



HOT CIPA SUMMER

CIPA claims are heating up in California...STILL!

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DESERVE TO WIN

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MAGAZINE

VOL. 2, ISSUE NO. 1.

SCOTUS Upholds CFPB Funding
Are We One Step Closer To Tyranny? *(Yep.)*

FAQs
Confused About The FCC's NEW One-To-One Consent Rules?

Not Buying It

Court Shows Healthy Skepticism Of TCPA Plaintiff's Claims Against Insurance Telemarketer



BRITTANY ANDRES

Howdy Partner

The Powerful "Baroness"—Brittany Andres—Makes The Cut As Troutman Amin, LLP's Newest Partner After The Ultimate Vegas Gamble Pays Off



PLUS!
Big TCPA ATDS Win
PAGE 26

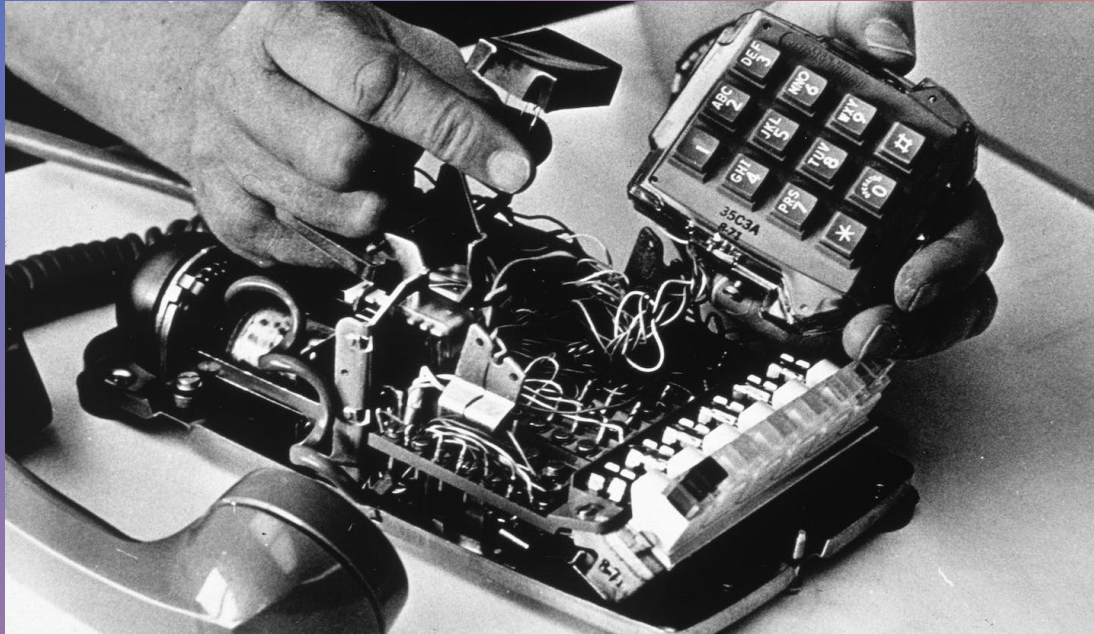
BRITTANY ANDRES

"THE BARONESS"





HISTORY



- Early twentieth century – telephone communications
- WWII – FBI and public officials
- CIPA was enacted in 1967



HISTORY PT. II

- First cases against police officers in criminal cases
- Expansion of CIPA claims
 - Web session recording
 - Web session analytics
 - Chat boxes
 - Trackers
- Litigation under CIPA is now the most dangerous litigation on the face of the planet--\$5,000 per violation!
- Class actions permitted
- Cal. Penal Code § 610, et seq. (Yes, a criminal statute!)



WHAT ARE THE PENALTIES?



01

Misdemeanor: 1 year in county jail and/or \$2,500 in fines

02

Felony: Jail (16 months, 2 years or 3 years)

03

Civil Liability: \$5,000 per violation!! OR

3 times the amount of actual damages victim suffered

Class actions enabled

SOL: 1 year





WHAT IS PROHIBITED UNDER CIPA?

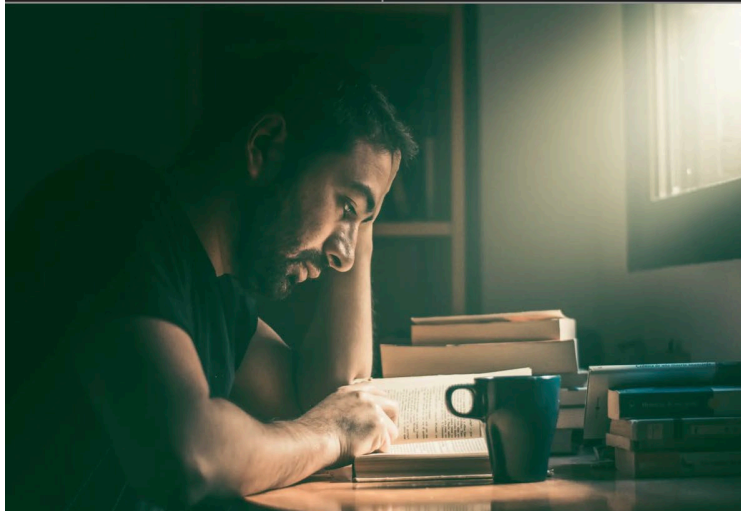
OVERVIEW



HERE IT IS!: Your Critical Breakdown of the Four Main Types of California Invasion of Privacy Act Violations That Could Cost You Millions (Even if You Don't Do Business in Cali!)

25 APR 2023

ADD A COMMENT



- Section 631
 - TCPA compliance recordings
 - Web session analytics
 - Chat Boxes
- Section 638.51
 - Pen register cases
- Section 632
 - Traditional call recording cases
- Section 632.7
 - Wiretapping and recording between phones





SECTION 631





Section 631 provides—in relevant part—it is illegal to “**read**[], or **attempt**[] to **read**, or to **learn** the content[] or meaning of any message, report, or communication while the same is **in transit** or passing over any wire, line, or cable or is being sent from, or received at any place within this state...”

SECTION 631



- “New” CIPA cases
- Applies to anyone who has a website, even if you are not directly targeting California consumers. If they can visit YOUR website, you are potentially at risk.
- Three varieties: 1) TCPA compliance recordings, 2) web session analytics, and 3) chat box usage
- A third-party vendor **MUST** be involved. So, a business can record its OWN web sessions with consumers



TCPA COMPLIANCE RECORDINGS



activeprospect



JORNAYA™

JAVIER V. ASSURANCE IQ, LLC



- Section 631 applies to internet communications
- 9TH Circuit held the use of technology on websites like ActiveProspect's TrustedForm, without affirmative consent, *may* violate Section 631
- Two-party consent when it comes to recording information on websites as well
- District court ruled directly that the use of third-party web session replay technology **does** constitute wiretapping under CIPA.
- CONSENT CONSENT CONSENT!

CASES POST *JAVIER*



- District courts are split on the issue.
- Some courts have held that third party web session technology is NOT a third-party eavesdropper and is more akin to a tape recorder. See *Williams v. What if Holdings* (holding TrustedForm functioned as a recorder and NOT an eavesdropper); *Graham v. Noom* (a third-party that essentially gained access to the Defendant's servers for the purpose of helping it to process and preserve data was not wiretapping:).
- Compare with *Javier v. Assurance IQ, LLC* (holding ActiveProspect **does** constitute wiretapping); *Loretta Williams v. DDR Media LLC, et al.*, (denying motion to dismiss stating a fuller factual record is necessary to resolve whether Jornaya's TCPA Guardian violated CIPA).

WHAT CAN YOU DO TO PROTECT YOURSELF?



- It's easy to operationalize – however you may get push back from your marketing team.
- Assuring consumers accept disclosures reflecting the use of web session recording and analytics software **BEFORE** any recording begins is critical. (i.e., consent)
- Obtain consent, separate from the TCPA consent for the consumer to be recorded – prior to the recording taking place.
- Implement appropriate privacy policies

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WEB SESSION ANALYTICS





- Analytics regarding consumer experience on a website
- Used to enhance a consumer's experience
- Google Analytics, Hotjar, Heap, Adobe Analytics



CASE LAW



- *Smith v. Google, LLC*, No. 23-CV-03527-PCP, 2024 WL 2808270 (N.D. Cal. June 3, 2024) (denying motion to dismiss holding users plausibly alleged that tracking tool was primarily or exclusively designed or intended for eavesdropping, as basis for liability under the CIPA)

WHAT CAN YOU DO TO PROTECT YOURSELF?



- **Step 1:** Know your vendors and know what (if any) type of tracking you're operating.
 - CIPA Questionnaire
 - Find out what risk exist
- **Step 2:** Implement appropriate privacy policies to disclose to the consumer what type of tracking is being conducted and what platforms are being used.

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CHAT BOXES





- Most dangerous type of CIPA case.
- Many companies will use a third-party vendor that supplies a chatbox to permit communication between a consumer and the website operator.
- Chatboxes are useful because it allows visitors to ask questions and receive immediate responses.
- But if the consumer is not informed that a third-party may be “listening in” to these communications—the vendor almost always has access to the text of communications in real time and may even be serving as a proxy communication channel for the website operator—the use of these chat boxes may also violate CIPA.

CASE LAW



- Split of authority.
- *Byars v. Hot Topic, Inc.*, 2023 WL 2026994 (C.D. Cal. Cal. Feb. 14, 2023) (granting motion to dismiss Section 631(a) case because the website owner and its vendor were the intended recipients of the plaintiff's communications and, therefore, could not be held to have illegally "eavesdropped" on the communications from the plaintiff); *Licea v. American Eagle Outfitters, Inc.*, No. 22-cv-01702-MWF-JPR, 2023 WL 2469630 (C.D. Cal. March 7, 2023) (same).
- Compare with *Byars v. The Goodyear Tire & Rubber Co., et al.*, No. 5:22-cv-01358, 2023 WL 1788553 (C.D. Cal. Feb. 3, 2023) (denying a motion to dismiss in "chatbox" lawsuit, allowing that action to proceed to the discovery phase).

SPIKE IN CASES



26 JUL 2023

CHATTY WHEELS OF CONTROVERSY: U-Haul's Chat Box Lands Them in CIPA Crosshairs Once Again!

ADD A COMMENT



28 AUG 2023

CHAT BOXES ARE STILL DANGEROUS: CIPA Lawsuit Filed Against The Container Store!

ADD A COMMENT



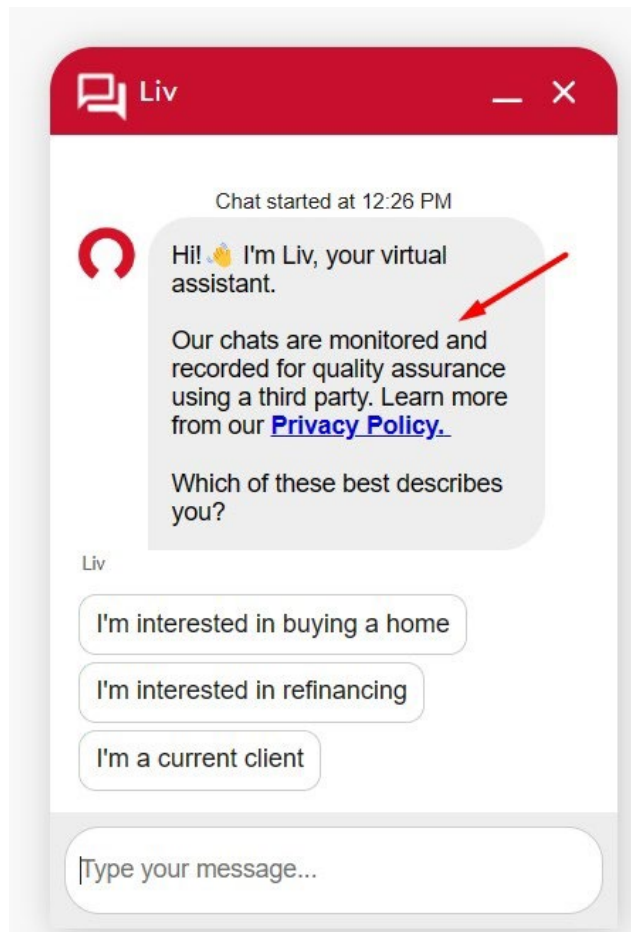
16 OCT 2023

ANOTHER CHAT BOX SUIT: Smart & Final Caught in CIPA Lawsuit!

ADD A COMMENT



WHAT CAN YOU DO TO PROTECT YOURSELF?



- **Step 1:** Check whether you are using any third-party vendors to use chat box functionalities (across all your sites, brands and channels).
- **Step 2:** Place a disclosure at the beginning of the chat box advising the consumer that the communication may be monitored by a third party



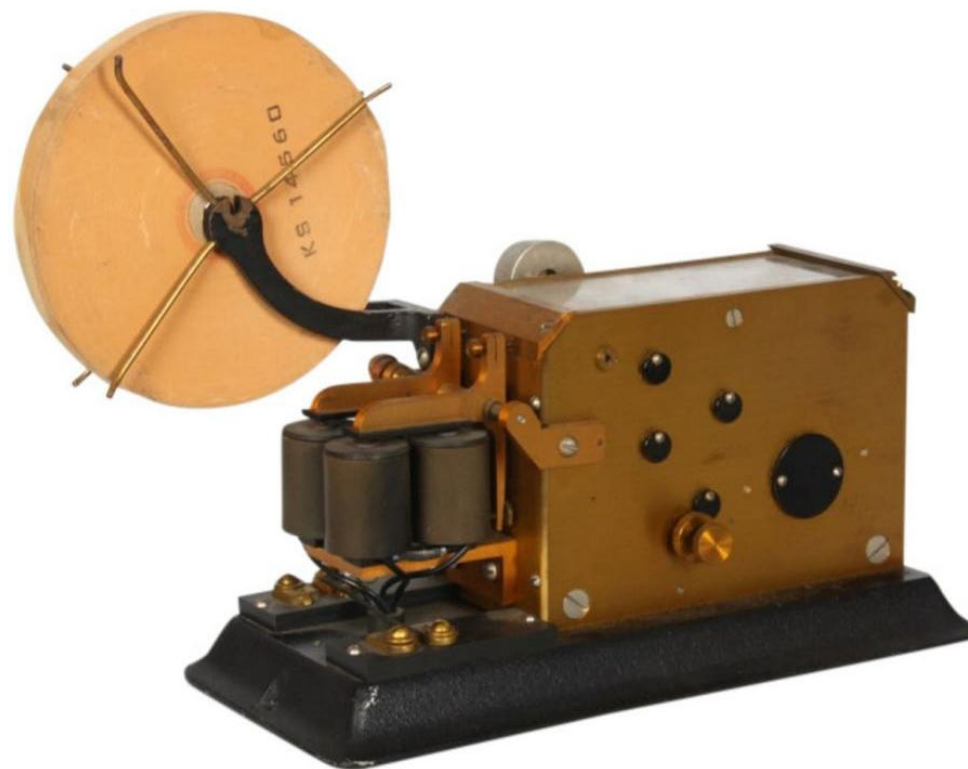
SECTION 638.51





WHAT IS A PEN REGISTER?

- “Pen register” means a device or process that records or decodes dialing, routing, addressing, or signaling information (DRAS) transmitted by an instrument or facility from which a wire or electronic communication is transmitted, but not the contents of a communication.
- Captures **outgoing** call information, such as the phone numbers dialed.



WHAT IS A TRAP AND TRACE DEVICE?



- “Trap and trace device” means a device or process that captures the incoming electronic or other impulses that identify the originating number or other dialing, routing, addressing, or signaling information (DRAS) reasonably likely to identify the source of a wire or electronic communication, but not the contents of a communication.
- Captures incoming communication information.

SECTION 638.51



- Traditionally, pen registers were employed by law enforcement to record outgoing and/or incoming telephone numbers from a telephone line.
- Primarily used for investigative purposes.
- Pen registers do not track content of communications or the identity of the parties.
- *Greenley v. Kochava, Inc.* No. 22-CV-01327-BAS-AHG, 2023 WL 4833466 (S.D. Cal. July 27, 2023).

WHAT CAN YOU DO TO PROTECT YOURSELF?



- **Step 1:** Know Your Vendors! First you need to understand technologies you are using and whether those technologies are data collection technologies that collect information (such as geolocation, search terms, click choices, purchase decisions, payment methods etc.)
- **Step 2:** Obtain consent prior to installation.
 - The CIPA pen register provision allows “a provider of electronic or wire communication service” to use a pen register “[i]f the consent of the user of that service has been obtained.”
 - Courts have not yet interpreted the CIPA pen register consent provision.



SECTION 632





SECTION 632



- Unlawful eavesdropping and recording statute
- Old-fashion “classic” CIPA cases
- Overhearing vs. Intentional eavesdropping
- “A person who, intentionally and **without the consent of all parties to a confidential communication**, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication...”
- California is two-party consent state
- *Kearney v. Salomon Smith Barney, Inc.* applies to telephone conversations
- This rule applies even if the party recording the call is out of state

WHAT IS A CONFIDENTIAL COMMUNICATION?



- A "**confidential communication**" means any communication carried on in circumstances as may **reasonably** indicate that any party to the communication desires it to be confined to the parties thereto.
- Standard: Objective test
- Excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.



SECTION 632.7



SECTION 632.7



- Section 632.7 was enacted to expand Section 632
- Prohibits intercepting or recording “a communication transmitted between two cellular radio phones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone...” without the consent of all parties to a communication.
- Applicable to internet communications? District courts are split on the issue.

LITIGATION DEFENSES



Lack of Personal Jurisdiction

Defendant not at home in the forum state and did not “expressly aim” conduct at the form.

Lack of Standing

Plaintiff lacks standing because he/she did not suffer an injury in fact.

Permissible Third Party / Participant Exception

Section 631 “appl[ies] only to eavesdropping by a third party.” It does not cover “a participant” to the communication.

No Interception “In Transit”

To be actionable under Section 631(a), a communication must be intercepted “in transit” between the user’s device and the website server. Given that online communications are nearly instantaneous, courts have concluded that the challenged access to the communication did not occur “in transit.”





WHO CAN BE SUED?




ANYONE CAN BE SUED!



- HUGE number of new filings under CIPA and these lawsuits are NOT limited to companies operating within California.
- If you are calling a California consumer, you may be at risk.
- If California consumers can access/use your website, you may be at risk.

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