

# Navigating the Net: Legal Insights into Trackers, Terms, and Arbitration

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What's the deal with all this  
wiretapping litigation?

# Do Tracking Pixels Really Violate CIPA?

- **Legal Theory #1:** Company aids and abets a wiretap violation by embedding a session replay cookie or pixel (Meta, TikTok, etc.) on its website, which provides a 3<sup>rd</sup> party with information about the user's interactions with the website without that user's consent.
  - CIPA Section 631(a) imposes liability on any person who aids a third party who “willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents 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.”
  - \$5,000 per violation

# How Have Courts Responded To Legal Theory #1?

- Who can be held liable?
  - Primary party exception
- Is the “intercepted communication” protected content under CIPA?
  - Compare *Saleh v. Nike, Inc.*, 562 F. Supp. 3d 503, 518 (C.D. Cal. 2021) with *Graham v. Noom, Inc.*, 533 F. Supp. 3d 823, 833 (N.D. Cal. 2021)
- Did the user consent?
  - *Smith v. Facebook, Inc.*, 745 F. App'x 8–9 (9th Cir. 2018)
- Were the communications intercepted in transit?

# Potential Defenses to Legal Theory #1

- **Consent:** Company obtained affirmative, opt-in consent
- **Primary Party Exception:** cookie provider functioned merely as a tape recorder for the company, and did not use the recorded information for its own financial gain
- **Content Not Protected:** Mouse clicks, etc. are not protected “communications” under CIPA
- **Recording Not “Intercepted in Transit”**

# Legal Theory #2: Pen Register

- Company unlawfully deploys a pen register or trap and trace device by embedding a tracking pixel on its website that captures a user's routing or addressing information (e.g., IP address or geo-location data) without the user's consent.
- **CIPA Section 638.51**: “ A person may not install or use a pen register or a trap and trace device without first obtaining a court order”
- What are Pen Registers and Trap and Trace Devices?
  - Pen register: “a device or process that records or decodes dialing, routing addressing or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, but not the contents of a communication”
  - Trap and Trace: Similar definition for incoming signals

# How Have Courts Been Dealing With Legal Theory #2?

- *Greenley v. Kochava*, 2023 WL 4833466 (S.D. Cal. July 27, 2023)
- *Licea v. Hickory Farms LLC*, Case No. 23STCV26148 (Cal. Sup. Ct. L.A. County Mar. 13, 2024)
- *Levings v. Choice Hotels International, Inc.*, Case No. 23STCV28359 (Cal. Sup. Ct. L.A. County Apr. 3, 2024)



# Potential Defenses to Legal Theory #2

- If Plaintiffs' Pen Register Theory is accepted, virtually every website visit would result in a Pen Register or Trap and Trace Violation (collection of IP address cannot be enough...)
- The device was installed by the company outside of CA (e.g., servers located outside CA)
- Consent

# Arbitration provisions and class action waivers

# So, you got sued....

- What is your potential exposure?
- Do you have an enforceable contract?
- Do you have an arbitration agreement?
- Do you have a class action waiver?

# AAA Consumer Arbitration Fees (Based on 5,000 Claimants)

- Initial Fee: \$3,125 for Individuals; \$8,125 for Business
- Per Case Fee:

	0-500	501-1500	1501-3000	3001+
Individual per case fee	\$125	\$75	\$75	\$75
Business per case fee	\$325	\$250	\$175	\$100

- Arbitrator Appointment Fee:
  - Business: \$450 or \$650 per case (depending if arbitrator is appointed vs selected)
  - Consumer: \$50 or \$75 per case (depending if arbitrator is appointed vs selected)
- Final Fee: \$600 per case for Business
- **Total For Business: More than \$7 million (not including arbitrator compensation or liability)**

# Can You Avoid Your Own Arbitration Agreement?

- Under Cal. Civ. Proc. Code § 1281.97-99
  - Monetary sanctions (pay plaintiffs' attorney's fees and costs)
  - Order Striking Defenses or Rendering Default Judgment
  - Evidentiary Sanctions

# So, what should companies do?

- Explore other ADR providers
- Revise Arbitration Agreement to include batching, bellwether and other stopgap measures
- Remove arbitration agreement entirely?

# Contract formation & enforceability

# Where We Are

“Reading an average American’s digital contracts would take almost 250 hours a year”

– *The Guardian*





# Watch the Ninth Circuit



# Contract Formation: Basics

To form a contract under **California** law:

- 1) There must be **conspicuous notice** of the terms to which the consumer will be bound; and
- 2) The consumer must take some action, such as clicking a button or checking a box, that **unambiguously manifests their assent** to those terms

# Notice

There must be **conspicuous notice** of the terms to which the consumer will be bound. Should be:

- Spatially coupled with the mechanism for manifesting assent (i.e., the button) and temporally coupled (i.e., provided simultaneously to enrollment, thereby connecting the contractual terms to the services to which they apply)
- Displayed in a way where the court can fairly assume that a reasonably prudent internet user would have seen it

# What Helps?

- Uncluttered screen
- Providing terms
  - Gold Standard: Have terms appear in a new screen or pop-up window on the same screen, requiring users to scroll through in order to click accept/agree
- If terms are in a hyperlink, the hyperlink should be:
  - (1) underlined,
  - (2) **bold**,
  - (3) IN CAPITAL LETTERS,
  - (4) in contrasting font color, ideally [blue](#), the color typically used to signify the presence of a hyperlink, and
  - (5) in a readable font
- Also mail a hardcopy or email a copy of the applicable terms to users, if possible

# What Hurts?

- Link to terms is buried at the bottom of webpage or located in obscure corners of website where users are unlikely to see it
- Notice of terms “not directly adjacent” to the button intended to manifest assent
- Hyperlinks are not readily apparent (e.g., underlined phrases/hyperlinks for “Terms & Conditions” appear in the same font as the rest of the sentence, rather than in blue)
- Notice is in small font (or smaller font than other text on page)
- Notice is not bold, capitalized, or conspicuous in light of whole page
- Use of several different colors, fonts, and having locations of text generally obscure the notice
- If there are numerous other links on the webpage on which the notice appears
- Notice appears alongside or below multiple buttons and promotional advertisements
- Users must scroll past other hyperlinks before seeing the hyperlink for the terms of service

# Manifesting Assent

Under Ninth Circuit law, the consumer must take some action, such as clicking a button or checking a box, that **unambiguously manifests** their assent to those terms

- “A user’s click of a button can be construed as an unambiguous manifestation of assent *only if* the user is explicitly advised that the act of clicking will constitute assent to the terms and conditions of an agreement.”
- “[T]he notice must explicitly notify a user of the legal significance of the action she must take to enter into a contractual agreement.”
- Can you solely email its subscribers to enforce updated terms, and will their continued use of your services constitute acceptance?
  - While we recommend using email to inform consumers of upcoming changes or explain complex issues, an email notification alone may be insufficient to bind consumers
- What about putting it in the terms?
  - “Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side”
- Where else on your site / app can you notify consumers / obtain consent?

# What Helps?

- Explicit language or prompt directing users to read the terms and signaling that their acceptance subjects them to contractual terms. Specifically explain legal significance of clicking the button/taking the action: e.g. “By clicking “I ACCEPT”, you agree to be bound by our updated [Terms of Service](#).”
- Use language like “I agree” or “I accept” instead of words like “Continue”
- Allow users to review the Terms of Service prior to registration/acceptance
- Maintain records demonstrating consumers’ assent

# What Hurts?

- Simply placing hyperlinks close to relevant buttons without any indication that clicking the button would bind plaintiffs to a set of terms and conditions
- Not explicitly informing users that by clicking on the “continue” button they would be bound by the terms and conditions
- Not requiring users to affirmatively click an unchecked box indicating that they agree to be bound by terms of service before they are able to access or register for the services
- Suggesting a limited relationship, like starting a free trial, that users would not reasonably expect to subject them to terms and conditions
- Hyperlinks to not actually take users to the applicable terms



# What to Consider When Amending

- The notice and manifest assent issues still stand
- For more minor changes, do you need this? Hard to determine what is material...
- If the new terms include provisions of import (e.g., class action waiver, compelled arbitration), consider including a robust pre-click description of the changes



# Additional Questions

This outline is a discussion in summary form and may not address all applicable issues or be relevant to all situations. It is not intended to be legal advice. Please consult your attorney for legal advice.