

Another trial court development in the website-CIPA case law: When will appellate courts enter the chat?

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For over a year now, the California Invasion of Privacy Act (“CIPA”) has been actively litigated in the California courts. The authors of this article have been monitoring that activity, as well as how California Judges at the trial level are applying this 1960s wiretapping law to the modern-day internet. In some cases, Judges are reviewing very similar pleadings and reaching quite different results about the viability of CIPA actions.

A recent decision in the Central District of California pushes this caselaw further — another order construing the viability of a CIPA cause of action. This case is part of a larger set of similar decisions, and reinforces the need for appellate intervention and clarity on the important questions of statutory construction at the heart of these matters.

Background on CIPA

Section 631 of the California Penal Code is the state’s 1967 wiretapping law. Section 631(a) of this statute prohibits the intentional tapping or unauthorized use of the contents of a telephonic communication.¹ Liability is further imposed on entities that “aid, agrees with, employs, or conspires with” those engaged in prohibited conduct.²

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CIPA allows any person to bring a private right of action for an injunction. Also under CIPA, successful plaintiffs are entitled to the greater of \$5,000 per violation or treble damages.

Prior CIPA-website developments

In September 2023, we wrote about a new CIPA argument making the rounds in California courts: that a website which uses a third-party service provider to support a chatbot violates CIPA because it is aiding and abetting in the third-party provider’s wiretapping of the website user.³

The September post describes four cases where this novel website-CIPA theory was challenged at the pleadings. In some of those cases, the theory survived. In others, it was defeated.⁴

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We wrote about a website-CIPA case again in November 2023.⁵ In this case, *Greenley v. Kochava*, the plaintiff argued not that a website was aiding a third-party service provider, but rather that the service provider’s technology constituted a pen register under the 1960s law.⁶ On this novel approach to a website-CIPA case, the plaintiff’s pleadings survived, as the Court held that the expansive definition of a pen register can cover new technologies.⁷

Cody v. Boscov’s, Inc.

The caselaw develops further. In *Cody v. Boscov’s*, the California federal court held that the plaintiff failed to state a CIPA claim upon which relief can be granted because there were no allegations that the communication was intercepted in transmission.

On May 10, the District Court dismissed plaintiff’s third amended complaint in *Cody v. Boscov’s, Inc.*⁸ Cody asserted two CIPA claims against Boscov’s Inc. (“Boscov’s”) for violations of Sections 631(a) and 632.7.⁹

Boscov’s operates a website including a chat feature that customers can use to communicate with the company.¹⁰ Cody alleged the chat feature contained code embedded with a software company’s, Kustomer, content.¹¹

According to Cody, Kustomer’s code allowed it to “intercept inquiries” sent to Boscov’s and rerouted the inquiries to “computer servers that Kustomer owns and controls.”¹² Cody alleged that Boscov’s use of the chat feature, with Kustomer’s embedded code,

amounted to aiding and abetting Kustomer’s violation of section 631(a).¹³

The Court determined that in order for *Boscov’s* to have aided and abetted Kustomer, Cody needed to show that Kustomer had violated section 631(a) in the first instance.

The Court concluded that Cody failed to accomplish this task for three key reasons: First, Cody failed to show that the communication occurred using a telephone.¹⁴

Second, Cody failed to show that the communication was intercepted during transmission.¹⁵

Third, the absence of a qualifying communication intercepted while in transit necessarily means that there was no ill-gotten information to be used.¹⁶ Specifically, the Court reasoned that because Kustomer electronically stored the communications, the communications were not intercepted *while in transit*.¹⁷

Takeaways for the road ahead

The decision in *Boscov’s* was certainly a victory for the defendant there. But it provides no clarity to how California courts construe the state’s wiretapping law. While *Boscov’s* joins *Garcia v. Build.com* in rejecting a CIPA claim, it stands opposite *Kochava* and *Valenzuela*, which allowed CIPA claims to survive.

Of course, none of these pleadings are identical. Nor are the CIPA liability theories in each of these complaints identical. But that gives no comfort to a company trying to run its website. The law remains

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in flux, and that will remain so until the trial courts have binding authority to guide their interpretation.

Notes:

¹ Cal. Pen. Code § 631(a).

² *Id.*

³ Jason Stiehl, et al., Chatbot Lawsuits Push Calif. Courts to Rethink Wiretap Law, Law360 (Sept. 11, 2023, 1:55 PM), <https://bit.ly/3VQkhLD>, Chatbot Lawsuits Push Calif. Courts To Rethink Wiretap Law - Law360 (discussing *Garcia v. Build.com’s* rejection of plaintiff’s aiding and abetting argument because plaintiff’s speculation on the identity of the third-party vendor was insufficient to allege the existence of a third-party eavesdropper).

⁴ *Id.* (discussing *Valenzuela v. Nationwide Mutual Insurance* finding that plaintiff alleged sufficient facts to support the claim that defendant aided and abetted the third-party vendor).

⁵ Jason Stiehl, et al., Kochava Ruling May Hint At Next Privacy Class Action Wave, Law360 (Nov. 27, 2023, 5:32 PM), <https://bit.ly/4cvfWD1>.

⁶ *Id.*

⁷ *Id.*

⁸ *Cody v. Boscov’s*, No. 8:22-cv-01434-SSS-DTB, ECF No. 69 (C.D. Cal. May 6, 2024).

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 4.

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 5–6.

¹⁶ *Id.* at 6.

¹⁷ *Id.*