**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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AARON C. BORING and CHRISTINE BORING, husband and wife, respectively,

Plaintiffs,

v.

GOOGLE, INC., a California corporation,

Defendant.

CIVIL ACTION NUMBER: 08-694 (ARH)

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**MOTION FOR RECONSIDERATION PURSUANT TO F.R.C.P. 59**
**Prior to Appeal**

This case is about every little guy, once again being trampled upon by the big shoe of big business. With nowhere to turn but the American Courts, he is cast away to endure the pinpricks of trespass that bleed our American liberty to death.

Whether the trespass is by a foreign king, or the royalty of big business, does not matter. The Borings, such as our American forefathers in millennia past, are entitled to proclaim, "Google, Don't Tread On Me."

The Borings should not need to post gates and guard dogs,[1] nor should they need to institute batteries of cannons in their driveways. They should have the full power and authority of our American Courts at their defense. But, now, this Court has left the American right of private property helpless, injured, and without remedy.

It is not so in our philosophy or our American body constitution. To wit, it is the Constitution of the People of this Commonwealth that a person should get to a jury to let the People decide the question:

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[1] Google's Brief (initial), pg. 2 (there is no gate or guard dog standing watch over the property).

> All men are born equally free and independent, and have certain **inherent and indefeasible rights**, among which are those of enjoying and defending life and liberty, of **acquiring, possessing and protecting property** and reputation, and of pursuing their own happiness. ... [A]nd every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and eight and justice administered without sale, denial or delay...

Pennsylvania Constitution §1 (Inherent Rights of Mankind), §11 (Courts to be Open).

Google intentionally and systematically enters onto private property, for a commercial profit-making purpose, without permission. Google trespasses. Google is a trespasser.

> **Trespasser. One who commits a trespass; one who intentionally and without consent or privilege enters another's property.**

Black's Law Dictionary, 8th Ed.[2]

Google, the pirating trespasser, pays no licenses, royalties or fees, and they keep the treasure-profit. They did it again to the Borings, common people.[3] But, the Borings take them to task. Quite rightfully so. And, it is the privilege of the undersigned to take up the pen, where a sword might otherwise be required.

Let us be clear:

The Borings do not assert that they are injured because trampled grass will remain flat, or that driveway pebbles have been moved. Certainly, the sun will rise, and grass will stand back up. There are no broken fences.

The injury is to every American's right of private property. And, the law is clear and well-established that injury to this fundamental American right is enough to have a jury of the People decide the value of the related injury.

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[2] Damages is not part of the definition of the term. Damage is a secondary jury question. In fact, damages is not an element of a state-based trespass claim in Pennsylvania, so dismissal on the basis of damages is ungrounded. See Section II, below.

[3] There was a "Private Road No Trespassing" sign, and the road turned from pavement to pebbles, but these are jury fact questions.

And, let us cut through the fat of Google's arguments to get to heart of it:

> This Court holds that Google, the trespasser, is allowed to look down a street and systematically and intentionally trespass on each house on the entire road, and then to make a profit, without compensation to the people who supplied the property to make that profit.

Google's defense is that the grass will stand back up, and there was no gate or guard dog.[4] Or, possibly, that you can pick the fruit off that poison tree by: a) stopping what you are doing; b) going to a computer, if you know how to use one; c) accessing a computer at the cost of doing so; d) accessing the Internet at the cost of doing so; e) researching and becoming familiar with the Google program by going onto their website properties; f) removing the pictures Google acquired while trespassing on your property; and g) not pursuing the happiness you might otherwise be finding. All while they directly and indirectly advertise to you. The more Google injures, the more money they make.

This Court tells Google that it is okay to enter onto a person's private property without permission. I would not teach that rule to my child.

This Court's ruling makes our private property a Google Slave; our property is no longer our own: it is forced to work for another, against its will, without compensation, for the profit of another. The Federal Court should free slavery, not create it.

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[4] See Note 1, above. It is important to note the 4-cell analytical matrix of who is trespassing relative to whose property upon which the trespass occurs. 1. Commercial trespasser (CT) onto commercial land (CL); 2. CT onto non-commercial land (NL); 3. Non-commercial trespasser (NT) onto CL; 4. NT onto NL.

For example, if a non-commercial person innocently drives down the street, and turns around in the driveway of a non-commercial owner (particularly on unmarked property) (4. NT/NL), the ability to measure damages may be nominal by nature, but even this is not our situation. In our situation, the party trespassing is a commercial enterprise who intentionally enters for a profit-making purpose. (2. CT/NL) Google confuses the analysis by using a No. 4 example for our No. 2. case. Everyone whose property is enjoyed by Google by their intentional trespass is entitled by law to a jury determination of damages. Google was on the Boring's land because it needed to be there for its service. The Borings are entitled to have a jury determination with an expert calculation of that act of trespass. For non-commercial land (NL), extrapolating rental value might include who is making the request, since it is not publicly offered, and such a fair market determination might or might not include who is requesting the access. But such things are for experts at trial. See 6, below.

The Plaintiffs' former private property is now the food of every commercial enterprise seeking to have a bite. There is no logical end to the principle. This Court has made a gift to Google and others of a right to and interest in the Borings' property.

Google made a profit of over four billion dollars ($4,000,000,000) in 2008.[5] If Google implemented proper internal controls it would have dedicated some of that profit to prevent its trespasses. It used the Plaintiffs' private property in some part to make that profit. Google intentionally disregards controls that would take money to implement: proper investigation and request of property owners.

Google completely avoids securing the legal permissions because controlling doing so would cost money. If our private property rights were natural persons, this case is nothing more than a seat belt manufacturer making huge profits by failing to make a better seat belt, even if our children die.[6]

If the new pervasiveness of 20th Century roads, in conjunction with the pervasiveness of 21st Century technology, requires any adjustment to the principles of trespass in the digital age, this is the case for such review.

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[5] 2008 Google Annual Report

[6] See, eg, Restitution and Unjust Enrichment (Draft) (attached for convenience as Exhibit 1):

**§ 40. Trespass and Conversion:** (1) A person who obtains a benefit by an act of trespass or conversion, is accountable to the victim of the wrong for the benefit so obtained. (2) The measure of recovery depends on the blameworthiness of the defendant's conduct. As a general rule: (a) a conscious wrongdoer, or one who acts despite a known risk that the conduct in question violates the rights of the claimant, will be required to disgorge all gains (including consequential) derived from the wrongful transaction.

**Comment b. Measure of Recovery.** ...In consequence, a conscious wrongdoer may be liable to disgorge more than the value of what was taken or obtained in the first instance. ... Restitution is justified in such cases because the advantage acquired by the defendant is one that should properly have been the subject of negotiation and payment....The more difficult issues of valuation are accordingly those in which the defendant has made a use of the claimant's property for which there is no ordinary market; or in which the defendant has bypassed any market by taking without asking, or by proceeding in the face of a refusal. Valuation in such cases resists any precise formula, and courts exercise a wide discretion in fixing a price for the benefit in question—in other words, a measure of liability—that will correspond to the unjust enrichment of the defendant. The one constant factor in such cases is that values will be more liberally estimated against a conscious wrongdoer. See, also, Note 4, above regarding party type matrix. See also, Jacques v. Steenberg Home, footnote 11, below.

In an age of needed responsibility, Google must be held accountable for its choices.

## I. STANDARD OF REVIEW

A motion for reconsideration will be granted if necessary to correct a clear error of law or to prevent manifest injustice. Hirsch Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 47 U.S. 1171 (1986). The undersigned asserts that the dismissal of the case was in clear error for the reasons stated herein. Plaintiff hereby requests that this Court vacate its decision on all counts, but with particular consideration, as stated above for the trespass and unjust enrichment counts with the claim for punitive damages.

## II. PLAINTIFF SET FORTH A VALID CAUSE OF ACTION FOR TRESPASS

It is the law in this Commonwealth that an owner of realty has a cause of action in trespass against any person who has committed a trespass upon the owner’s land, and it is not necessary for the landowner to allege any actual injury or damage as an element of the cause of action.

> There is no need to allege harm in an action for trespass, because the harm is not to the physical well-being of the land, but to the landowner's right to peaceably enjoy full, exclusive use of the property.

Jones v. Walker, 425 Pa.Super. 102, 109 (Pa.Super. 1993); see, Houston v. Texaco, Inc., 371 Pa.Super. 399, 538 A.2d 502 (1988), alloc. den., 520 Pa. 575, 549 A.2d 136 (1988).

This Court opines that the Plaintiffs “do not describe damage to or interference with their possessory rights.” Memorandum Opinion, February 17, 2009, at 8. However, as stated, Pennsylvania law, like many states, does not have damage as an element of a substantive cause of action for trespass. Any requirement of pleading proximate cause is rendered accordingly unnecessary.

In clear error to the Walker Pennsylvania substantive standard of law, this Court cites to no precedent for the support of its dis-

missal of Plaintiff's trespass count. This Court cites merely to a district court case for the ever-present standard proposition that liability is imposed for damages caused, to wit: "See N.E. Women's Ctr., Inc. v. McMonagle, 689 F.Supp. 465, 477 (E.D.Pa. 1988)." Memorandum Opinion, at 8. The indirect citation to Kopka v. Bell Tel, 91 A.2d 232, 235 (1952) stands for the same proposition.

The fact that the District Court of Philadelphia stated the positive proposition that, "a trespasser is responsible in damages for all injurious consequences which are the natural and proximate result of his conduct," does not make the negative inverse proposition true. That is, that without physical damage, there is no liability.[7] While a trespasser is responsible in damages for all injurious consequences which are the natural and proximate result of his conduct, this is not the same as opining that the Plaintiff, in a trespass action, has to establish actual damages to maintain the action.[8] In N.E. Women, the Court was merely not limiting Plaintiff to actual damages to real property. Moreover, importantly, the Court still let the jury decide whether the damages flowed from the trespass.[9] [10]

[7] *E.g.*, "If you are hungry, then you eat" does not create the truth of the inverse negative proposition, "You cannot eat unless you are hungry."

[8] Defendants in N.E. Women contended that the Court erred by permitting the jury to award plaintiff damages for injury to its business as well as injury to its property under the trespass claim. The defendants argued that they should only be required to pay for the actual damage to plaintiff's real property, not for any injury to plaintiff's business. The Court found that it "sees no valid reason why a trespasser could not be held liable for injuries to his or her business which are properly found by a jury to be the proximate cause of the trespass. If plaintiff's alleged injuries to business were not the consequence of defendants actions, the jury would have found that they were not the proximate cause of defendants' actions. Plaintiff's injuries as alleged and proven were not unduly indirect or remote from defendants' trespass. Therefore, defendants' motion on this ground is denied." N.E. Women, at 477.

[9] In the dicta of footnote 4 of the Memorandum Opinion, this Court references the case of Costlow v. Cusimano, 34 A.D.2d 196; 311 N.Y.S.2d 92 (1970). That case is inapplicable as it is a citation to the New York state court, which is applying the rules of procedure and body of law for that state court forum, rather than this Federal court forum, using the substantive law of the State of New York, not the Commonwealth of Pennsylvania.

[10] In Phillips v. County of Allegheny, 515 F.3d 224, 231, the Third Circuit delineates the substance of what Twombly expressly leaves intact. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The

Accordingly, Plaintiff's trespass action should not have been dismissed. Moreover, see Restatement (Second) of Torts, §158, 163. Section 158 states as follows:

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so...

Id. (emphasis added). And, in Goodrich Amram, Summary of Pennsylvania Jurisprudence 2d, § 23:1, it is further stated:

> Under this definition, one who intentionally and without consensual or other privilege enters land in possession of another or causes anything or a third person to do so is liable as a trespasser irrespective of whether harm is thereby cause to any legally protected interest.

Id. (emphasis added). See also, Pennbaur v. City of Cincinnati, 745 F.Supp. 446 affirmed 947 F.2d 945 (S.D.OH 1990) (every unauthorized entry upon land of another constitutes a trespass, and regardless of whether the owner suffered substantial injury, he at least sustains legal injury which entitles the owner to verdict for some damages); Gavcus v. Potts, 808 F.2d 596 (7th Cir. 1986) (nominal compensatory damages can be awarded when no actual or substantial injury has been alleged or proven to have resulted from trespass, as law infers some damages from unauthorized entry on land); Hoffman v. Vuilcan Materials Co., 91 F.Supp. 2d 881 (M.D.NC. 1999) (trespass upon the land of another entitles the possessor to at least nominal damages). Wilson v. Amoco, 33 F.Supp.2d 969 (D. Wyo. 1998) (once Plaintiff establishes that trespass occurred, Plaintiff is entitled to at least nominal damages for wrongful intrusion); Cook v. Rockwell Int'l., 273 F.Supp 2d 1175 (D.Colo. 2003) (proof that trespass invasion caused actual damages is not required to establish liability, and Plaintiff is always entitled to recover at least nominal damages); Lugue v. Hercules, 12 F.Supp. 2d 1351 (S.D.Ga. 1997) (proof of ac-

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Supreme Court reaffirmed that FED R. Civ.P. 8 "'requires only a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests,'" and that this standard does not require "detailed factual allegations." Twombly, 127 S.Ct. at 1964, quoting Conley v. Gibson, 355 U.S. 41, 47 (1957).

tual injury to the land or a diminution in the property's value is not required to maintain an action for trespass, and nominal damages can be awarded when the amount of actual injury is unclear).

This Court has made a gift to Google and others of a right to and interest in the Borings' property and that is a manifest injustice.

**III. PUNITIVE DAMAGES ARE PROPER.**

With regard to punitive damages, our Pennsylvania Supreme Court has delineated the clear purpose:

> If the purpose of punitive damages is to punish a tortfeasor for outrageous conduct and to deter him or others from similar conduct, then a requirement of proportionality defeats that purpose. It is for this reason that the wealth of the tortfeasor is relevant. In making its determination, the jury has the function of weighing the conduct of the tortfeasor against the amount of damages which would deter such future conduct. In performing this duty, the jury must weigh the intended harm against the tortfeasor's wealth. If we were to adopt the Appellee's theory, outrageous conduct, which only by luck results in nominal damages, would not be deterred and the sole purpose of a punitive damage award would be frustrated. If the resulting punishment is relatively small when compared to the potential reward of his actions, it might then be feasible for a tortfeasor to attempt the same outrageous conduct a second time. If the amount of punitive damages must bear a reasonable relationship to the injury suffered, then those damages probably would not serve as a deterrent. It becomes clear that requiring punitive damages to be reasonably related to compensatory damages would not only usurp the jury's function of weighing the factors set forth in Section 908 of the Restatement (Second) of Torts, but would also prohibit victims of malicious conduct, who fortuitously were not harmed, from deterring future attacks. (emphasis added) Kirkbride v. Lisbon Contractors, 521 Pa. 97, at 103-4, 555 A.2d 800 (1998).

Google's argument that punitive damages are not warranted because Plaintiffs do not point to aggravating or outrageous conduct found in the complaint is factually conclusory in that the illegal entry onto property, pursuant to a calculated scheme of approach, is

a crime and clearly warrants punitive damages.[11] Furthermore, Plaintiff is entitled to all inferences.

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[11] [Plaintiffs] argue that both the individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of measurable harm that results. We agree with the [Plaintiffs]. …

[T]he United States Supreme Court has recognized that the private landowner's 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." Dolan v. City of Tigard, 512 U.S. 374, 384, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994); (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979)). Accord Nollan v. California Coastal Comm'n, 483 U.S. 825, 831, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). ...

[B]ecause a legal right is involved, the law recognizes that actual harm occurs in every trespass. The action for intentional trespass to land is directed at vindication of the legal right. W. Page Keeton, Prosser and Keeton on Torts, § 13 (5th ed. 1984). The law infers some damage from every direct entry upon the land of another. Id. The law recognizes actual harm in every trespass to land whether or not compensatory damages are awarded. Id. Thus, in the case of intentional trespass to land, the nominal damage award represents the recognition that, although immeasurable in mere dollars, actual harm has occurred. . . .

Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner. Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to "self-help" remedies. In McWilliams, the court recognized the importance of "'preventing the practice of dueling, [by permitting] juries to punish insult by exemplary damages.'" McWilliams, 3 Wis. at 381. Although dueling is rarely a modern form of self-help, one can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser, like Steenberg, who refuses to heed no trespass warnings. . . .

If punitive damages are not allowed in a situation like this, what punishment will prohibit the intentional trespass to land? Moreover, what is to stop [Defendant] from concluding, in the future, that [it] is not more profitable than obeying the law? . . . An appropriate punitive damage award probably will.

In sum, as the court of appeals noted, the Barnard rule sends the wrong message to [Defendant] and any others who contemplate trespassing on the land of another. It implicitly tells them that they are free to go where they please, regardless of the landowner's wishes. As long as they cause no compensable harm, the only deterrent intentional trespassers face is the nominal damage award of $1, the modern equivalent of Merest's halfpenny, and the possibility of a Class B forfeiture under *Wis. Stat. § 943.13*. We conclude that both the private landowner and society have much more than a nominal interest in excluding others from private land. Intentional trespass to land causes actual harm to the individual, regardless of whether that harm can be measured in mere dollars. Consequently, . . ., we hold that nominal damages may support a punitive damage award in an action for intentional trespass to land.

Jacque v. Steenberg Homes, 209 Wis. 2d 605; 563 N.W.2d 154, 159-162 (1997) (emphasis added).

In good faith and for judicial efficiency, Plaintiff request that the Honorable Magistrate Judge reconsider her initial determination, as stated in the Memorandum Opinion, and reinstate the Counts II (Trespass) and V (Unjust Enrichment) with the claim for punitive damages for the reasons stated herein.

If the case goes forward with effectively on one substantive claim, the case will proceed to a jury determination as guaranteed to Plaintiff by law, and the case will be procedurally streamlined as a result of this Court's dismissal of the other counts.

Dated: February 27, 2008

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**CERTIFICATE OF SERVICE**

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## § 40. Trespass and Conversion

**(1) A person who obtains a benefit by an act of trespass or conversion, or in consequence of such an act by another, is accountable to the victim of the wrong for the benefit so obtained.**

**(2) The measure of recovery depends on the blameworthiness of the defendant's conduct. As a general rule:**

**(a) A conscious wrongdoer, or one who acts despite a known risk that the conduct in question violates the rights of the claimant, will be required to disgorge all gains (including consequential gains) derived from the wrongful transaction.**

**(b) A person whose conduct is innocent or merely negligent will be liable only for the direct benefit derived from the wrongful transaction. Direct benefit may be measured, where such a measurement is available and appropriate, by reasonable rental value or by the reasonable cost of a license.**

**Comment:**

*a. General principles and scope; relation to other sections.* See Chapter 5, Topic 1, Introductory Note.

Sections 40, 41, and 42 set forth parallel versions of a uniform rule directing the restitution of benefits obtained through interference with legally protected property rights. The rules separately stated in §§ 40 and 41 ignore technical distinctions between categories of personal property. Because currency, negotiable instruments, and security certifi-

cates are all tangibles, conversion of property in these forms would technically give rise to a claim within the language of the present section. For convenience of organization, however, cases involving the misappropriation of financial assets in any form, tangible or intangible, have been grouped together in § 41.

*b. Measure of recovery.* The variable measure of recovery described in § 40(2) is an application of the broader rules of §§ 49-51. Consistent with general principle, a conscious wrongdoer will be stripped of consequential gains from unauthorized interference with another's property; while the restitutionary liability of an innocent defendant will not exceed the value obtained in the transaction for which liability is imposed. In consequence, a conscious wrongdoer may be liable to disgorge more than the value of what was taken or obtained in the first instance. By contrast, innocent trespassers and converters are liable in restitution for the value of what they have acquired — including the value of an unauthorized use — but not for consequential gains derived therefrom. Even this lesser liability will at times exceed any quantifiable injury to the property owner. Restitution is justified in such cases because the advantage acquired by the defendant is one that should properly have been the subject of negotiation and payment.

Given the factual setting of most claims within the rule of § 40, the problem of measuring liability in restitution only rarely involves (as it does in Illustrations 4 and 5) the identification of consequential gains in the form of an accounting for profits. The usual difficulty lies, rather, in assigning a value to the benefit acquired by the defendant as an initial matter.

Thus, while a defendant's interference with real property sometimes involves a physical taking of material sus-

ceptible of market valuation, its more common form is that the defendant has made a valuable use of the defendant's property without paying for it. To the extent that the value of the use may be identified with the ordinary rental value of the property, the owner's entitlement is captured in the claim to damages for "use and occupation." While such an obligation might be viewed as a liability in restitution — as opposed to its traditional classification in tort — the choice of analysis makes no difference to the result.

The more difficult issues of valuation are accordingly those in which the defendant has made a use of the claimant's property for which there is no ordinary market; or in which the defendant has bypassed any market by taking without asking, or by proceeding in the face of a refusal. Valuation in such cases resists any precise formula, and courts exercise a wide discretion in fixing a price for the benefit in question — in other words, a measure of liability — that will correspond to the unjust enrichment of the defendant. The one constant factor in such cases is that values will be more liberally estimated against a conscious wrongdoer.

The choice between possible valuations takes on a sharper focus in some factual settings. Examples include cases in which the defendant's unauthorized use of the claimant's property saves the expense of making alternative arrangements. Where such a trespass is innocent, the benefit to the defendant is appropriately identified with the cost of the license the defendant might have obtained by negotiation with the claimant. Where the trespass in intentional, the benefit to the defendant will sometimes be measured by comparison with the cost of achieving the same objective by means that required no use of the claimant's property.

General guidance on these problems of valuation may be found in the rationale of the disgorgement remedy. A conscious wrongdoer ought not to be left on a parity with a person who, in pursuing the same objectives, respects the legally protected rights of the property owner, since if liability in restitution were limited to the price that would have been paid in a voluntary exchange, the calculating wrongdoer would encounter no incentive to bargain. By this reasoning, a benefit taken by a conscious wrongdoer is properly valued at a price greater than the cost of the negotiated transaction that the defendant wrongly elected to bypass.

The measure of recovery in restitution will likewise be affected, in a number of cases within this Section, by the court's determination whether and to what extent to allow a credit for the defendant's contributions to property or values for which the defendant is required to account. See § 51(2). The problem is posed in classic terms by cases involving the conversion of natural resources and the doctrine of accession. See Illustrations 1 and 18.

*c. Interference with real property.* Unjust enrichment from interference with real property may involve a taking of physical assets (Illustration 1). More commonly, what the defendant has "taken" from the claimant is an unauthorized use of property from which the claimant had a right to exclude him. See Illustrations 2-7. Valuation of the benefit obtained in all these cases involves the characteristic difficulties described in Comment *b*.

Property rights fixed by lease transactions may be subject to profitable interference by both tenants (Illustration 8) and landlords (Illustration 9). The general principle forbidding enrichment from conscious wrongdoing may influence a court to require the surrender of other

benefits acquired as the result of an intentional trespass. See Illustration 10.

**Illustrations:**

1. A and B hold mining leases on adjoining tracts. A removes coal from B's tract and sells it. A's liability to B in restitution depends on the character of A's wrongdoing. If A acted in conscious disregard of B's property rights, A will be required to account for the full sale proceeds of the converted coal, with no credit for the costs of extraction and transportation. If A took B's coal by mistake, A's liability in restitution is limited to the value of the coal in place.

2. A owns Blackacre; B owns Whiteacre, an adjoining tract. Whiteacre is burdened by an easement, benefiting Blackacre, permitting A to transport coal removed from Blackacre by a tramway crossing Whiteacre. A uses the tramway to transport coal from Greenacre as well as Blackacre. B discovers the facts and obtains an injunction against further surcharge of the Whiteacre easement. A has moved one million tons of coal from Greenacre in violation of B's property rights. The measurable injury to B (or to Whiteacre) as a result of A's trespass is nil, and tort damages by the law of the jurisdiction would be nominal only. A license to transport additional coal over an existing easement would normally be available by agreement at a price of one cent per ton. The benefit obtained by A through interference with B's property rights will be determined by the court in an amount not less than $10,000.

3. Telecommunications Company installs a buried fiber-optic cable within Railroad's right-of-way traversing Blackacre, obtaining a license from Railroad in

exchange for a one-time payment of $5 per running foot. The cable is imperceptible from the surface of the land, and damages for trespass would be nominal only. Landowner (owner of Blackacre) seeks to recover for the presence of the cable on a theory of unjust enrichment. The viability of the claim depends on the state of title to the real property involved. If Railroad owns its right-of-way in fee simple, Landowner has no claim. Conversely, if Landowner can demonstrate that the right-of-way is created by easement, that the estate burdened by Railroad's easement was conveyed to Landowner as part of Blackacre, that the installation of the cable is outside the scope of the easement, and that Landowner did not authorize the installation (by estoppel or otherwise), then Landowner has a claim in restitution against Company for the value of the unauthorized use. If Company can show that $5 per foot is the prevailing rate being paid to fee-simple landowners, the court might conclude that Railroad — in receiving payment of $5 per foot — was compensated for rights that, in part at least, actually belong to Landlord. Landowner on this view has an alternative claim in restitution against Railroad for that portion of the $5 fee that was attributable to Landowner's right to exclude others from the underlying estate, as distinct from Railroad's right to exclude others from its right-of-way. See § 47.

4. Edwards owns Blackacre; Lee owns Whiteacre, an adjoining tract. Blackacre contains the only known entrance to a magnificent cave. Edwards develops the cave as a tourist attraction, installing illumination and walkways and offering guided tours to paying visitors. About 30 percent of the cave area being exhibited in this manner actually lies beneath the surface of White-

acre. Edwards is aware of this fact, which he attempts to disguise from Lee. Lee eventually obtains a survey and an injunction against further trespass. By the rule of this Section, Lee has a claim to the profits realized by Edwards in conscious violation of Lee's rights. The court determines that Lee is entitled to 30 percent of Edwards's profits from operation of the cave. Lee's further claim to 30 percent of the profits from a hotel operated by Edwards near the cave entrance is rejected on the ground that the hotel profits are too remote from the trespass.

5. A owns Blackacre; B owns Whiteacre, an adjoining tract. Blackacre contains former gas wells that A uses for storage purposes. Natural gas extracted elsewhere is pumped into A's wells, to be removed for sale at a later date, on payment of a storage charge to A. Unknown to A or B, the mineral formations underlying A's wells extend beneath B's property, so that approximately 15 percent of the gas pumped into Blackacre migrates to Whiteacre. Under local property law, this migration of gas constitutes a trespass: when the facts come to light, A will be obliged to abandon the gas-storage business unless he negotiates a suitable license with B. On the other hand, A's liability as an innocent trespasser will be limited to the value of what A took from B, as opposed to a share of the resulting profits. On the facts supposed, the measure of recovery in restitution is the reasonable value of a license to store gas underneath Whiteacre. B is not entitled to 15 percent of the profits realized by A from the storage of gas.

6. Oil Company tries and fails to negotiate a license permitting exploration of Owner's swampland with an option to lease for later production. Company

crews later enter the property and detonate explosions, obtaining information about underground mineral formations elsewhere. A license to do this much and no more might ordinarily have been obtained from Owner on payment of a "shooting fee" of $50. Information derived from its unauthorized testing leads Company to acquire mineral leases from other landowners. In determining the measure of Company's liability to Owner in restitution, the court will assess the reasonable value of the privilege that Company took by trespassing, considering all the circumstances of the taking and its consequences. The extent of Company's unjust enrichment is not limited to the $50 fee that Company might have expected to pay in a bargain transaction. Nor is it appropriate to identify the benefit taken by trespass with subsequent profits from Company's mineral leases, because such profits are both remote from and disproportionate to the injury to Owner.

7. Green and White own adjoining city lots. Green begins construction of an improvement that will occupy the entire surface of his land. Green requests White's permission to install anchor rods extending three feet into White's subsoil as a temporary method of shoring, offering $5000 for this privilege. White refuses. Acting without White's knowledge, Green installs the anchor rods and removes them on completion of the work. On suit by White, the court finds that Green's willful trespass has caused no injury to White's land, that a reasonable price for the license Green had requested is $5000, and that alternative methods of shoring would have increased Green's cost of construction by $50,000. Green's liability to White by the rule of this Section will be fixed by the court in an

amount between $5000 and $50,000. The measure of the benefit wrongfully obtained by Green will reflect the court's judgment of the parties' equitable positions.

8. Tenant refuses to surrender possession of Blackacre, notwithstanding Landlord's effective termination of the lease, continuing to plant and harvest successive crops while resisting eviction. In the ensuing litigation between the parties, the court determines that Tenant has not even a colorable claim to possession; accordingly, Tenant's liability to Landlord for the period of disputed occupancy is not that of a good-faith holdover tenant but that of an intentional trespasser. During the pendency of the dispute, Tenant has realized $100,000 from the sale of crops harvested from Blackacre, the expense of producing these crops has been $75,000, and the rental value of Blackacre (at market rates) has been $5000. The court determines that production expenses are properly deducted from sale proceeds to determine Tenant's consequential gain. Tenant's liability to Landlord in restitution is $25,000.

9. Landlord leases an office building to Tenant, then purports to lease space on the roof to Advertiser for the purpose of erecting a billboard. On suit by Tenant against Landlord, the court finds that Landlord reserved no right to possession of the roof that could be the subject of a subsequent lease. Tenant may recover the rent paid by Advertiser to Landlord under the purported lease. Compare § 47.

10. Finder, equipped with a metal detector, removes buried treasure from land belonging to Neighbor. Finder is a conscious trespasser who conducts his searches at night rather than ask his neighbors for permission. Neighbor sues Finder to establish ownership

of the treasure. Under local property law, as between a landowner and a nontrespassing finder, ownership of lost or abandoned property is ordinarily awarded to the finder. Yet Finder, as an intentional trespasser, will not be permitted to profit from a conscious wrong. Finder holds the treasure (and its proceeds) in constructive trust for Neighbor.

*d. Interference with tangible personal property.* When converted property has been disposed of by the converter, a recovery in restitution may be more advantageous than tort damages if (under local law) the measure of damages for conversion fails to capture a subsequent appreciation in value, or if the sale of the converted property yields proceeds greater than the owner's loss. See Illustrations 11 and 12. To the extent that an appreciation in value is due to the efforts of the converter, an innocent converter will obtain a credit against liability in restitution but a conscious wrongdoer will not. See Illustration 13.

**Illustrations:**

11. Owner's antique silver service is stolen from her home. At the time of the theft, the silver has a reasonable market value of $25,000. Acting with notice of the theft, Dealer purchases the silver for $5000 and resells it some years later for $50,000. By the tort law of the jurisdiction, Owner's claim against Dealer for damages is limited to the value of the silver at the time of the conversion ($25,000), plus interest from the date of the conversion. By the rule of this Section, Owner's claim against Dealer in restitution is to the product of the converted property in Dealer's hands, or $50,000, plus interest from the date of Dealer's resale. Dealer is not entitled to credit for the $5000 paid to the thief.

12. Blackacre is successively leased by Landlord to A for growing beets, then to B for grazing cattle. By the terms of the A lease, beet tops cut from harvested beets remain the property of Landlord, to be left on the ground and plowed under as fertilizer. A sells beet tops to B for $5000. B feeds them to cattle grazing on Blackacre. A's sale to B is a conversion of Landlord's chattels, but Landlord sustains no injury thereby: consumption of beet tops by the cattle will add as much fertilizer to Blackacre as plowing under the beet tops themselves. Landlord's claim to damages for conversion will therefore be denied. By the rule of this Section, however, A must account to Landlord for the value of what was wrongfully taken, whether A was a conscious wrongdoer or not. A's liability to Landlord in restitution is $5000.

13. Owner's car is stolen and sold to Dealer for $15,000. The value of the car at the time of the theft and at the time of the sale to Dealer is $18,000. Dealer resells the car for $20,000. If Dealer purchased the car with notice that it was stolen, Dealer's liability to Owner by the rule of this Section is $20,000. If Dealer purchased the car in good faith, Dealer's liability to Owner by the rule of this Section is $18,000. (In the latter case, Dealer as an innocent converter will not be required to account for consequential gains from dealing with Owner's property.) In neither case is Dealer entitled to credit for the $15,000 paid to the thief.

Where the defendant's interference consists of unauthorized use as opposed to disposition, the converter (innocent or otherwise) is liable in restitution for the value of the unlicensed use. As in the case of trespass to real property, use value is susceptible of different measures. See Comment

*b.* There are circumstances in which it is possible to state no rule apart from the need to weigh relevant factors to determine a reasonable measure of the defendant's unjust enrichment. See Illustration 14; compare Illustration 6, supra. Where property has an ordinary rental value, the benefit to the defendant from wrongful detention is ordinarily assessed at the aggregate rent (see Illustration 15); yet particular circumstances may indicate that the proper measure of the defendant's enrichment is either more or less than this amount. If a defendant has ignored an opportunity to lease the claimant's property, attempting instead to use it without paying, a liability restricted to the price of the forgone rental would treat a theft as if it were a consensual transaction on ordinary terms. See Illustration 16. In the case of an innocent converter, by contrast, a liability measured by ordinary rental value might exceed not just the claimant's loss (an acceptable consequence in restitution) but the defendant's enrichment as well. See Illustration 17.

If converted property has been substantially improved, or if its product otherwise embodies substantial value contributed by the converter, the extent of liability in restitution will depend on the issue of credit for the wrongdoer's contribution. See § 51(2). Outcomes in such cases draw a sharp distinction between the respective liabilities of innocent and conscious wrongdoers. See Illustration 1, supra, and Illustration 18.

**Illustrations:**

14. Distributor of unsolicited e-mail advertising messages, known as "spam," makes unauthorized use of the facilities of internet service Provider. In measuring the value of the rights misappropriated by Distributor, the court determines that Distributor has sent 100 million pieces of spam to Provider's customers; that the

marginal cost to Provider of distributing the unwanted messages is 78 cents per thousand; and that Provider would have distributed these messages as paid advertising at a rate of $8 per thousand. Because "spam" is less attractive to customers than paid advertising, however, the court fixes the value of the unauthorized use of Provider's facilities at a lower rate, reasonably estimated to be $2.50 per thousand. Distributor's liability to Provider by the rule of this Section is $250,000.

15. Logger lends a road grader to Rancher. When Logger asks that the grader be returned, Rancher refuses, eventually advising Logger that the grader has been stolen. Logger hires an airplane to fly over Rancher's land and discovers the grader hidden in the woods in a remote area. Logger sues Rancher for restitution of the grader and its use value, together with incidental damages for repairs and costs of recovery. The court determines that the grader was wrongfully detained for 30 months and that the prevailing rate for the rental of such a machine is $2500 per month. Three years before lending it to Rancher, Logger had purchased the grader for $20,000. Rancher is liable to Logger by the rule of this Section to return the grader, to account for the value of its use in the amount of $75,000, and to pay incidental damages resulting from its wrongful detention. Measurement of the grader's use value at $75,000 is a response to egregious misconduct; a more restricted measure of use value would be appropriate against a less culpable defendant.

16. Owner's disused egg-washing machine is sitting in storage adjacent to Packer's business premises. Without seeking Owner's authorization, Packer removes the machine from storage and uses it to wash eggs at a time of labor shortage. Discovering the use

being made of his machine, Owner offers to lease it for $25 a week or sell it outright for $500. Packer offers to buy it for $100. The parties fail to come to terms. Packer continues to use the machine, in the face of Owner's demand that it be given up. Owner sues Packer for restitution of the machine and the value of its unauthorized use for 25 weeks. Assuming that the reasonable rental value of the machine is in fact $25 per week, a decision limiting Packer's liability to $625 would give him the benefit of the consensual transaction he rejected. The court finds that Packer's wrongful use of the machine has resulted in a net saving of 500 hours of labor for which Packer would have had to pay $5 per hour. Packer is liable to Owner by the rule of this Section to return the egg-washing machine and to account for the value of its use in the amount of $2500. If Packer had been honestly mistaken about the ownership of the machine (or if its ownership were the subject of an honest dispute), the unauthorized use would properly be valued on a basis that was compensatory rather than confiscatory.

17. Former Employee of video-rental store has five videos in her car on the day she is discharged. The videos are not subject to a rental contract; rather, they are the subject of a gratuitous bailment, pursuant to store policy by which employees are allowed to borrow videos without charge. Employee discovers the videos three months later and returns them to store. Store's Owner sues to recover the rental value of the videos at its ordinary rate per diem, amounting to $450. The court finds that Employee was in wrongful possession of the videos from the date of her discharge, but as an innocent converter: Employee forgot she had the videos and never watched them. Under the circumstances, liability at the

per diem rate would overstate Employee's enrichment from the wrongful detention of Owner's property. Owner is entitled only to nominal recovery in restitution.

18. Distiller converts corn worth $50 and makes it into whiskey worth $500. Owner of the corn discovers what has happened and demands the whiskey. If Distiller is a thief, Owner is entitled to recover the whiskey as the product of the corn, without credit for other costs of production. If Distiller is an innocent converter, Distiller owns the product of the corn by the doctrine of accession. In the latter case, Owner's entitlement by the rule of this Section is limited to $50.

*e. Following property into its product.* The techniques of specific relief in restitution (§§ 54-60) permit the dispossessed owner to follow converted property through subsequent changes of form and to recover the product from the wrongdoer or a transferee who is not a bona fide purchaser (§ 65). The ability to obtain restitution of specific assets is particularly significant when the restitution claimant would otherwise be in competition with general creditors of the wrongdoer. See Illustrations 19-20. There is no difference in principle or result between a claim under § 40 to reach the product of converted goods and a claim under § 41 to reach the product of embezzled funds, although cases of the latter kind are much more numerous. See § 41, Comment *c*, and the illustrations thereto.

**Illustrations:**

19. Employee of farm equipment Dealer converts machinery worth $200,000 and sells it to absent third parties, realizing cash proceeds of $150,000. Employee uses $100,000 of this amount to pay the full purchase

price of a house, taking title in joint tenancy with his Wife; a further $35,000 is deposited in a joint savings account, of which $20,000 remains. The balance of the proceeds of the converted property has been dissipated. Employee is insolvent. Wife is unaware of Employee's wrongdoing. On proof of these facts, Dealer is entitled by the rule of this Section to ownership of the house and the savings account, typically via constructive trust. Dealer's claim to these assets is good against Wife, because she took her interest as a donee. Dealer's claim is also good against Employee's general creditors, whether or not they have obtained judgment liens on the property, because such creditors are not purchasers for value. See §§ 65 and 68. Dealer's claim to specific restitution of the house is unaffected by the fact that the house (as homestead property) may be exempt from the claims of Employee's creditors under local law. Dealer has an unsecured claim against Employee for the balance of Dealer's loss: the value of the property converted ($200,000) less the amount recovered via specific relief in restitution.

20. Neighbor converts cattle belonging to Rancher and sells them for $5000 cash. Neighbor applies $3000 of this amount to the purchase price of different cattle and dissipates the remainder. Rancher's primary claim against Neighbor by the rule of this Section (or in tort damages for conversion) is for $5000. Neighbor is insolvent. Rancher is entitled to specific relief in restitution, but only to the extent of the $3000 in value that can be followed into its product. Specific relief in this case takes the form of an equitable lien on Neighbor's new cattle, securing a claim to $3000. Rancher's equitable lien is good against Neighbor's general creditors, whether or not the cattle are subject to judgment liens,

because such creditors are not purchasers for value. See §§ 65 and 68. Rancher is a general creditor of Neighbor for the $2000 balance of his claim.

## REPORTER'S NOTE

*a. General principles and scope; relation to other sections.* See generally Restatement of Restitution §§ 128-130; Restatement Second, Restitution § 45 (Tentative Draft No. 2, 1984); cf. Restatement Second, Torts §§ 927 and 929.

*b. Measure of recovery.* See generally Friedmann, Restitution for Wrongs: The Measure of Recovery, 79 Tex. L. Rev. 1879 (2001). Several of the illustrations to this Section may be supported by Restatement Second, Torts § 931(a), authorizing recovery "for the detention of, or for preventing the use of, land or chattels" to include "the value of the use during the period of detention or prevention," and noting at Comment *d*: "In substitution for the damages for the detention, the owner may have an election to receive any profits made by the defendant."

*c. Interference with real property.* The rule of this Section authorizes a recovery in restitution for wrongful interference with real property, on terms analogous to restitution for wrongful interference with property of any other kind. The present rule therefore greatly expands the scope of liability described by Restatement of Restitution § 129, which explained that restitution was generally unavailable in cases of trespass or dispossession because the action of assumpsit was inconvenient for trying title to land. To the extent that this limitation has been observed in modern cases, its principal consequence is that money judgments measured by defendants' profits have been awkwardly classified as damages in tort.

Illustration 1 is based on Pan Coal Co. v. Garland Pocahontas Coal Co., 97 W. Va. 368, 125 S.E. 226 (1924), and West Virginia Dep't of Highways v. Roda, 177 W. Va. 383, 352 S.E.2d 134 (1986) (likening a wrongful taking by the state to an intentional trespass, and measuring liability accordingly). Compare Young v. Ethyl Corp., 581 F.2d 715 (8th Cir. 1978) (innocent converter liable for the value of what was taken, not for a share in the profit from sale of its product). Numerous cases

draw the same distinction between innocent and conscious trespass in the wrongful removal of timber, see, e.g., Nashville Lumber Co. v. Barefield, 93 Ark. 353, 124 S.W. 758 (1910); State v. Shevlin-Carpenter Co., 62 Minn. 99, 64 N.W. 81 (1895)), or soil or gravel, see, e.g., Johnson v. Pavich, 168 Colo. 382, 451 P.2d 440 (1969); State ex rel. Evans v. Spokane Int'l R. Co., 99 Idaho 197, 579 P.2d 694 (1978). Additional citations are collected by Annotations at 21 A.L.R.2d 380 (1952 & Supp.) (minerals) and 1 A.L.R.3d 801 (1965 & Supp.) (earth, sand, or gravel). The same distinctions are embodied in rules governing what are ostensibly damages in tort for conversion. See Restatement Second, Torts § 927, Comments *f, g,* and *h*.

Illustration 2 is based on Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946). In DeCamp v. Bullard, 159 N.Y. 450, 54 N.E. 26 (1899), defendants floated logs down a river belonging to the claimant. The river was not subject to any navigation easement, and the defendants' use was accordingly a trespass; though the defendants argued that their trespass had caused no damage to the land. The New York court responded as follows:

> The defendants insist that the measure of damages is not what the privilege of trespassing was worth to the trespassers, but what the plaintiff actually lost through interference with his business, loss of rent and the like. As there was no proof of actual loss of this character, they further insist that the plaintiff is entitled to nominal damages only. *This position would place a premium on trespassing, because it makes the position of the trespasser more favorable than that of one lawfully contracting.* If a man's house is vacant with no prospect of a tenant and no intention on his part of occupying it himself, and a trespasser occupies it, he must pay as damages for the trespass the value of the use and occupation, for this would be the duty of a tenant contracting upon a *quantum meruit* for the use, by consent, of that which the trespasser uses without consent.

159 N.Y. at 454, 54 N.E. at 28 (emphasis added). The court affirmed a judgment for the landowner approximating the "tollage" reasonably

payable in respect of the use made of the river. Compare Proprietors of Second Turnpike Rd. v. Taylor, 6 N.H. 499 (1834) (restitution for ordinary tolls from toll road user who had refused to pay in the belief that he was exempt).

Illustration 3 is suggested by cases such as Isaacs v. Sprint Corp., 261 F.3d 679 (7th Cir. 2001) (reviewing class certification in this context), and Gipson v. Sprint Communications Co., 81 P.3d 65 (Okla. Civ. App. 2003) (same).

Illustration 4 is based on Edwards v. Lee's Adm'r, 265 Ky. 418, 96 S.W.2d 1028 (1936).

Illustration 5 is based on Beck v. Northern Natural Gas Co., 170 F.3d 1018 (10th Cir. 1999). Older case law on this pattern involved trespassing cattle. In Lazarus v. Phelps, 152 U.S. 81 (1894), defendant's cattle had trespassed on claimant's adjoining, unfenced rangeland; the "fence law" of the jurisdiction (Texas) provided that a landowner who did not "fence out" his neighbor's cattle could not recover damages for their trespass. The Supreme Court observed that the manifest object of the statute was to save the ranchers "the heavy expense of fencing their land":

> It could never have been intended, however, to authorize cattle owners deliberately to take possession of [others'] lands, and depasture their cattle upon them without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorized, or rather condoned, was an accidental trespass caused by straying cattle. If, for example, a cattle owner, knowing that the proprietor of certain lands had been in the habit of leasing his lands for pasturage, should deliberately drive his cattle upon such lands in order that they might feed there, it would scarcely be claimed that he would not be bound to pay a reasonable rental.

Id. at 85. The defendant in *Lazarus* had placed more cattle on his own land than it could support, making it foreseeable that they would

stray onto the unfenced land of the claimant. The court affirmed a judgment awarding the claimant the reasonable rental value of the land so occupied.

Illustration 6 is based on Shell Petroleum Corp. v. Scully, 71 F.2d 772 (5th Cir. 1934), and Phillips Petroleum Co. v. Cowden, 241 F.2d 586 (5th Cir. 1957).

Illustration 7 is based on Epstein v. Cressey Development Corp., 89 D.L.R.(4th) 32 (B.C. Ct. App. 1992). Compare Jacque v. Steenberg Homes, Inc., 209 Wis. 2d 605, 563 N.W.2d (1997) (defendant crosses plaintiff's land to deliver a mobile home, in the face of plaintiff's refusal to allow access for this purpose). Plaintiffs in both cases recovered amounts greatly in excess of any quantifiable injury; both courts explained the awards in terms of exemplary damages. Liability in such cases may be more appropriately based on the rule of this Section. Restitution (measured by saved expenditure) grounds the defendant's liability in the circumstances of the wrong, affording both protection of the claimant's interest and an appropriate deterrent to the defendant's conduct without resort to an arbitrary penalty.

Illustration 8 is based on Andersen v. Bureau of Indian Affairs, 764 F.2d 1344 (9th Cir. 1985). In addition to the case of the holdover tenant, a tenant may make unauthorized use of leased property by violating covenants limiting use during the lease term. In Kerin v. United States Postal Service, 116 F.3d 988 (2d Cir. 1997), the USPS occupied leased premises subject to a covenant fixing the maximum occupancy at 30 persons; the limit was routinely exceeded, resulting in injury to the property. The district court awarded damages for the harm to the realty plus an additional amount measured by defendant's unjust enrichment, taking care to avoid a double recovery. The Court of Appeals reversed the unjust enrichment award, apparently on the view that the defendant could not be "unjustly enriched" once the plaintiff had been compensated for the damage to his real property. On the principles of this Restatement, the judgment of the district court in *Kerin* was the correct one. If liability for conscious interference with another's property is restricted to compensation for resulting injury, the wrongdoer is given, in effect, a private right of condemnation. The property owner in *Kerin* is entitled to negotiate over the terms (if any) on which he will authorize the use the defendant wished to make of his property.

Illustration 9 is based on Monarch Accounting Supplies, Inc. v. Prezioso, 170 Conn. 659, 368 A.2d 6 (1976).

Illustration 10 is based on Favorite v. Miller, 176 Conn. 310, 407 A.2d 974 (1978). See also Bishop v. Ellsworth, 91 Ill. App. 2d 386, 234 N.E.2d 49 (1968); Niederlehner v. Weatherly, 73 Ohio App. 33, 54 N.E.2d 312 (1943).

*d. Interference with tangible personal property.* Illustration 11 is based on Welch v. Kosasky, 24 Mass. App. Ct. 402, 509 N.E.2d 919 (1987). See also Felder v. Reeth, 34 F.2d 744 (9th Cir. 1929) (converted mining equipment sold for more than its value); Fur & Wool Trading Co. v. George I. Fox, Inc., 245 N.Y. 215, 156 N.E. 670 (1927) (accounting for profits realized on favorable resale of stolen property). Illustration 12 is based on Corey v. Struve, 170 Cal. 170, 149 P. 48 (1915). Illustration 13 is based on Creach v. Ralph Nichols Co., 37 Tenn. App. 586, 267 S.W.2d 132 (1953), qualified (as regards innocent converters) by the rule of Restatement of Restitution § 154 (1937).

Illustration 14 is based on America Online, Inc. v. National Health Care Discount, Inc., 174 F. Supp. 2d 890 (N.D. Iowa 2001). See also Reid-Newfoundland Co. v. Anglo-American Telegraph Co., [1912] App. Cas. 555 (P.C.), in which defendant railroad — entitled to use claimant's telegraph wire for the transmission of certain classes of messages only — employed it to transmit unauthorized messages as well; railroad was held liable to account to claimant for profits made from the unauthorized use.

Illustration 15 is based on Cross v. Berg Lumber Co., 7 P.3d 922 (Wyo. 2000). See also John A. Artukovich & Sons, Inc. v. Reliance Truck Co., 126 Ariz. 246, 614 P.2d 327 (1980) (liability for rental value of property used without authorization); Strand Electric & Eng'g Co. v. Brisford Entertainments Ltd., [1952] 2 Q.B. 246 (Ct. App.) (same).

Illustration 16 is based on Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 173 P.2d 652 (1946). See also Ablah v. Eyman, 188 Kan. 665, 365 P.2d 181 (1961), in which the defendant was held to have converted his former accountant's work papers. (Defendant obtained temporary possession of the accountant's papers by bringing a groundless action in replevin.) Restitution was awarded in the amount of the defendant's

saved expenditure, measured by what defendant would have had to pay to have the information assembled anew by another accountant.

Illustration 17 is based on Schlosser v. Welk, 193 Ill. App. 3d 448, 550 N.E.2d 241 (1990).

Illustration 18 is based on Silsbury & Calkins v. McCoon & Sherman, 3 N.Y. 379 (1850) (conscious wrongdoer), and Wetherbee v. Green, 22 Mich, 311 (1871) (innocent converter). See also Capitol Chevrolet Co. v. Earheart, 627 S.W.2d 369 (Tenn. Ct. App. 1981), discussing the rights of one who purchases the stripped hull of a stolen automobile and entirely rebuilds it: an innocent converter may acquire ownership of the product by the doctrine of accession, but a conscious or negligent converter may not.

*e. Following property into its product.* Illustration 19 is a composite based on cases such as Pioneer Mining Co. v. Tyberg, 215 F. 501 (9th Cir. 1914); Corn Belt Products Co. v. Mullins, 172 Neb. 561, 110 N.W.2d 845 (1961); and Preston v. Moore, 133 Tenn. 247, 180 S.W. 320 (1915). Illustration 20 is based on Lamb v. Rooney, 72 Neb. 322, 100 N.W. 410 (1904).

## § 41. Misappropriation of Financial Assets

**(1) A person who obtains a benefit by misappropriation of financial assets, or in consequence of their misappropriation by another, is accountable to the victim of the wrong for the benefit so obtained.**

**(2) The measure of recovery depends on the blameworthiness of the defendant's conduct. As a general rule:**

**(a) A conscious wrongdoer, or one who acts despite a known risk that the conduct in question violates the rights of the claimant, will be required to disgorge all gains (including consequential gains) derived from the wrongful transaction.**