January 16, 2008

Pretexting Scandal at Hewlett-Packard

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THE PRETEXTING SCANDAL AT HEWLETT-PACKARD

INTRODUCTION

In 2006 Hewlett-Packard Corporation, (H.P.) and Chairwoman Patricia Dunn committed the tort of intrusion and violated the right to privacy afforded to citizens by California’s Constitution when Patricia C. Dunn ordered the requisition of the phone records of H.P. directors and members of the media. H.P.’s agents masqueraded as the directors and journalists to the phone company in order to induce the phone company to hand over the private phone records. This practice, referred to as pretexting, became a criminal offense in 2007.

FACTUAL BACKGROUND

Someone in Hewlett-Packard’s, (H.P.) boardroom was covertly speaking to the media about confidential board business. As early as 2004, when Carly Fiorina was still Chief Executive Officer, (CEO), of H.P., she asked outside counsel, Larry Sonsini, to investigate a boardroom leak to the press. Sonsini, a partner at Wilson, Sonsini, Goodrich & Rosati, was the advisor to the H.P. Board of Directors. Sonsini interviewed all of the Board members, but the leaker was not identified.

As 2004 progressed, the H.P.’s Board of Directors became increasingly disenchanted with Carly Fiorina’s leadership. On January 10, 2005, three members of the Board of Directors, Patricia C. Dunn, George A. Keyworth II, and Richard Hackborn delivered a 500-word statement to Ms. Fiorina listing the Board members’ issues with her leadership. Two weeks later, when a detailed account of the board members’ concerns about Ms. Fiorina’s leadership appeared in the

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3 Ibid.
Wall Street Journal, Ms. Fiorina was infuriated. The information leaked could have only come from a high-level board member.

Carly Fiorina

During the next month, Ms. Fiorina focused on the leaks from the Board of Directors when Directors felt she needed to focus on issues with her management style. Ms. Fiorina suspected that George A. Keyworth II was the leaker. He was the longest-serving member of the H.P. Board of Directors, with twenty-one years of service. On February 7, 2005, the Board of Directors voted Ms. Fiorina out of office at a meeting in Chicago. At the same meeting, the Board of Directors asked Ms. Dunn to become the Non-Executive Chairwoman of the Board.

Dunn made it a priority to find out who was leaking information to the press about H.P. Boardroom business. She first initiated an investigation into the persistent boardroom leak on July 22, 2005, called “Kona I.” In January of 2006, Ms. Dunn became concerned when CNET published an article by Dawn Kawamoto and Tom Krazit, that contained a detailed account of

5 Ibid.
6 Ibid.
9 Ibid.
10 Ibid.
what transpired at a January 2006, off-site board meeting.\textsuperscript{13} Because of this leak, Dunn decided to intensify the investigation, called Kona II.\textsuperscript{14}

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\caption{Patricia C. Dunn}
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\caption{Anne Baskins}
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Dunn consulted H.P.’s General Counsel, Anne Baskins, on how to conduct the investigation.\textsuperscript{15}

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Baskins referred Dunn to H.P.’s Senior Counsel and Director of Ethics, Attorney Kevin Hunsaker.\(^{16}\)

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\caption{Kevin Hunsaker}
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Hunsaker proceeded to work closely with Anthony R. Gentilucci, H.P.’s Manager of Global Investigations.\(^{17}\)

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\includegraphics[width=0.5\textwidth]{anthony_gentilucci.jpg}
\caption{Anthony Gentilucci}
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\(^{16}\) Ibid.

On Hunsaker’s advice, Dunn hired the outside investigations firm Security Outsourcing Solutions (S.O.S.) owned by Ronald R. DeLia.\textsuperscript{18}

![Ronald DeLia](image)

When hired, Mr. DeLia asked Ms. Dunn to pick a codename for the investigation. She was staying in Kona, Hawaii at that time and decided to call the project Kona.\textsuperscript{19}

Ron DeLia in turn hired Action Research Group (A.R.G.) managed by Mathew Depante.\textsuperscript{20} Matthew Depante then hired Bryan C. Wagner to obtain the personal telephone records of members of the H.P. Board of Directors and individual members of the media.\textsuperscript{21}

\begin{thebibliography}{99}
\bibitem{21} Ibid., p.4.
\end{thebibliography}
Bryan C. Wagner

Hunsaker, therefore, provided the investigators the home, cellular and office phone numbers for Hewlett-Packard directors. Further, he instructed the investigators to obtain the phone records of directors and specific journalists at CNET, The Wall Street Journal and The New York Times. DeLia obtained the social security numbers of the H.P. Board members. Then he gave them to A.R.G. Mr. DeLia and Mr. Wagner proceeded to get directors' phone records without their permission. This technique, called "pretexting," involves fooling phone companies into handing over call logs by impersonating a customer.

While employed at A.R.G., Wagner setup online accounts over the telephone by calling the Customer Care Representative at AT&T and pretending to be the account holder by using the Social Security numbers and phone numbers of directors and journalists, a methodology commonly known as “pretexting.” Wagner was than able to access and review the phone records online. AT&T Investigators, Mark Ferrara and Mark Toponce, later confirmed that Wagner obtained the phone records by confirming that the ip address of the pretexter belonged to

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Wagner, whose computer accessed eight online accounts in 2006 and fourteen in 2005.26 AT&T also traced 200 calls from Wagner’s home phone to AT&T’s 800 number.27 “Hunsaker ordered the team to compare telephone records of members of the H.P. Board of directors with the phone records of reporters.”28

Hunsaker asked Gentilucci how DeLia obtained the phone records. Gentilucci, H.P.’s Manager of Global Investigations responded, “Investigators call operators under some ruse to obtain the call record over the phone. The operator shouldn’t give it out, and that person is liable in a sense. I think it’s on the edge, but above board.”29 Hunsaker replied, “I shouldn’t have asked.”30 Hunsaker and Gentilucci knew the records were being obtained through misrepresentation and continued to collect them.31 Hunsaker briefed Anne Baskins and Patti Dunn weekly.32

Between January 2006 and April 2006, H.P. admitted that the following individuals’ telephone records were obtained from third party telephone carriers as part of the Kona II investigation without the subscribers’ consent: directors George Keyworth, Tom Perkins, Jack Hackborn, Lucie Salhany; wife of a Director, Marion Keyworth, H.P employee, Brigida Bergkamp, and journalists: Dawn Kawamoto, Tom Krazit, Pui-Wing Tam, Michelle Moeller, Steven Shankland, and Tom Shankland.33 H.P. collected call logs for 413 separate landlines, 157 separate cellular lines, and 20 separate toll free lines.34 Wagner at A.R.G. delivered these

26 Ibid.
27 Ibid.
29 Ibid.
31 Ibid.
32 Ibid.
34 Ibid., p. 6.
records to DeLia who delivered them to Hunsaker. Kevin Hunsaker was the only H.P. employee who had access to the phone records that were illegally obtained.\(^{35}\)

In March 2006, DeLia of S.O.S. prepared a report for Patricia Dunn at H.P. summarizing the investigation’s findings.\(^{36}\) The report identified the leaker as veteran board member, George A. Keyworth II, and described the methods used to obtain the information, including pretexting, which was described by Hunsaker as a “lawful method”.\(^{37}\) A copy of this report was sent to outside counsel, Larry Sonsini.\(^{38}\) A copy was also sent to H.P.’s new CEO, Mark Hurd, who asserted that he did not read it.\(^{39}\)

Mark Hurd

In March 2006, General Counsel Anne Baskins asked Mr. Ryan, an attorney, board member and head of the H.P. Audit Committee to reveal the results of the investigation to Mr. Keyworth, who then confessed to talking to the press.\(^{40}\) The same day, Ms. Dunn revealed the

\(^{35}\) Ibid., p.6.


\(^{38}\) Ibid.

\(^{39}\) Ibid.

surveillance activities to the entire H.P. Board of Directors and that George A. Keyworth II was
the leaking director. Mr. Keyworth was asked to wait outside the room while the board
deliberated his fate. The Board Members engaged in a heated debate for 90 minutes. Eventually, a divided board voted in favor of requesting Mr. Keyworth’s resignation. Keyworth refused to resign saying that it was up to the shareholders to decide.

George A. Keyworth II

One vehement dissenter, Tom Perkins, a close friend of Director Keyworth, resigned from the board in a rage, and walked out of the room. Perkins was furious with Dunn for circumventing the board’s Nominating and Governance Committee, of which he was a member. Perkins inquired whether pretexting was illegal. He claimed the investigation methods were unethical and Dunn’s zeal in pursuing it was a misplaced corporate priority on her

41 Ibid.
42 Ibid
43 Ibid.
44 Ibid.
45 Ibid.
46 Ibid.
48 Ibid.
Perkins accused Dunn of betraying him because she promised to come to him privately with the identity of the leaker.\textsuperscript{50} She denied that she made such a promise.\textsuperscript{51} Dunn said that upon learning of the leaker she consulted General Counsel Baskins who advised her to take the matter before the entire board.\textsuperscript{52} In a letter to the Board of Directors written after his resignation, Perkins reminded the board that Larry Babbio, President of Verizon, an H.P. board member, personally testified before the FCC on the illegality of pretexting, and filed lawsuits against consultants who engaged in pretexting.\textsuperscript{53}

During the four months after Mr. Perkins resignation in March 2006, a behind the scenes battle brewed which would end with the public disclosure of these secret boardroom events. Before the actions of H.P. and its Board of Directors became known, Perkins pressured H.P. to inform the media of the reason he resigned. Instead, H.P. reported that Perkins resigned but gave no reason.\textsuperscript{54} Perkins also pressured H.P. General Counsel, Anne Baskins, to revise the meeting minutes to reflect that his resignation was in protest to the company’s pretexting activities.\textsuperscript{55} Baskins did not revise the minutes.\textsuperscript{56}

\begin{flushleft}
\textsuperscript{50} Ibid.
\textsuperscript{51} Ibid.
\textsuperscript{52} Ibid.
\textsuperscript{53} Kaplan, David A. “Intrigue In High Places, Our Guide To The Congressional Investigation Of The Leak Scandal At A Silicon Valley Icon.” Newsweek. 5 September 2006.
\textsuperscript{55} Perkins, Tom. “Minutes” email to Anne Baskins. 18 July 2006.
\textsuperscript{56} Perkins, Tom. Letter “To the Directors of the Hewlett Packard Company.” @ August 2007.
\end{flushleft}
In May of 2006, Mr. Sonsini interviewed Mr. Perkins regarding his resignation from the H.P. Board, and concluded that Mr. Perkins did not resign because of a disagreement with the company, but rather a disagreement with Ms. Dunn. Because of this conclusion, Sonsini did not prompt the Board to disclose the circumstances to the SEC. In June 2006 when the scandal was full blown, Perkins inquired to Ray Sonsini if the methods used during the investigation were legal. Sonsini replied via email that “the process was well done and within legal limits” and ‘was not generally unlawful.’ Thomas DiFilipps, a partner at Wilson Sonsini Goodrich & Rosati is married to Anne Baskins, General Counsel of H.P., suggesting a potential conflict of interest.

58 Ibid.
59 Ibid.
When HP was unresponsive to his requests, Mr. Perkins hired lawyer, Viet Dinh, a Georgetown faculty member, and former Assistant U.S. Attorney General for Legal Policy, who helped draft the Patriot Act.\textsuperscript{63} A Harvard Law School graduate, Dinh clerked for U.S. Supreme Court Justice Sandra Day O’Connor.\textsuperscript{64} Perkins and Dinh met when they both served on the board of News Corp. Mr. Dinh accused H.P. of sanitizing the minutes for the board meeting in which Mr. Perkins resigned.\textsuperscript{65} 

Finally, in early August 2006, Perkins formally asked the Securities and Exchange Commission, (SEC), to compel H.P. to report the reason for his resignation, citing violations of the Sarbanes-Oxley Act of 2002. As a result, the SEC required H.P. to publicly file a written explanation for Perkins’ resignation because of the claim that Perkins’s disagreement with the board concerned unlawful conduct, improper board procedures, and breakdowns in corporate governance, and related to operations, policies or practices’ requiring disclosure to the SEC under Item 5.02 of Form 8-K and Section 409 of the Sarbanes-Oxley Act of 2002.

Because of the public outrage following the public disclosure of pretexting at H.P., on September 12, 2006, Ms. Dunn announced that she would step down as chairwoman in four months time, but would remain on the H.P. Board. The same day, George A. Keyworth II announced his resignation as a Director. Only 10 days later, under intense public pressure, Patricia Dunn resigned from the board altogether. Mr. Gentilucci also left H.P. Hunsaker was fired after he refused to resign.

On September 28, 2006, a U.S. Congressional sub-committee questioned Dunn, Sonsini, Hurd, Hunsaker, DeLia, Gentilucci and Wagner about the pretexting activities at H.P.. General Counsel, Anne Baskins resigned that day, and refused to testify, invoking her Fifth Amendment right against self-incrimination. “The U.S. Congressional sub-committee released handwritten
notes Baskins took in a meeting on June 15, 2005 that showed she and Dunn were aware of the use of ‘pretexts to extract info.’”

At the Congressional hearing, H.P.’s new C.E.O., Mark Hurd apologized on behalf of H.P. for pretexting. Larry Sonsini abandoned his prior statement in an email that the H.P. investigation was conducted “within legal limits.” In front of Congress, Sonsini claimed that he never fully understood the methods employed by H.P. during the investigation, “It’s important to note that I, too, did not understand pretexting,” Mr. Sonsini said, but now concluded that it was “improper.” Dunn refused to accept personal responsibility for pretexting, claiming that she relied on the advice of counsel that she acted lawfully. Subsequently, the H.P. Board ended its advisory relationship with outside counsel, Larry Sonsini.

On October 3, 2006, a representative of Ms. Dunn said that she had stage 4 ovarian cancer and was set to begin six months of chemotherapy. The next day, the Attorney General of the State of California, Bill Lockyer, filed criminal felony charges against Patricia Dunn, Kevin Hunsaker, Ronald DeLia, Matthew Depante and Bryan Wagner for identity theft, fraudulent wire communication, wrongful use of computer data and conspiracy. Wagner pleaded guilty to two felony counts. He admitted to using pretexting to obtain the phone records of Perkins, Keyworth, Pui-Wing Tam of The Wall Street Journal and Dawn Kawamoto of CNet Networks.

75 Ibid
76 Ibid.
77 Ibid.
78 Ibid.
79 Ibid.
84 Ibid.
On March 14, 2007, Judge Ray Cunningham dismissed the charges against Patricia Dunn. Dunn’s lawyer, Mr. Brosnahan said that the Judge indicated Dunn’s health was a consideration in the dismissal of the charges. Judge Cunningham also agreed to dismiss a reduced misdemeanor charge against the other three defendants once they each performed 96 hours of community service.

H.P. agreed to pay $14.5 million to settle a lawsuit by the California Attorney general over pretexting. There was no finding of liability against H.P. The settlement included an agreement by the attorney general not to file any civil claims against the company, its current and former directors, its officers or employees.

Three reporters are suing H.P. for invasion of privacy. They are Dawn Kawamoto, Stephen Shankland and Tom Krazit. Six other journalists continue to pursue private settlement talks with H.P.

**LEGAL BACKGROUND**

In addition to violating criminal law, pretexting may also violate civil law, including both California Constitutional privacy law & tort laws of privacy based on intrusion.

**California Constitutional Privacy Claim**

Article 1, Section 1 of the California Constitution states that privacy is an inalienable right. “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and

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86 Ibid.
88 Ibid.
89 Ibid.
pursuing and obtaining safety, happiness, and privacy.” Cal. Const. art. I, § 1. The right to privacy was added to the California Constitution in 1972 through an initiative adopted by the voters. *Hill v. NCAA*, 7 Cal.4th 1 (1994). The amendment creates a right of action against private as well as government entities. *Hill*, 7 Cal.4th at 20. The amendment was intended to be self-executing; the constitutional provision in itself creates a legal and enforceable right of privacy for every Californian. *White v. Davis*, 13 Cal.3d 774, 775 (1975).

**Mischiefs Targeted: Government and Business Snooping**

The mischiefs targeted by the amendment were government and business snooping. The right to privacy was specifically added to the California Constitution to combat the secret gathering of personal information and the overbroad collection and retention of information by government and business interests. *White*, 13 Cal.3d at 774. At the time the amendment was considered Californians felt that “the proliferation of government snooping and data collecting was threatening to destroy out traditional freedoms…computerization of records made it possible to create cradle to grave profiles of every American.” *White*, 13 Cal.3d at 774. Moreover, citizens were concerned about control of their personal information. “Fundamental to our privacy is the ability to control circulation of personal information.” *Id.* at 774. Citizens were concerned about the security and privacy of their data and information. “The average citizen . . . does not have control over what information is collected about him. Much is secretly collected.” *Id.* at 775.

**Informational Privacy at Core**

The California Constitution sought to protect two types of privacy, 1) informational privacy, the interest in precluding the dissemination or misuse of sensitive and confidential information, and 2) autonomy privacy, the interest in making intimate personal decisions or
conducting personal activities without observation, intrusion or interference, *Hill*, 7 Cal.4th at 35.

“Informational privacy is the core value furthered by the privacy initiative.” *White* 13 Cal.3d at 774. Not all information is private. “The particular class of information is private when well established social norms recognize the need to maximize individual control over its dissemination and use. Such norms create a threshold reasonable expectation of privacy in the data at issue.” *Hill*, 7 Cal.4th at 35-36.

In a Constitutional privacy claim in California, many sources of law are considered in determining whether there has been an offense. The California Constitution is broadly construed to protect privacy. *Hill*, 7 Cal.4th at 36. “Whether established social norms safeguard a particular type of information or protect a specific type of personal decision from public or private intervention is to be determined from the usual sources of positive law governing the right to privacy: common law development, constitutional development; statutory enactments; and the ballot argument accompanying the privacy initiative.” *Id.* at 35-36.

**Elements of Invasion of Privacy under the California Constitution**

In order to prove an invasion of privacy under the California Constitution, the plaintiff must prove three elements. A defendant may prevail by negating any of these three elements. First, the plaintiff must identify a specific legally protected privacy interest. *Hill*, 7 Cal.4th at 35. Legally recognized privacy interests are of 2 classes: informational privacy and autonomy privacy. *Id.* at 35. Whether a legally recognized privacy interest exists is a question of law to be decided by the courts. *Id.* at 39-40. The phone records of the H.P. Directors and the journalists that were obtained by pretexting are subject to protection under the laws of the State of California. They fall under the protected class of informational privacy.
Second, the plaintiff must have a reasonable expectation of privacy in the circumstances. *Id.* at 39-40. The factors affecting a person’s reasonable expectation of privacy are 1) conduct by a defendant constituting a serious invasion of privacy and 2) the nature, scope and actual or potential impact. *Id.* at 39-40. Whether there is a reasonable expectation of privacy under the circumstances is a mixed question of law and fact. *Id.* at 39-40. The directors and journalists at who were pretexted had a reasonable expectation of privacy in their phone records. It is a well-established social norm that phone records are not shared by the phone company with anyone except the account holder. Phone companies ordinarily only release phone records to the actual customer. Phone records are not published or publicly available. Those whose records were obtained did not consent to sharing that information, nor were they asked for their consent. They had no knowledge that H.P was obtaining these records from the phone companies.

Dissemination of phone records is strictly controlled through the policies of the phone company. The habits of neighbors and fellow citizens are factors in an objectively reasonable expectation of privacy. Neighbors and fellow citizens conduct themselves in a manner that is consistent with phone records in this country being private. No subpoenas or search warrants were obtained for these directors and journalists phone records. They broke no laws and were not charged with any crimes. They had no reason to suspect that they were being surveilled. Therefore, the expectation of privacy in the data was objectively reasonable.

Third, actionable invasions of privacy must be sufficiently serious in their nature, scope and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.” *Hill*, 7 Cal.4th at 37. Egregious breach is a mixed question of law and fact. *Id.* at 40. The invasion of privacy by H.P. was serious. Bill Lockyer, the Attorney General of California filed criminal complaint against Ms. Dunn, Mr. Hunsaker, Misters DeLia, Depante
and Wagner.  

After the disclosure that H.P. was pretexting, the U.S. Congress called a special sub-committee hearing to interview the Officers, outside counsel and investigators of H.P.. Congress found H.P.’s pretexting outrageous. Members of Congress sternly questioned and rebuked the H.P. leaders, their agents and attorneys for pretexting. “Lawmakers in Congress convened the hearing to emphasize the need for legislation that explicitly bans the use of pretexting to obtain phone records.” Congress raised the issue as one of gross seriousness and subsequently passed laws to criminalize pretexting.

Ms. Dunn could counter that the “offensiveness” of the intrusion was overblown for political reasons. Lockyer brought the criminal indictment against Dunn on the eve of his seeking election for California State Treasurer, which he one. An official that was newly elected, Attorney General Brown Jr., dismissed the charges against Dunn and the others..

**Defense to a California Constitutional Privacy Cause of Action: Balancing**

In a Constitutional invasion of privacy claim, the privacy interest must be specifically identified and compared with competing and countervailing privacy and non-privacy interests in a balancing test. *Hill*, 7 Cal. 4th at 37. A defendant may prevail by pleading and proving, as an affirmative defense, that the invasion was justified because it substantively furthered one or more countervailing interests. *Id.* at 40. The presence or absence of countervailing interests, based on competing social norms may render the defendants conduct inoffensive. *Id.* at 26.
Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. *Id.* at 38. If the alleged intruder presents a strong countervailing defense, then the plaintiff may rebut the affirmative defense. The plaintiff would then need to demonstrate the availability and use of protective measures, safeguards and alternatives to the defendant’s conduct that would minimize the intrusion on privacy interests. *Id.* at 38.

In her defense, Chairwoman Dunn called it an "important investigation that was required after the board sought to resolve the persistent disclosure of confidential information from within its ranks." 100 She asserted, “the most sensitive aspects of a company's business come before its board. This is exactly the type of information a company's competitors and those who trade in its stock would love to have before that information is properly disseminated.” 101 However, while Ms. Dunn was Chairwoman, she could point to no material information that leaked to the press. 102

Moreover, the directors did not break any laws. Dunn stated that, “at H-P, all directors, officers and employees are bound by … Standards of Business Conduct, . . . which say, "you may not grant interviews or provide comments to the press without prior approval from H-P Corporate Communications . . . If any suspicion emerges that one or more board members are violating their oath of confidentiality, then, it is the board's responsibility to do something about it"” 103 H.P. directors and employees agree to be bound by this policy. While there is a director’s duty of loyalty to the firm, there is no legal duty of confidentiality by board members. Mr.

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102 Ibid.
103 Ibid.
Sonsini mustered little legal support for Ms. Dunn saying, "There was a crisis in this boardroom."¹⁰⁴

H.P.’s countervailing interest in finding the boardroom leaker, was a legitimate objective. However, competing social norms will not render the defendants’ conduct inoffensive because the means used to carry out the objective affront social norms. It is not socially normal for a corporation to pose as someone else to get phone records from the phone company. Pretexting is not legally authorized, and is not a socially beneficial activity of a business entity. Society has expressed no belief that pretexting accrues a social benefit. H.P. and its agents will fail in their counter argument against the strong interest that the State of California has in protecting the informational privacy of its citizens.

**Legal Elements of Intrusion**

To show intrusion, the plaintiff must prove two elements. First, the plaintiff must show that the defendant penetrated some zone of physical or sensory privacy, or obtained unwanted access to data about the plaintiff. Restatement Second of Torts, section 652A(a). When H.P. obtained unauthorized access to phone records belonging to members of its Board of Directors and several outside journalists, it obtained unwanted access to data about the plaintiffs.

Intent is an element of intrusion. Restatement Second of Torts, section 652A(a). H.P. collected social security numbers and phone numbers of its directors and then misused the information for the illegal purpose of obtaining phone records by impersonating directors to the phone company. H.P. provided Kevin Hunsaker with the phone numbers and Social Security numbers of H.P.’s Board of Directors. Hunsaker than gave this information to private detectives with the goal of obtaining their private phone records. Pretexters used the information to masquerade as board members in order to obtain their confidential phone records. H.P.

intentionally obtained unauthorized access to phone record data of George A. Keyworth II, Tom Perkins, Lucie Salhany, Marion Keyworth, Jack Hackborn, Dawn Kawamoto, Tom Krazit, Pui-Wing Tam, Michelle Moeller, Brigida Bergkamp, Steven Shankland, and Tom Shankland.\(^\text{105}\)

Therefore, the defendant intentionally obtained unwanted access to data about the plaintiffs.

A plaintiff must have had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source. Restatement Second of Torts, section 652B, comment c. This element is the same as in the California Constitutional right to privacy, and is analyzed above (page 12 supra). In sum, the directors and journalists reasonably believed that their home telephone, cellular phone and fax number records were private and not being accessed by H.P., consistent with social norms. The directors and journalists did not know, suspect or believe that they were being surveilled.

Moreover, the plaintiff must have conducted himself in a manner consistent with an actual expectation of privacy and must not have manifested consent. *Hill*, 7 Cal.\(^4\)th at 26. Consent was not requested by H.P. in the gathering of the directors’ and journalists’ phone records. Account holders did not give their consent to H.P. or to the phone company or any other party, to access or turn over phone records. The plaintiffs conducted themselves in a manner consistent with an actual expectation of privacy.

Second, the plaintiff must show that the intrusion was effected in a manner highly offensive to a reasonable person. Restatement Second of Torts, section 652 B, comment d. The factors for offensiveness are the degree of the intrusion, the context, the conduct and circumstances surrounding the intrusion, the intruder’s motives and objectives, and the expectations of those whose privacy is invaded. *Miller v. NBC*, 187 Cal. App. 3d 1483, 1484, (1986). H.P.’s behavior was highly offensive to a reasonable person. The degree of the intrusion

was extensive in that H.P. collected inbound and outbound calls for 413 separate landlines, 157 separate cell lines and 20 separate toll-free lines of at least twelve people. The context was the family home telephone number, the private cellular numbers, the work numbers, and fax numbers of the directors and journalists. In the context of the home, Courts have recognized a heightened right to privacy. Hill, 7 Cal.4th at 28 citing Griswold v. Connecticut, 381 U.S. 479 (1965). By obtaining home phone records, H.P. intruded into a zone of privacy considered most protected.

Moreover, H.P.’s conduct was deceitful. The circumstances surrounding the intrusion were secretive and without the consent of the account holders. The intruder’s motives and objectives were to find the boardroom leaker. While H.P.’s objective was understandable, the means used exceeded socially accepted limits. The directors and journalists were completely unaware of the intrusions. People expect their home phone records to be private. In light of the individuals’ expectations that their phone records were confidential, the actions of H.P.’s agents were highly offensive. Moreover, upon learning of the pretexting at H.P., Congress called a special sub-committee meeting to sternly question and rebuke those responsible for pretexting. The pretexters were charged with criminal felonies in California. Furthermore, U.S. Senate and the state of California introduced new laws to criminalize pretexting. Therefore, H.P.’s behavior was highly offensive to a reasonable person.

**Master-Servant Liability**

H.P. is liable for the intentional torts committed by the outside investigators. “In California, the hirer of a detective agency for either a single investigation or for the protection of property may be liable for the intentional torts of employees of the private detective agency

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committed in the course of employment.” Noble v Sears, 33 Cal.App.3d 654, 663, (1973). H.P. hired Ronald DeLia, Matthew Depante and Bryan Wagner. Delia owned and operated Security Outsourcing Solutions, (S.O.S.). Depante managed Action Research Group. Wagner was employed by A.R.G. and performed the work of unlawfully obtaining phone records through false pretenses for the benefit of H.P.. Therefore, H.P. may be liable for the investigators intentional torts.

For H.P. to be found liable, the acts of the investigators must be committed within the scope of their employment. Hirer’s have been held liable for the intentional torts of the agency’s personnel committed in the scope of the agency’s employment against the hirer’s invitees. Noble, 33 Cal.App.3d at 661. Whether or not the tort was committed in the scope of employment is a question of fact. 33 Cal.App.3d at 663. DeLia, Depante and Wagner committed intrusion in the scope of their employment by H.P. because H.P. exercised control over the outside agencies by giving them the names of directors and journalists and ordering the requisition of their phone logs. On behalf of H.P., Hunsaker supplied the investigators with the social security numbers and private phone numbers of the directors. He also identified for which journalists he wanted data collected. H.P. also exercised control by financially compensating the investigators. Each time DeLia, Depante or Wagner accessed the phone records of a Director or journalist, H.P. was responsible. Therefore, the acts were committed in the scope of employment.

The acts of intrusion were committed under the instructions and prior approval of H.P.. In Sears the court held that each and every of the wrongful and intrusive acts complained of were committed under the instructions and prior approval, express or implied of Sears and its attorneys.” Id. at 660. Mr. DeLia, very early in the first leak probe, told Ms. Dunn that he had

done similar investigations in the past by obtaining phone records of journalists and others "via pretexting."109 "In June 2005, a Wilson Sonsini lawyers wrote: ‘Mr. DeLia briefed Ms. Dunn and Ms. Baskins in a conference call. ‘DeLia explained pretexting,’ on that call . . . telling Dunn and Baskins that it involved investigators requesting information from operators orally, over the phone, 'pretending' to be someone else if necessary.’ DeLia informed Dunn and Baskins that pretexting had been used in connection with reporters."110 "Dunn was briefed regularly by Hunsaker on the progress of the investigation."111 Therefore, the acts were committed under the instructions and prior approval of Dunn, Hunsaker and H.P..

Dunn countered by saying that she did not personally pretext and that she did not know others were doing it. "I had no knowledge that journalists' phone records were being accessed. It was always my understanding that their telephone numbers were only being cross-referenced against legally obtained director phone records."112 Ms. Dunn said in her U.S. House of Representatives testimony that she did not recall hearing the term pretexting during the 2005 probe. "However, according to meeting notes from H-P's then-general counsel, Ann Baskins, someone with the initials "PCD" asked direct questions about the matter. Ms. Dunn's full name is Patricia Cecile Dunn."113 The evidence indicated that Dunn was updated regularly.114

**Causation**

Causation is an element of the tort of Intrusion. Restatement 2nd of Torts section 652B. But for Chairwoman Dunn’s order to acquire the phone records of directors and journalists, there would have been no intrusion. But for the obtaining unauthorized accessing of phone record data

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110 Ibid.
111 Ibid.
of George A. Keyworth II, Tom Perkins, Lucie Salhany, Marion Keyworth, Jack Hackborn, Dawn Kawamoto, Tom Krazit, Pui-Wing Tam, Michelle Moeller, Brigida Bergkamp, Steven Shankland, and Tom Shankland by Delia and Wagner through pretexting, there would have been no access into the private informational data of these individuals. But for the unauthorized collection of phone records by agents of H.P., there would be no intrusion.

**Damages**

Emotional distress damages are recoverable by George Keyworth, Tom Perkins, Lucie Salhany, Marion Keyworth, Jack Hackborn, Dawn Kawamoto, Tom Krazit, Pui-Wing Tam, Michelle Moeller, Brigida Bergkamp, Steven Shankland, and Tom Shankland flowing from the intrusion by H.P.. Damages are recoverable in a tort claim for violation of privacy. Noble, 33 Cal.App.3d at 658. “The gravamen of the action here charged is the injury to the feelings of the plaintiff, the mental anguish and distress caused by the publication.” Miller, 187 Cal.App.3d at 1484-1485. “Special damages need not be charged or proven …substantial damages for mental anguish alone may be recovered.” Id. at 1485. Emotional distress damages include anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, anguish. Id. at 1485. These are compensable if they flowed from the actionable wrong. Id. at 1485.

The plaintiffs may recover damages for mental anguish flowing from the intrusion. George A. Keyworth II may claim special damages including harm to reputation and lost wages. For example, when George A. Keyworth II was dubbed “the leaker,” the H.P. board requested his resignation and the pejorative label damaged his reputation. Mr. Keyworth was a nuclear physicist, a Yale graduate, a science advisor to President Reagan, and served on H.P.’s board for 21 years. Under pressure, Mr. Keyworth resigned from H.P.’s board causing him to lose

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wages. Therefore, Mr. Keyworth may show special damages such as lost income and harm to reputation.

Tom Perkins enjoyed an excellent reputation. Perkins may claim special damages including harm to reputation and lost wages flowing from the intrusion. Tom Perkins worked at H.P. in the 1950s and 1960s and helped start its computer business. In 1972, he co-founded Kleiner, Perkins, Caufield, & Byers, a leading Silicon Valley venture capital firm that made billions of dollars for partners and investors by backing companies like Genentech, Netscape, Google and AOL. Perkins returned to H.P. as an outside Director in 2002 and served until 2004 when he retired. Keyworth urged Perkins to return 11 months later because he said the firm needed Mr. Perkins’ expertise.

After the pretexting scandal came to public light, some called Tom Perkins a whistle-blower for reporting H.P.’s pretexting activities to the SEC. Also, Tom Perkins has been accused in the press of disliking business women because he facilitated the firing of Carly Fiorina and the ousting of Chairwoman Dunn. Mr. Perkins was embarrassed and his reputation harmed when he felt compelled to initiate legal action against H.P., a company that he loved where he worked for many years. Mr. Perkins was a close friend to H.P. co-founders Misters Hewlett and Packard. In his memoirs, he refers to Dave Packard as a father figure and

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118 Ibid
119 Ibid.
a mentor. Because of Mr. Perkins blemished reputation and loss of director’s income, he may claim special damages.

**IMPLICATIONS AND CONCLUSION**

The implications of H.P.’s violations of privacy laws are far reaching. The settlement H.P. reached with Attorney General Lockyer cost H.P. $14.5 million. $13.5 million established a new “Privacy and Piracy Fund” in the Attorney General’s Office, (AGO). $650,000 were civil penalties and $350,000 covered the cost of the AGO’s investigation. HP agreed to permanently refrain from engaging in unlawful investigatory practices and to implement, for five years, corporate governance reforms that will improve in-house monitoring and oversight of any HP investigations. H.P. was required to appoint an independent director to oversee compliance issues; to expand the duties and responsibilities of the Chief Ethics and Compliance Officer (“CECO”) and the Chief Privacy Officer (“CPO”); to create a new Compliance Council chaired by the CECO; and to strengthen the Company’s ethics and conflict-of-interest training programs.

Because of these intrusions by H.P., the U.S. Senate passed legislation that made it a federal crime to obtain a person’s telephone records without permission. Moreover,

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124 Ibid.
127 Ibid.
128 Ibid.
129 Ibid.
California made pretexting a crime.\textsuperscript{131} A bill signed into law by Governor Arnold Schwarzenegger went into effect on 1/1/2007.\textsuperscript{132}


\textsuperscript{132} Ibid.