especially important in light of Sudden Infant Death Syndrome (SIDS).

> The National Institute of Child Health and Human Development (NICHD) defines SIDS as the sudden death of an infant under one year of age which remains unexplained after a thorough case investigation . . . . SIDS is a diagnosis of exclusion, assigned only once all known and possible causes of death have been ruled out.[107]

Every year almost 2,500 infants die of SIDS;[108] there is no known cause and it unexpectedly takes the lives of healthy babies.[109] "SIDS cannot be predicted or prevented and can claim any baby, in spite of parents doing everything right."[110] Baby monitors not only help guard against tragedies like SIDS, but they provide parents the freedom and peace of mind to check on their babies with a quick glance at the screen.

102. *Id.*
103. *Id.*
104. *Baby Monitors—Making the Right Choice*, CMVLIVE.COM (Oct. 31, 2011), http://cmvlive.com/technology/gadgets/baby-monitors-making-the-right-choice.
105. *Id.*; Robert Martinez, *The Lindbergh Kidnapping*, HISTORYMARTINEZ'S BLOG, http://historymartinez.files.wordpress.com/2011/01/the-lindbergh-baby.ppt (last visited Oct. 13, 2012).
106. *See, e.g.*, Amended Complaint at 3–4, Jamison v. Summer Infant (USA), Inc., 778 F. Supp. 2d 900, 905 (N.D. Ill. 2011) (No. 09-CV-07513) [hereinafter Complaint] (when filed on Dec. 21, 2009, the orignal named plaintiff was Denkov).
107. *So What Exactly is SIDS?*, CJ FOUNDATION FOR SIDS, http://www.cjsids.org/resource-center/what-is-sids-suid.html (last visited Oct. 13, 2012).
108. *Id.*
109. *Id.*
110. *Id.*

B. The Mechanics of the Device

In response to SIDS and in seeking peace of mind, "[p]arents and caregivers of infants . . . rely on the ability to monitor the safety and well-being of infants in their care through monitor devices."[111] Most monitors consist of two components:

> (1) a base unit which is switched to "on" and placed in the room where the baby is, typically the nursery; and (2) a receiving unit that receives the audio and/or video transmitted by the base unit. The receiving unit is portable and often carried to the room in the house where the parents or caregivers will be located.[112]

Today, baby monitors have come a long way from the simple "radio nurse" and offer several bells and whistles.[113] Both audio and visual displays are available, and options include nightlights, pre-loaded lullabies, thermometers to monitor room temperature, sound detectors, alarm options for lack of movement—if the baby stops breathing for more than a few seconds—night vision, color LCD screens, digital zoom, and two-way talk capabilities.[114] Multiple cameras can be connected to the receiving unit, which can be adjusted remotely.[115] Advanced models may even allow for private remote monitoring from anywhere in the world using Skype.[116]

However, despite technological advancements monitors with significant shortcomings are still on the market.[117] Privacy may be compromised depending on how the signals are transmitted.[118] Baby monitors function using either analog or digital technology. "Analog technology has been around for decades";[119] transmission is simple and

111. Complaint, *supra* note 106, at 4.
112. *Id.* at 5.
113. *See, e.g.*, *Samsung Wireless Video Monitoring System*, AMAZON.COM, http://www.amazon.com/Samsung-Wireless-Security-Monitoring-System/dp/B004VG6FBC/ref=sr_1_10?ie=UTF8&qid=1325529860&sr=8-10 (last visited Oct. 13, 2012).
114. *See, e.g.*, *id.*
115. *Id.*
116. *Id.*
117. *See, e.g.*, Heather Corely, *What's the Difference Between Digital and Analog Baby Monitors?*, ABOUT.COM, http://babyproducts.about.com/od/sleepbedding/f/analog_digital_baby_monitors.htm (last visited Oct. 13, 2012).
118. *Id.*
119. Paul Wotel, *Analog. Digital. What's the Difference?*, HELLODIRECT.COM, http://telecom.hellodirect.com/docs/Tutorials/AnalogVsDigital.1.051501.asp (last visited

less expensive because the signals are recorded in their original form.[120] However, anyone within range can easily intercept the unencrypted signals.[121] "Analog baby monitors generally use the 49 mHZ or 900 mHZ frequency" and function like a radio or a television.[122] This poses a problem for consumers living within range of others[123] because the signals are likely to "cross paths" when a baby monitor is "competing for frequency space" with other devices.[124] When this occurs, images of consumers' homes are broadcast through public channels.[125]

Digital technology, on the other hand, scrambles the original signal from the base unit then transfers it to the receiving device where it is reconstructed.[126] This type of signal is much more difficult to intercept.[127] Many baby monitor manufacturers, including Summer Infant, use digital technology as a selling point because it provides added security.[128] Manufacturers often feature digital technology using Digital Enhanced Cordless Telecommunications (DECT) in product descriptions.[129] DECT engines are small, yet "powerful enough to build a local network enabling flexible, cordless communication between the base station and peripherals. . . . Compared with other cordless solutions, DECT Engines offer a high level of resistance to faults and interference."[130] They "use a newer, less common 1.9 GHz frequency that doesn't seem to be prone to interference."[131] The problem, however, is that people are often unaware of the difference in security between the two options.

Oct. 13, 2012).

120. *Id.*

121. Corley, *supra* note 117.

122. *Id.*

123. *Id.*

124. *Id.*

125. *See* Complaint, *supra* note 106, at 5.

126. Wotel, *supra* note 119.

127. Corley, *supra* note 117.

128. *See, e.g.*, *Summer Infant Best View Handheld Color Video Monitor*, AMAZON.COM, http://www.amazon.com/Summer-Infant-Handheld-Monitor-Sliver/dp/B004UAD0RQ/ref=sr_1_2?ie=UTF8&qid=1325264800&sr=8-2 (last visited Oct. 13, 2012).

129. SIEMENS, *Wireless Modules: Intelligent Communication for Tomorrow's World*, 3, http://www.wdm.se/alla/wirelessimagebroe.pdf (last visited Oct. 13, 2012).

130. *Id.*; E-mail from Hank Turner, Attorney, to author (Dec. 22, 2011, 12:30 PM CST) (on file with author).

131. Corley, *supra* note 117.

IV. JAMISON V. SUMMER INFANT, INC.

A. Facts

In June 2008, Wes Denkov, an Illinois resident, purchased the Summer Infant Day and Night video monitor from the local Toys "R" Us to monitor his newborn baby.[132] He placed the base unit in the nursery where it remained on at all times.[133] He moved the receiving unit depending on where he was in the house so he could monitor the baby as needed.[134] The parents entered the nursery at "all hours of the day . . . to care for their child."[135] "At all times, they believed they were in the privacy of their own home and, accordingly, were not concerned with their state of dress while in the baby's room, nor the content of their conversation."[136] Denkov's wife often breastfed their baby while the base unit was on.[137]

After using the monitor for six months, Denkov became aware that his neighbor also used a Summer Infant monitor to care for his newborn twins.[138] Because the signals from both monitors were unencrypted, the neighbor could receive audio and video of Denkov's home on his own monitor.[139] The "baby's room was completely visible to the neighbor, and . . . he could see and hear everything that occurred within the room, and could hear conversation that occurred outside of the room."[140] Denkov switched channels on his own monitor and was "shocked" to discover that "he could view and hear his neighbor's children and their room."[141]

Denkov immediately stopped using the device and contacted Summer Infant customer service.[142] The representative informed him that "there is no security when using the Video Monitor" and suggested purchasing a "'more secure'" Summer Infant monitor at a higher price.[143]

132. Complaint, *supra* note 106, at 4–6.
133. *Id.* at 7.
134. *Id.* at 6.
135. *Id.* at 7.
136. *Id.*
137. *Id.*
138. *Id.*
139. *See id.*
140. *Id.*
141. *Id.*
142. *Id.* at 8.
143. *Id.*

When Denkov inquired about replacing the monitor with a more secure and expensive unit, the representative responded that there was "'nothing they could do' . . . because (a) the product was not 'malfunctioning,' (b) the product was out-of-warranty, and (c) [Denkov] no longer had his receipt for the purchase."[144] Denkov suggested applying the amount he had already spent on the unencrypted monitor toward a more secure and expensive Summer Infant product, but his request was also refused.[145] "The customer service representative took [Denkov's] name and said that someone would follow up with him—no one ever did."[146]

Denkov filed suit against Summer Infant and Toys "R" Us "individually and on behalf of a class of all persons resident in the United States who purchased the Video Monitor."[147] Because the particular model was unencrypted, "the video and audio signals displaying the product's consumers and their children [were] capable of being viewed by third persons up to a football field's distance from the consumers' home and expected zone of privacy."[148] The defendants removed the case to federal court under 28 U.S.C. § 1446, and in December 2009 the court dismissed the complaint.[149] Denkov amended the complaint, and after a second dismissal he filed a motion to substitute a party.[150] In April 2010, the court denied the motion and dismissed the complaint.[151]

Plaintiffs Jamison and Brantley, who also purchased Summer Infant Day and Night video monitors from Babies "R" Us, filed a second amended complaint in November 2010.[152] Jamison owned two Summer Infant Day and Night monitors; the first she purchased in 2006 to monitor her infant son, and the second she bought in 2008 when she had a second child.[153] The base units were placed in each child's room and the parents kept the receiving unit close by.[154] Jamison breastfed both of her babies and entered the children's rooms in "various states of

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 9.
148. *Id.* at 5.
149. Jamison v. Summer Infant (USA), Inc., 778 F. Supp. 2d 900, 905 (N.D. Ill. 2011).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 904.
154. *Id.*

dress."[155] "[W]hile watching the receiving unit one day," Jamison realized that the child on the screen was not her own but was the son of her neighbor who lived in the building across the street.[156] "Jamison and her neighbor[s] 'were shocked to learn that their Video Monitors had this type of transmission capability.'"[157]

In South Carolina, Brantley had a similar experience with the same model of the Summer Infant video monitor.[158] After using the device to monitor her child, she was "'appalled'" to learn from her neighbor that he could view her child on his own device.[159] Summer Infant customer service refused to assist Brantley because she was "outside of the one-year warranty period."[160] Both Jamison and Brantley argued that they "would not have purchased the Video Monitor had [they] known it was capable of broadcasting the image and sounds of [their children's rooms] to the public."[161]

Babies "R" Us is the "'exclusive'" seller of the "'Summer Day and Night Video Monitor.'"[162] "The base unit and receiving unit are packaged, distributed, and sold together as one product," and the device was sold for $99.99.[163] The "box states that it allows 'you to monitor [your] baby from anywhere in the home' and 'see and hear [your] baby for peace of mind.'"[164] The box and advertising for the monitor fail to mention that the signal is unencrypted and allows third parties to hear and see consumers' families within the privacy of their homes.[165]

The complaint filed by Jamison and Brantley first alleged that the defendants violated the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) by "omitting in the advertising and warnings on the Video Monitors' boxes the material fact that the product broadcast in an unencrypted fashion."[166] The defendants argued that the state consumer fraud claims were barred by conflict preemption under the Federal

155. *Id.*
156. *Id.* at 904–05.
157. *Id.* at 905.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. Complaint, *supra* note 106, at 4–5.
163. *Id.* at 5.
164. *Id.*
165. *Id.* at 4–5; *Jamison*, 778 F. Supp. 2d at 904.
166. *Jamison*, 778 F. Supp. 2d at 905.

Communications Act.[167] The court rejected this argument because the two laws serve different purposes.[168] ICFA is enforced to protect consumers from falling prey to "deceptive omissions" or becoming victims of fraud.[169] The Federal Communications Commission (FCC) regulates "technical labeling requirements" to ensure uniformity throughout the states; therefore, compliance with both is possible.[170] "Plaintiffs' allegations pertain to [d]efendants' deceptive omission of material facts about the product on the outside packaging of the Video Monitors, not to the technical labeling requirements in the FCC regulations."[171] The defendants' compliance with FCC guidelines "[did] not protect them from [p]laintiffs' allegations that their marketing and advertising practices were unfair or deceptive."[172]

The defendants further alleged that the plaintiffs failed to state a claim under the ICFA, specifically because the plaintiffs failed to prove that the product malfunctioned and did not suffer "'concrete, ascertainable'" damages.[173] The court rejected this argument.[174] The harm was "sufficiently concrete" because the plaintiffs would not have purchased the device had they known it was unencrypted.[175]

The complaint also alleged that the defendants violated the Magnuson–Moss Act by "breach[ing] the implied warranty of merchantability under Illinois and other states' laws by selling a product that cannot be used securely for its ordinary purpose."[176] The court upheld this claim against Toys "R" Us, but it granted Summer Infant's motion to dismiss because the privity prerequisite was not met since the manufacturer "was not the 'immediate seller' of the Video Monitors to [p]laintiffs."[177]

The plaintiffs also claimed unjust enrichment.[178] They argued that the "[d]efendants were unjustly enriched by retaining payments for the Video Monitors because [the] [d]efendants: (1) omitted material

167. *Id.* at 907.
168. *See id.* at 908.
169. *See id.*
170. *See id.*
171. *Id.*
172. *Id.*
173. *Id.* at 911 (citations omitted).
174. *Id.*
175. *Id.* at 911–12.
176. *Id.* at 912.
177. *Id.* at 913–14.
178. *Id.* at 914.

information that would have altered consumers' decision to purchase the Video Monitors or pay the purchase price of the Video Monitors, and (2) the Video Monitors were unfit for their intended purpose."[179] The defendants countered this claim by pointing out that the instruction manual disclosed the possibility that public airwaves may be used to transmit signals and that the packaging met all FCC labeling requirements.[180] In the preliminary proceedings, the court upheld the plaintiff's argument,[181] stating that "[t]he existence of the warning in the instruction manual does not defeat [p]laintiffs' claim for unjust enrichment [during the pleading] stage."[182]

Finally, the plaintiffs contended that the defendants were "negligent in the manufacturing, distribution, and sale of the Video Monitor and failed to give adequate warnings that the Video Monitor could broadcast an unencrypted signal."[183] Specifically, the plaintiffs argued that the defendants' lack of notice to purchasers that the device was unencrypted put their families at a "serious risk from both a safety and privacy standpoint."[184] The plaintiffs also pointed out that "[s]imilarly priced video baby monitors with similar features . . . come equipped with encryption," and "[h]ad the [d]efendants disclosed their failure to provide even basic encryption, the Video Monitors would have been less marketable or unmarketable altogether."[185] The defendants responded, "without citation to any legal authority, that '[d]efendants do not have a legal duty to put a label on the outside of their Video Monitors that they may use public airwaves to transmit signals.'"[186] The court found this argument to be "unsupported and conclusory."[187] The defendants further argued that the plaintiffs failed to prove personal injury; however, the court ruled that the harm suffered by the plaintiffs was "beyond that of mere diminished commercial expectations."[188]

179. *Id.*
180. *Id.*
181. *Id.* at 903, 914.
182. *Id.* at 914.
183. *Id.* at 905–06.
184. Complaint, *supra* note 106, at 6.
185. *Id.*
186. *Jamison*, 778 F. Supp. 2d at 915.
187. *Id.*
188. *Id.* at 916.

The court granted Summer Infant's motion to dismiss with respect to the second claim, but all other claims against the defendants were upheld.[189] The parties are currently in the settlement process.[190]

V. FAILURE TO ADEQUATELY NOTIFY CONSUMERS THAT BABY MONITOR SIGNALS MAY BE INTERCEPTED VIOLATES THE RIGHT TO PRIVACY

A. A Flood of Questions

Consumers purchase baby monitors to ensure the safety of the children in their care, yet unencrypted monitors do just the opposite. If the device functions using public airwaves, anyone with a receiving unit has access to the family's private life. Predators or kidnappers might use the monitor to determine the child's location, and thieves could use it to plot the ideal break-in time or to eavesdrop on personal conversations.

A slew of additional concerns exist regarding unencrypted signals. What if a neighbor inadvertently witnesses a crime, such as domestic violence or neglect, while watching the monitor? Do they have a duty to report? Suppose they did report it; could the state even take action? What if a neighbor used the device to broadcast the footage live over the Internet? What if a sex offender nearby uses the receiving unit to watch a young mother breastfeed her baby each night before bed?

Technological developments in monitors have made them valuable to more than just parents; they have been used for other purposes in recent years. Caretakers and nurses use baby monitors to take care of patients in nursing homes and hospitals. This fact raises more questions. What if the device is used to monitor a medical procedure? What if it is used to overhear a confidential conversation between a doctor and patient? Each of these scenarios poses additional liability questions and threats to safety. Considering the possibilities and implications of broadcasting images and audio to the public emphasizes the need to ensure the signal is encrypted or, if it is not, to adequately warn the consumer.

189. *Id.*

190. E-mail from Hank Turner, Attorney, to author (Dec. 22, 2011, 12:30 CST) (on file with author).

B. The Video Monitor in Question

The Summer Day and Night Video Monitor is still available for purchase on the Babies "R" Us website; it is priced at $69.98 and is one of the cheapest video monitors sold by the company.[191] The product description states, "Summer Infant . . . tries to create products that help parents by alleviating everyday child and baby care worries to make the parenting experience more fulfilling."[192] Ironically, the device does just the opposite; parents were "shocked" upon discovering that the signals were accessible to the public.[193] The video monitor increased[194] rather than alleviated their "baby care worries."[195]

The 900 mHz technology[196] is one of the listed features of the device, indicating that the monitor functions using public airwaves. The likelihood of interception may be obvious to those who are technologically savvy, but many consumers are oblivious to what this jargon entails. The label fails to sufficiently warn the average consumer of the possible risks. Simple compliance with labeling standards may evidence a willingness on Summer Infant's part to comply with regulations, but it is not a defense for the harm that occurred.[197]

Amidst eight other warnings on the second page, the instruction manual states, "[n]ursery monitors use public airwaves to transmit signals. This monitor may pick up signals from other monitors or similar devices and signals broadcast by this monitor may be picked up by other receivers."[198] Yet, "[t]his material fact [was] glaringly absent from the Video Monitor's box or any advertising for the Video Monitor."[199] "Summer Infant has manufactured and shipped more than 134,224 of the video baby monitors at issue that have been sold at . . . Babies 'R' Us."[200] Had Summer Infant communicated the lack of encryption upfront it is

191. *Summer Infant Day and Night Video Monitor*, TOYSRUS.COM, http://www.toysrus.com/product/index.jsp?productId=2437590 (last visited Oct. 13, 2012).
192. *Id.*
193. Complaint, *supra* note 106, at 7.
194. *Id.* at 14.
195. *See Summer Infant Day and Night Video Monitor*, *supra* note 191.
196. *Id.*
197. *See* Jamison v. Summer Infant (USA), Inc., 778 F. Supp. 2d 900 (N.D. Ill. 2011).
198. *Instruction Manual: Day and Night Video Monitor*, SUMMER INFANT, 2 (Oct. 2007), http://www.summerinfant.com/getattachment/643d254e-a27e-434c-9778-1e604aeabb63/Day---Night%C2%AE-Video-Monitor-Instructions.aspx.
199. Complaint, *supra* note 106, at 6.
200. *Id.* at 3.

unlikely the device would have been so popular.

C. Application of the Restatements

1. Privacy Torts

The common law privacy action is described in the Restatement (Second) of Torts section 652D:

> One who gives *publicity* to a matter concerning the *private life* of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.[201]

The Summer Infant Day and Night monitor publicly displayed the homes of consumers to third parties. Comment (a) defines "publicity" as "[a] matter [that] is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[202] Unencrypted signals are broadcast and made available to everyone within range;[203] anyone with a receiving unit can easily see inside the consumers' homes.

Communication may be made in any form to meet the requirements of the Restatement; it does not have to be written or oral, as long as it "reaches, or is sure to reach, the public."[204] Comment (a) also states that "communicat[ion] . . . concerning the plaintiff's private life to a single person or . . . a small group of persons" is not an invasion of privacy.[205] One might argue that several people in the area owning the exact model capable of interception is unlikely, and only a small group of people, if any, would be able to view and hear inside consumers' homes. Yet, this still infringes on the right to privacy. Comment (a) also articulates specific examples of public communication, including "any broadcast

201. RESTATEMENT (SECOND) OF TORTS § 652D (1977) (emphasis added).
202. *Id.* at cmt. a.
203. *See* Jamison v. Summer Infant (USA), Inc., 778 F. Supp. 2d 900, 913 (N.D. Ill. 2011).
204. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a.
205. *Id.*

over the radio."[206] Regardless of whether they are intercepted, broadcasted signals constitute public communications and are subject to the Restatement.

The term "private life" is also defined in the Comments to the Restatement.[207] Comment (b) explains that

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends. . . . When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy . . . .[208]

Breastfeeding and other intimate interactions within a home undoubtedly fall within the scope of the term "private life." Broadcasting these interactions is repugnant and violates an innate inner compass of societal norms; a reasonable person would be "highly offen[ded]" to discover that someone else could view and hear inside his home.[209] Moreover, the Summer Day and Night video monitor visually exposes consumers. Listening in on others is probably a violation of privacy, but visual monitoring undoubtedly takes the intrusion to an even higher level.

Day-to-day activities within the home are essential to survival, yet they are often trivial to others. Most people have more resourceful ways to spend their time than by watching a neighbor rock her infant or eavesdropping on a conversation about what's for dinner; they do not care to monitor their neighbors. Unfortunately, some may take advantage of the monitor's shortcomings and use it as a tool to violate another's right to privacy.

A reasonable person who accidentally intercepts signals may feel uncomfortable for inadvertently seeing inside a neighbor's home, but the invasion would be *most* shocking and offensive to the person who was watched unknowingly. Ironically, this is often the consumer who has conferred a benefit upon the manufacturer and distributor of the device and expects a heightened peace of mind in return. Instead, the consumers

206. *Id.*
207. *Id.* at cmt. b.
208. *Id.*
209. *See id.*

are victimized.

Further, one who intercepts the unencrypted signal probably is not a complete stranger but someone living in the vicinity; this familiarity may cause an increased feeling of violation or embarrassment. Families living in densely populated areas are at a higher risk of invasion. When many people live in a concentrated area, such as on a block of residential buildings in Manhattan, the likelihood of interception skyrockets. Anyone with a receiving unit within the 350-foot range in any direction can access footage of the consumer's home.[210]

Summer Infant's failure to encrypt its monitors not only broadcast personal footage of consumers' homes but opened doors for consumers to commit privacy torts against another. "Often, multiple privacy torts are brought together in actions for violation of several distinct rights."[211] Intrusion upon seclusion of others differs from Prosser's other theories of privacy because "no publication of the private intrusion is necessary—the intrusion itself is the tort."[212]

The Restatement (Second) of Torts section 652B describes the tort "Intrusion upon Seclusion."[213] It states that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[214] Most neighbors inadvertently intrude upon their neighbors when they discover their signals crossing; therefore, they do not meet the Restatement's intent requirement. Others, however, may decide to use the device for less than noble purposes. Intentional intrusion is a blatant violation of personal privacy rights. Despite full knowledge that this product provided consumers a peephole into one another's homes, Summer Infant mass produced the monitor without digital protection and distributed thousands of them through a popular retailer.

210. *See* Jamison v. Summer Infant (USA), Inc., 778 F. Supp. 2d 900, 913 (N.D. Ill. 2011).

211. MILLS, *supra* note 25, at 189.

212. *Id.* at 177 (citing RESTATEMENT (SECOND) OF TORTS § 652B cmt. b).

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

214. *Id.*

2. Negligence

An innate sense of the right to privacy should have encouraged Summer Infant to opt for digital technology when manufacturing the Day and Night video monitor, or at the very least Summer Infant should have adequately warned consumers that their babies' rooms would be broadcast to the public.

To meet the elements of a negligence claim the plaintiff must prove the existence of "'a duty owed by the defendant to the plaintiff, a breach of that duty[,] and an injury proximately resulting from the breach.'"[215] Summer Infant owed its consumers a duty to provide a product that could be safely used for its ordinary purpose.[216] In fact, the advertising on the box claims that the monitor enables consumers to "'see and hear [their] baby for peace of mind.'"[217] Yet, "because the [v]ideo [m]onitor broadcasts the sights and sounds of the home to third parties, it did not perform that function safely."[218] As a result, the inner homes of the Summer Day and Night video monitor purchasers were made available over public airwaves to anyone within range.[219] But for Summer Infant's failure to digitally encrypt the monitor, no intrusion would have occurred.[220] Summer Infant's failure to encrypt the signals to guarantee privacy was a proximate cause of the consumers' legal injury.[221]

In sum, anything short of digital encryption or full disclosure of the risk violates the right to privacy. The victims deserve a remedy. The right to privacy today exceeds its recognition as a natural right and is supported by countless sources emphasizing its role in society. The explicit acknowledgement and reinforcement of privacy leaves little doubt that any type of watching, spying, or eavesdropping on one who is unaware is wrong. Surely enabling third parties to do so falls within this category. The right to privacy is so central to society that it far outweighs a brief, one-line warning in an instruction manual.

215. *See Jamison*, 778 F. Supp. 2d at 915 (quoting Jones v. Chi. HMO Ltd. of Ill., 730 N.E.2d 1119, 1129 (Ill. 2000)).
216. *See id.* at 912.
217. Complaint, *supra* note 106, at 5.
218. *Jamison*, 778 F. Supp. 2d at 912.
219. *Id.* at 913, 914.
220. *See id.* at 911–12.
221. *See id.*

3. Restitution

In light of the harm suffered, avenues for recovery do exist. Restatement (Second) of Torts section 652H states:

> One who has established a cause of action for invasion of his privacy is entitled to recover damages for
>
> (a) the harm to his interest in privacy resulting from the invasion;
>
> (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
>
> (c) special damage of which the invasion is a legal cause.[222]

The plaintiffs' injuries should entitle them to recover under each of these subsections. The harm to their privacy interest resulting from the invasion is plainly clear given the uncontroverted fact that the unencrypted signals allowed unintended third parties to view the plaintiffs' inner homes. The plaintiffs' "emotional well-being was [also] damaged when [they] learned that [their] family had been watched within their home without their knowledge or consent and in a place where they had the utmost expectation of privacy."[223] Finally, because the plaintiffs' "solitude, seclusion, and private affairs were interfered with"[224]—which constitutes a legal cause of the injury sustained—the plaintiffs can satisfy all of the requirements to recover under section 652H.[225]

Most consumers would be shocked or emotionally distressed after discovering footage of their children's rooms had been broadcast to the public, and they would be concerned for their children's safety and family's sense of privacy. "The injuries that result from a nosy neighbor's unwanted gaze include . . . the fear that gossip and slander will result, and the offense against sexual modesty. But these are manifestations of a broader injury, which is an injury directly to the person, an intrinsic offense against individual dignity."[226] Resulting harm from invasion of privacy is subjective to the victim and runs deeper than "diminished commercial expectations";[227] "damage caused by the gaze

222. RESTATEMENT (SECOND) OF TORTS § 652H (1977).
223. Complaint, *supra* note 106, at 19.
224. *Id.*
225. RESTATEMENT (SECOND) OF TORTS § 652H.
226. ROSEN, *supra* note 8, at 19.
227. Jamison v. Summer Infant (USA), Inc., 778 F. Supp. 2d 900, 915 (N.D. Ill. 2011).

has no measure."[228]

4. Alternatives

Motorola manufactures the second least-expensive video monitor available at Toys "R" Us for $129.99.[229] Only thirty dollars more than the original price of Summer Infant's unit, it functions using DECT, or "Interference-Free Wireless Technology," which encrypts the signals to ensure security.[230] Although the price difference between the two models is relatively minimal, the difference in security is tremendous and probably worth the extra expense. Unfortunately, parents on a tight budget who wish to visually monitor their babies are likely to purchase the least-expensive model because they are unaware of the accompanying risks. Had Jamison and Brantley been aware of the risk, it is likely they would have opted for a monitor with audio capabilities only or paid the difference to guarantee a secure connection.

The small price difference reiterates that DECT is a viable option for manufacturing the Summer Day and Night video monitor. "Video baby monitors of comparable price and with similar features as the Video Monitors use an encrypted signal."[231] In fact, there are less-expensive digital video baby monitors on the market.[232]

The "[d]efendants' failure to provide and/or to disclose the Video Monitor's lack of encryption defect has in turn placed the purchase[r]s of the Video Monitors and their families at serious risk from both a safety and privacy standpoint."[233] Technology may have its drawbacks, but these are often paired with practical, feasible solutions such as DECT. Alternatively, had the defendants taken simple, reasonable measures to disclose to consumers that the monitor used public airwaves they may have avoided liability.

228. ROSEN, *supra* note 8, at 19 (citation omitted) (internal quotation marks omitted).

229. *Motorola Digital Video Baby Monitor*, TOYSRUS.COM, http://www.toysrus.com/product/index.jsp?productId=12369630 (last visited Oct. 13, 2012).

230. *Id.*

231. *Jamison*, 778 F. Supp. 2d at 904.

232. *See, e.g.*, *Wireless Digital Baby Monitor Kit*, AMAZON.COM, http://www.amazon.com/LYD-W386D1-Wireless-Digital-Speakers/dp/B003SX0RFE (last visited Aug. 22, 2012) (On January 14, 2012, the price was listed at $95.36 on Amazon.com. On August 22, 2012, the price was listed at $113.27 on Amazon.com).

233. Complaint, *supra* note 106, at 6.

E. Jamison v. Summer Infant Settlement

On May 16, 2012, the final settlement agreement between Summer Infant and the plaintiffs was approved for the amount of $1,675,000.00.[234] A sum of $10,000.00 will be "divided equally among the [p]laintiffs and [former l]itigants" for their time and efforts in "aiding in the prosecution of the case."[235] A class settlement fund of $940,000.00 will be distributed to notify consumers of settlement benefits and reimburse each class member who submits a claim for up to 40% of the cost of the Manufacturers' suggested retail price of his or her Summer Infant video monitor.[236] "In addition to the cash payments, Summer Infant has also agreed to modify its product descriptors and disclose on all advertising and . . . packaging . . . that the broadcast signals of its non-digital video baby monitors are susceptible to reception by other monitors."[237] At a Final Fairness Hearing, the class counsel will request court approval for their fees.[238] This will be determined by "calculat[ing] the number of hours they spent over the last two and a half years litigating this case, multiplied by their hourly rates."[239] This request for fees and costs will be capped at $725,000.00.[240]

Summer Infant and Toys "R" Us continue to deny the plaintiffs' claims that defendants unlawfully failed to advise consumers that signals were unencrypted and susceptible to viewing on other video monitors.[241] They settled in order "to avoid the uncertainties and further expense of litigation and trial."[242]

234. Joint Motion for Preliminary Approval of a Class Action Settlement, Exhibit 1 at 8, Jamison v. Summer Infant (USA), Inc., No. 09-CV-07513 (N.D. Ill. Jan. 9, 2012) [hereinafter Preliminary Settlement Approval]; *see also* Final Approval Order and Judgment, Jamison v. Summer Infant (USA), Inc., No. 09-CV-07513 (N.D. Ill. May 16, 2012) [hereinafter Final Approval Order].

235. Preliminary Settlement Approval, *supra* note 234, Exhibit 1 at 9; *see also* Final Approval Order, *supra* note 234.

236. Preliminary Settlement Approval, *supra* note 234, Exhibit 1 at 9; *see also* Final Approval Order, *supra* note 234.

237. Preliminary Settlement Approval, *supra* note 234, Exhibit A at 1.

238. *Id.* Exhibit A at 3.

239. *Id.*

240. *Id.*

241. *Id.* Exhibit A at 1.

242. *Id.*

VI. CONCLUSION

Technology plays a huge role within contemporary society. Often the benefits of modern conveniences far outweigh the possible dangers, yet there are circumstances when even those advantages are not worth the risk. The right to privacy traces back to common law; moreover, privacy's worth to society is emphasized in statutes, law review articles, and case law. Privacy is crucial to personal introspection, emotional health, and human development. Broadcasting the unsuspecting consumer's home to the public not only breaks the law but violates an intuitive code of conduct and respect.

Summer Infant's failure to encrypt the Summer Day and Night video monitor violated the consumers' right to privacy by publicly exposing their conversations and children to anyone within range of the device. Analog monitors are scary because they expose consumers to the public while they engage in the most personal and private aspects of life. In contrast, digital monitors are both inexpensive and secure. Unfortunately, consumers are often unaware of the difference. Ideally, analog monitors should be taken off the market. Despite the advantages and conveniences of monitoring a child from inside the home, nothing is worth harm resulting from invasion and exposure. Manufacturers who insist on profiting from unencrypted monitors should adequately warn consumers of possible privacy invasions to prevent future harm.