Unpacking The Complicated Question Of CIPA's Applicability

By **Matthew Pearson** (March 29, 2024)

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The California Invasion of Privacy Act is quickly becoming the new frontier in California privacy litigation.

Whether under CIPA's wiretap statute or the as-of-yet untested pen-trap theory, more than 200 CIPA lawsuits have been filed in California in the last six months alone.

As the number of these cases increases, so, too, does their reach. More and more frequently, companies with little-to-no California presence are being hauled into California court to defend themselves under a California penal statute, which begs the question: Must every company operating a website accessible by California residents comply with CIPA?

The simple answer to this question is no, but determining when CIPA applies and to whom is far more complicated.

Does CIPA apply outside of California?

In 2011, in Sullivan v. Oracle Corp., the Supreme Court of California stated that California has a presumption against "the extraterritorial application [of] state law,"[1][2] that can only be rebutted if the statute's language "clearly express[s]" that it applies outside of California's borders or the statute's "purpose, subject matter or history" allows its extraterritorial application "to be inferred."[3]

Nothing in CIPA's language suggests that the Legislature intended it to apply extraterritorially. Therefore, CIPA should only apply to conduct occurring within California's borders.

That, however, does not end the inquiry because determining where the conduct that allegedly violated CIPA occurred is often claim- and fact-dependent.

For example, as recently as November 2023 in Luis v. Zang, the U.S. District Court for the Northern District of California noted in a CIPA wiretapping claim that "there is a strong argument that" the alleged wiretapping occurred when a third party hired by the defendant "intercepted the website users' communications," which, according to the court, took place at the plaintiff's browser.

The same has been held in federal Wiretap Act cases.[4] Put another way, at least with regard to wiretapping claims, the place of the wrong is likely plaintiff-specific.

CIPA pen-trap claims are inherently different from CIPA wiretapping claims, though. Unlike wiretapping claims, where the unlawful conduct is the "interception" of communications, the unlawful conduct in pen-trap cases is the installation and use of a pen-trap device.

Under facts like those in Greenley v. Kochava Inc., in the U.S. District Court for the Southern District of California, the place of installation and use is relatively clear.[5] There, the alleged pen register, which was surreptitiously embedded in an app, was installed and used when and where the app was downloaded — i.e., on the user's phone.[6]

The facts in pen-trap cases are rarely this straightforward. Some plaintiffs allege that the defendant installed on its own website a web beacon that allowed the defendant to capture electronic impulses from the website user's browser. Others claim that the defendant installed on the website user's browser trackers that captured information emanating from the user.

Which theory the plaintiff adopts may have an impact on whether CIPA applies to a non-California defendant. For example, where the plaintiff asserts that the company has installed a web beacon on its own website, the location of the alleged wrongful conduct would be company-specific, not user-specific.

In contrast, where the plaintiff alleges that the company installed a tracker on his or her own browser, the location of the violative conduct may, in fact, be user-specific — i.e., where the user was when the tracker was installed on his or her browser.

In either situation, however, it is imperative that an out-of-state defendant conduct this analysis because, of course, there can be no liability under CIPA if CIPA does not apply to the conduct alleged.

Can a non-California defendant be sued in California under CIPA?

Even assuming that the alleged unlawful activity under CIPA occurred in California, that does not mean that the company that engaged in that activity can be sued in California. The company must still be subject to personal jurisdiction in California.

In California, courts can generally exercise jurisdiction over a non-California defendant so long as the "defendant has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional conceptions of fair play and substantial justice,"[7] as noted by the U.S. District Court for the Central District of California in Doe v. Unocal Corp. in 1998. Jurisdiction under the minimum contacts analysis can be either general or specific.[8]

As stated by the Supreme Court in 2014 in Daimler AG v. Bauman, general jurisdiction arises when the nonresident defendant's "activities in the forum are substantial, continuous and systematic,"[9] like (1) the "paradigm all-purpose forums" — i.e., "a corporation's place of incorporation and principal place of business"[10] and (2) the "exceptional case" where the "corporation's operations in a forum other than its formal place of incorporation or principal place of business [are] so substantial and of such a nature as to render the corporation at home in that State."[11]

In contrast, as stated in Doe, specific jurisdiction is present when the cause of action "arises out of or has a substantial connection with" the nonresident defendant's in-state activities.[12][13]

In California, specific jurisdiction has three requirements, all of which must be met.[14]

The first element, which, for the purposes of CIPA claims, asks whether the company purposefully directed its activities toward California,[15] has been and likely will remain the main focus of the court's personal jurisdiction analysis.

What Is purposeful direction?

In 1984's Calder v. Jones, the U.S. Supreme Court set forth a three-part test — the Calder effects test — to determine whether a nonresident defendant has directed its actions at the forum state.[16]

As it relates to CIPA claims, the second factor is likely to be the most contested: Did the nonresident defendant, in deciding to implement trackers and cookies on its own website, "expressly aim" those trackers and cookies at California?[17]

According to the U.S. Court of Appeals for the Ninth Circuit in Briskin v. Shopify Inc. in 2023, "allow[ing] personal jurisdiction anywhere that a web platform can be accessed" would raise serious due process concerns.[18] As a result, the Ninth Circuit has drawn a line between merely operating a website and "operating a website in conjunction with 'something more.'"[19][20]

What constitutes that "something more" is generally a fact-intensive question that must be decided on a case-by-case basis. Nevertheless, a review of the Ninth Circuit cases analyzing this very question provides some relevant factors to consider.[21]

Is the subject matter of the website specifically tailored to Californians?

For example, the Ninth Circuit has found that a company's posting on its website of copyrighted photographs of celebrities was, in part, intended to further the company's "exploitation of the California market for its own commercial gain," and, therefore, supported a finding of personal jurisdiction.[22]

In contrast, as stated in AMA Multimedia LLC v. Wanat by the Ninth Circuit in 2020, where the subject-matter of the website "lacks a forum-specific focus" because "the market for [the] content is global, evidenced by" a significant number of website viewers from outside California, the Ninth Circuit has found that personal jurisdiction is lacking.[23]

Does the company engage in activities to drive California residents to its website?

In trying to answer this question, the Ninth Circuit has considered a myriad of factors, including whether, in setting up the website, the company took affirmative steps to cater to California residents.

Specifically, as stated in Will Co. v. Lee in 2022 in the Ninth Circuit, where the company actively tried to "reduce[] the time it takes for the site to load in [California]," i.e., hosting the website and purchasing content delivery network services near California, the company sought to increase the likelihood that certain users — here, Californians — would visit the site and, in turn, subject itself to personal jurisdiction in California.[24]

Does the company specifically profit from California website viewers as opposed to viewers generally?

This factor largely depends on how the company makes money from advertisements on its website. Where the company makes money based on the number of Californians who view the California-specific advertisements on its website, the Ninth Circuit has held that the company was subject to personal jurisdiction.[25]

But, where the company makes money on the number of visitors to its website regardless of where the visitor resides, the Ninth Circuit has found personal jurisdiction lacking.[26]

What percentage of the website's users are associated with a California address?

Of course, there is no getting around the fact if the viewership of a company's website is largely driven by Californians — i.e., in excess of California's percentage of the U.S. population — the company is more likely to be subject to personal jurisdiction in California.

Are the website's terms and conditions and/or privacy policies aimed at Californians or users as a whole?

This factor has yet to be fully fleshed out in California. It has, however, played a significant role in the Ninth Circuit deciding that a company was subject to personal jurisdiction in the U.S.[27]

Given California's privacy policy requirements under the California Consumer Privacy Act, this factor is likely to have little, if any, weight under the court's analysis today. Any other result would lead to subjecting nearly every company doing business online to personal jurisdiction in California.

Again, deciding whether CIPA applies and, if so, whether the company can be subject to personal jurisdiction in California for alleged CIPA violations is a fact- and claim-dependent analysis. But it is an analysis every non-California company must undergo before even considering any merit-based defenses to CIPA claims.

California statutes are certainly broad, but they are also not limitless. Testing those limits may be first step toward ebbing the tide of CIPA class actions in California.

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[1] O'Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989, 1004 (N.D. Cal. 2014).

[2] A law is said to apply extraterritorially where it is "operative with respect to occurrences outside the state." N. Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 4 (1916).

[3] Sullivan v. Oracle Corp., 51 Cal. 4th 1191, 1207 (2011) (internal quotations omitted).

[4] See Luis v. Zang, 833 F.3d 619, 633 (6th Cir. 2016) ("The alleged intercept of a communication thus occurs at the point where [the defendant] – without any active input from the user – captures the communication and reroutes it.").

[5] Greenley v. Kochava Inc., No. 22-CV-01327-BAS-AHG, 2023 WL 4833466, at *1 (S.D. Cal. July 27, 2023).

[6] Id.

[7] Doe, 27 F. Supp. 2d at 1184.

[8] Id.

[9] Id. at 1184.

[10] Daimler AG v. Bauman, 571 U.S. 117, 118 (2014).

[11] Id. at 139 n.19.

[12] Id.

[13] For purposes of this article, we focus on specific jurisdiction, given that companies subject to general jurisdiction likely have little reason to question being hauled into California court.

[14] "If any of the three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law." Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995).

[15] Id.

[16] Calder v. Jones, 465 U.S. 783 (1984).

[17] Many reading this may wonder why the "intentional act" prong is not likely to be contested. The reason lies in how the term has been interpreted. "Intentional act," as used in this context, "refer[s] to an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act." Schwarzenegger, 374 F.3d at 806. In the context of CIPA cases, the intentional act would be the installation and use of cookies/trackers. Thus, unless the trackers and cookies at issue were installed/utilized without the website owner's knowledge and/or consent, their installation and use likely satisfies the "intentional act" prong.

[18] Id. at 417.

[19] Id.

[20] The Ninth Circuit has also drawn a distinction between "passive" and "interactive" websites, but the former have largely become a thing of the past. Id.

[21] The cases considered for this analysis include, among others: Mavrix Photo Inc. v. Brand Techs. Inc., 647 F.3d 1218 (9th Cir. 2011); AMA Multimedia LLC v. Wanat, 970 F.3d 1201 (9th Cir. 2020); Will Co. v. Lee, 47 F.4th 917, 926 (9th Cir. 2022); Briskin v. Shopify Inc., 87 F.4th 404 (9th Cir. 2023).

[22] Mavrix Photo Inc., 647 F.3d at 1229-1230.

[23] AMA Multimedia LLC, 970 F.3d at 1210.

[24] Will Co., 47 F.4th at 925.

[25] Mavrix Photo Inc., 647 F.3d at 1230.

[26] AMA Multimedia LLC, 970 F.3d at 1211.

[27] Will Co., 47 F.4th at 925.