

**The Hewlett Packard Complaints:
A Warning to Internet Companies about Investigations**

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The Hewlett Packard pretexting scandal received widespread publicity. There were two main legal aspects. First, there is the criminal case filed against Ms. Patricia Dunn (former Chairperson of the Board), a senior Hewlett Packard lawyer and several private investigators. Second, there was a civil case filed by the California Attorney General against Hewlett Packard. Hewlett Packard recently settled the civil case. Hewlett Packard will pay fines of \$14,500,000, with the lion's share going to fund future California law enforcement investigations of privacy violations and piracy. Hewlett Packard also agreed to a permanent injunction with many strong provisions. Perhaps the most surprising obligation of the Independent Director is a requirement - literally a court order - to report any violation of California law in the course of investigations directly to the California Attorney General. This means that Hewlett Packard must report violations of law in the course of investigations before it has analyzed and corrected them.

While Hewlett Packard is having to take some pretty stiff medicine, most companies may be inclined to perceive the whole situation as a bizarre aberration. After all, how many companies investigate members of their own Board of Directors? Probably very few. But the Hewlett Packard cases raise a red flag about the improper conduct of investigations. There are some very real dangers for any company which gathers information to be used by another company for possible legal action.

The proliferation of trademark and copyright infringements on the web has grabbed the attention of not only trademark and copyright owners, but also Internet professionals. Some of these professionals have reached the logical (and correct) conclusion that trademark and copyright owners need more cost effective ways to scour the Internet for infringements than paying high fees for attorneys to spend hours doing manual searches. These professionals have put their finger on a real need of trademark and copyright owners. While these professionals may have substantial Internet expertise and solid financial backing, they may not be aware of one other critical element virtually every state requires for a company which locates and reports infringements: a state investigator's license. For example, California law, with a few narrow exceptions, requires that investigators be licensed. Business & Professions Code §§7521(a), 7520. A company

which conducts investigations without a license has committed a crime. Business & Professions Code §7523(b).

An examination of the civil complaint against Hewlett Packard and the criminal complaint reveal that some of the same legal claims could be filed against companies which begin offering investigative services without a license.

In the criminal case Ms. Dunn, the former chairperson, a Hewlett Packard lawyer and several private investigators are charged with criminal conspiracy (Penal Code §182(a)(1)) and a computer crime (Penal Code §502), among other charges.

A computer crime is committed by one who "knowingly . . . uses any data, computer, computer system or computer network . . . in order to . . . wrongfully obtain, money, property, or data." (Penal Code §502(c)(1)(B)). If a company were to use the Internet to gather information about infringements which it provided to its customers for a fee and that company did not have an investigator's license, section 502 would apply. The company is doing investigative work on the Internet without a license and is therefore "wrongfully" obtaining data and money.

Hewlett Packard was charged with unfair competition (Business and Professions Code §17200) in the civil complaint filed by the California Attorney General. This very broad statute prohibits unfair competition. Unfair competition is anything that is unlawful, unfair or fraudulent in the conduct of a business. As interpreted by the courts, a business which violates almost any law may also be competing unfairly. In other words, a business violating one law is probably also violating the unfair competition law. Business and Profession Code §17100 makes violation of the unfair competition law a crime.

If a California company is operating an Internet investigative business without a license that would also be a violation of the unfair competition law. This analysis is not surprising - a company which does not bother to qualify and pay for the correct license is readily viewed as trying to compete unfairly with companies that have spent the time and money to meet all the legal requirements. What may be surprising is that this may also be a crime.

A most interesting aspect of the criminal case against Ms. Dunn is the very thin allegations about her conduct. Keep in mind, she was not even an employee of Hewlett Packard. The only allegations of actions by Ms. Dunn in the criminal complaint are: she gave someone phone numbers and she requested a summary of the investigation. Yet she was charged with the same crimes with which the more active private investigators and in-house counsel were charged. The foundation for criminal charges against her is that she knew what was going on and made a small contribution to the effort. There is no allegation that she even left her office to participate in the crime!

It is interesting to compare Ms. Dunn's role to that of a venture capitalist investing in an online investigation company acting without a license. The venture capitalist is making more than a token contribution to the effort. He or she is providing vital financial backing,

perhaps millions of dollars. No doubt the venture capitalist gets frequent reports about the business, including the types of investigations it is conducting and selling. Many venture capitalists provide business advice. Some serve as board members. A venture capitalist investing in a new online infringement investigation company is likely to have a far more active role in the business than Ms. Dunn did in Hewlett Packard. The venture capitalist then may have more exposure to civil and criminal charges for illegal investigations than did Ms. Dunn. Certainly the broad sweep of criminal conspiracy is likely to apply. As with Ms. Dunn, participation in the conspiracy might be enough to embroil one in other charges such as investigation without a license, computer fraud and unfair competition.

In addition to prohibiting investigation without a license, most other states also have unfair competition statutes, computer fraud and criminal conspiracy laws similar to those of California. One lesson to be learned from Hewlett Packard is that it is important for everyone involved in an enterprise to be concerned about compliance with laws pertaining to investigations. These laws are not limited in their application to the private eye on the street.