

Wiretap Litigation

A Product Counsel's Playbook

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Agenda

1. The Landscape
2. The Conundrum
3. The Playbook

The Landscape

Statutes & Exposure

1. CIPA: \$5,000 per violation
2. ECPA: \$100/day or \$10,000
3. CDAFA: Actual damages + attorneys' fees
4. VPPA: \$2,500 per violation

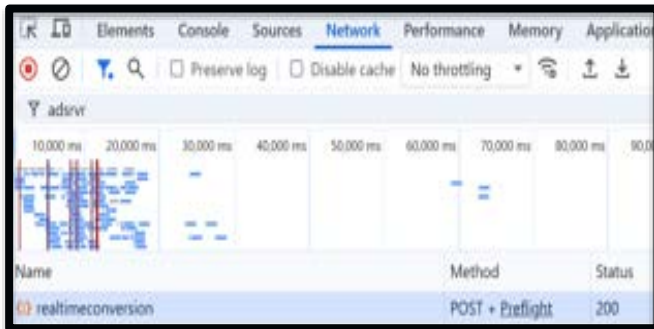
Unique California Visitors Per Day	Number of Trackers	Total Exposure
100	1	\$182,500,000
500	2	\$1,825,000,000
1,000	3	\$5,475,000,000
5,000	4	\$36,500,000,000
7,500	5	\$68,437,500,000

Plaintiffs' Theory

- The “surreptitious” collection by third parties of information “about” website visitors

Technologies at Issue

- Pixels / Tags / Beacons
- Analytics & Other SDKs
- Session Replay Tools



```
Request Payload View source
{data: [{adv: "ygdrdy", pixel_ids: ["186z53b"],...}]}
  data: [{adv: "ygdrdy", pixel_ids: ["186z53b"],...}]
  0: {adv: "ygdrdy", pixel_ids: ["186z53b"],...}
    Geo: "US"
    TD1: "PRODUCT|BW ARMY SHOES (HQ9234)"
    TD3: ["UNISEX"]
    TD4: ["LIFESTYLE"]
    TD5: ["ORIGINALS"]
    TD7: ["SHOES"]
    TD8: ["ORU97"]
    TD9: ["120.00"]
    TD10: 8
    adv: "ygdrdy"
    data_processing_option: null
    pixel_ids: ["186z53b"]
      0: "186z53b"
    privacy_settings: []
    referrer_url: "https://[REDACTED]/us/bw-army-shoes/HQ9234.html?pr=product_rr&slot=3&rec=ds"
    vf: "USD"
```

CDAFA: The Rising Threat

- CDAFA: knowingly access and without permission take, copy, or use data from a computer, or introduce a 'computer contaminant'
- Why is CDAFA surging? Two reasons:
 - (1) The Variety writ
 - (2) Attorneys' fees
- Disgorgement theories gaining traction
- Expect CDAFA to become a standard claim

The New Frontier: Connected Television

- Two separate CTV class actions filed in same week (April 2026), asserting CIPA, ECPA, CDAFA, and UCL claims
- Same theories as website tracking
- If these complaints survive motions to dismiss, expect a wave of similar filings
- Product counsel takeaway: CTV ad tech, smart TV data collection, and streaming-app SDKs are the next targets

Cookie Banner Failures Driving Litigation

- *Type 1* – Mis-firing banners
- *Type 2* – Late-firing banners
- *Type 3* – Sticky or ignored preferences
- Three plaintiff wins in early 2026
- “A misrepresentation about how information would be used and the non-consensual sharing of personal information could give rise to injuries that were actionable invasions of privacy at common law”

The Conundrum

CCPA Compliance ≠ CIPA Compliance

CCPA

Notice + ability to opt out
of sales/shares of data

vs.

CIPA

Prior express consent
before any interception

A Problem for Cookies

- Cookie preferences \neq CCPA opt-out \neq CIPA consent – three different regimes, three different requirements
- A CCPA-designed cookie banner is, at times, a square peg in a round hole for CIPA compliance
- Being compliant with one does not mean being compliant with the other

The Cookie Banner Trap

- Cookie banners do not prevent CIPA litigation
 - Tracking technologies typically fire the moment a user lands on the site
 - CIPA requires ‘prior consent’
- Cookie banners that malfunction create additional exposure
 - If the opt-out does not work, the banner is doing more harm than good
 - Plaintiffs now assert misrepresentation claims based on defective banners
- Companies scrambling to mitigate CIPA risk with cookie banners
 - More problems created than are solved

The Playbook

Mitigation on a Sliding Scale

- Sliding Scale
 - Option 1: No tracking technology on the site
 - Option 2: No tracking technology fires unless and until user affirmatively consents
 - Option 3: Make yourself harder to sue

Don't Be the Slowest Gazelle in the Pack

- Move to server-side tracking where possible
 - Both CIPA and the ECPA focus on “interception;” there is no “interception” with server-side tracking
 - Less visibility

Don't Be the Slowest Gazelle in the Pack

- Disclose early and often
 - Hiding the ball helps no one

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[Manage Cookies](#) **Accept All** **Reject All**

Don't Be the Slowest Gazelle in the Pack

- Have the right provisions in your Terms of Use
 - Mandatory, informal pre-dispute resolution procedure
 - Stand-alone class action waiver with mandatory minimum
 - Forum-selection clause
 - Choice-of-law provision
 - Jury trial waiver

Don't Be the Slowest Gazelle in the Pack

- Distinguish between “customers” and “visitors”
 - Customers: people with whom you have a relationship
 - Visitors: people who visit the site

Don't Be the Slowest Gazelle in the Pack

- Make sure your Terms of Use are enforceable



Don't Be the Slowest Gazelle in the Pack

- Take advantage of pre-existing friction
 - If users are already engaging with you (i.e., account creations, email sign-ups, purchases), get enforceable, click-wrap consent

Don't Be the Slowest Gazelle in the Pack

- Know the litigation landscape
 - California Court of Appeals decision in *Variety*
 - Pending online-tracking litigation

Don't Be the Slowest Gazelle in the Pack

- Be innovative
 - Plaintiffs' counsel are constantly evolving, both in their claims and their tactics; companies need to evolve, too, including by pushing the boundaries of what is allowed

Key Takeaways

- Wiretap exposure is real, escalating, and applies to every company with tracking technologies on its website or in its apps
- CCPA compliance does not equal CIPA compliance
- A broken cookie banner creates more problems than it solves
- CDAFA is the rising threat, expect it in every new complaint
- Be intentional about tracking, move to server-side where possible, fortify your Terms of Use, and stay ahead of the curve

Questions?

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