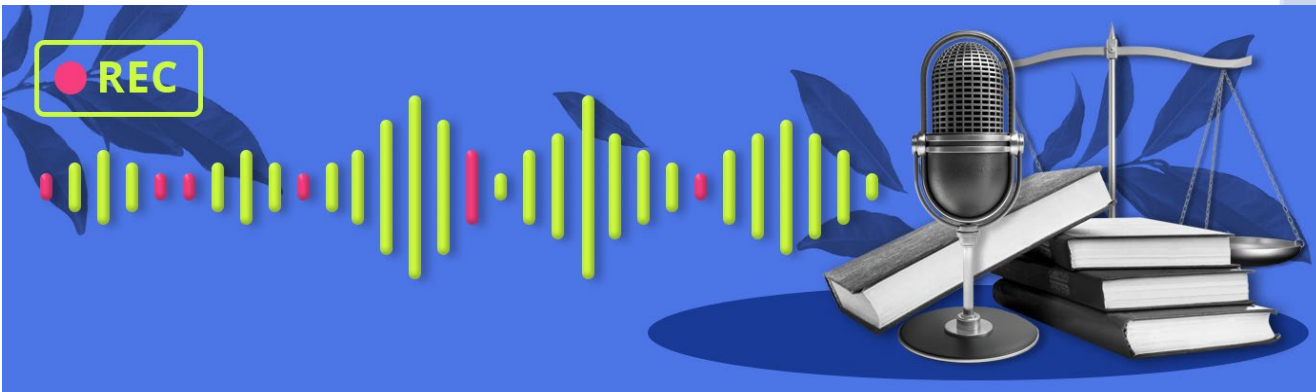


Who's Recording Me Now? California Invasion of Privacy Act

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AGENDA

- California Invasion of Privacy Act (CIPA)
- Consent
- Scope of CIPA
- Reasonable Expectation of Confidentiality
- Class Action Treatment of CIPA Claims
- Key Takeaways

INVASION OF PRIVACY IN CALIFORNIA

privacy





California Invasion of Privacy Act

- In 1967, Penal Code § 632 prohibited eavesdropping or recording a confidential communication, including confidential telephone communications, without consent of all parties.
- In 1992, Penal Code § 632.5 and 632.6 were enacted, prohibiting the malicious interception and eavesdropping on calls involving at least one cell phone, without consent of all parties.
- In 1993, Penal Code section 632.7 was enacted, prohibiting the interception or receipt of communications, and recording of communications between at least one cell phone or cordless phone, without consent of all parties.
- NOTABLY, Penal Code sections 632.5, 632.6 and 632.7 do not contain the confidentiality element.



California Invasion of Privacy Act

- In 1967, when enacted, the California Legislature intended to protect Californian's privacy:
- "In enacting [CIPA], the Legislature declared in broad terms its intent "to protect the right of privacy of the people of this state" from what it perceived as "a serious threat to the free exercise of personal liberties [that] cannot be tolerated in a free and civilized society." (Pen. Code, § 630.)
- In 1992, Penal Code § 632.5 and 632.6 were enacted, prohibiting the malicious interception and eavesdropping on calls involving at least one cell phone, without consent of all parties.
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Applied Broadly

- Applies to live monitoring of calls. *Ribas v. Clark*, 38 Cal. 3d 355 (1985).
- Applies even if one party is not in California. *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 128 (2006).



CONSENT





- Consent is required even if only one party is recorded.
Gruber v. Yelp Inc., 55 Cal. App. 5th 591, 607 (2020)
- One-sided recordings reveal firsthand and in real time the recipient's understanding of or reaction to the non-recorded party's words. (*Id.* at 609.)
- Consent through privacy policy on website when communicating through website.
Javier v. Assurance Iq, 2021 U.S. Dist. LEXIS 158236, *3 (N.D. Cal. Aug. 6, 2021), *rev'd*, 2022 U.S. App. LEXIS 14951 (9th Cir. May 31, 2022) (consent was acquired after communication)

- California is a “two-party consent” state.
- Consent can be obtained by noting at the “outset of the conversation” that the call is being recorded.

Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 118 (2006)

- Consent midway through the call does not provide consent for the beginning of the call.

Keck v. Bank of America, case no. 08-cv-01219-CRB, 2008 U.S. Dist. LEXIS 107477, at *1 (N.D. Cal. Apr. 15, 2008)

- What about if the call is disconnected and then a party calls back???

Maghen v. Quicken Loans Inc., 94 F. Supp. 3d 1141, 1146 (C.D. Cal. 2015)

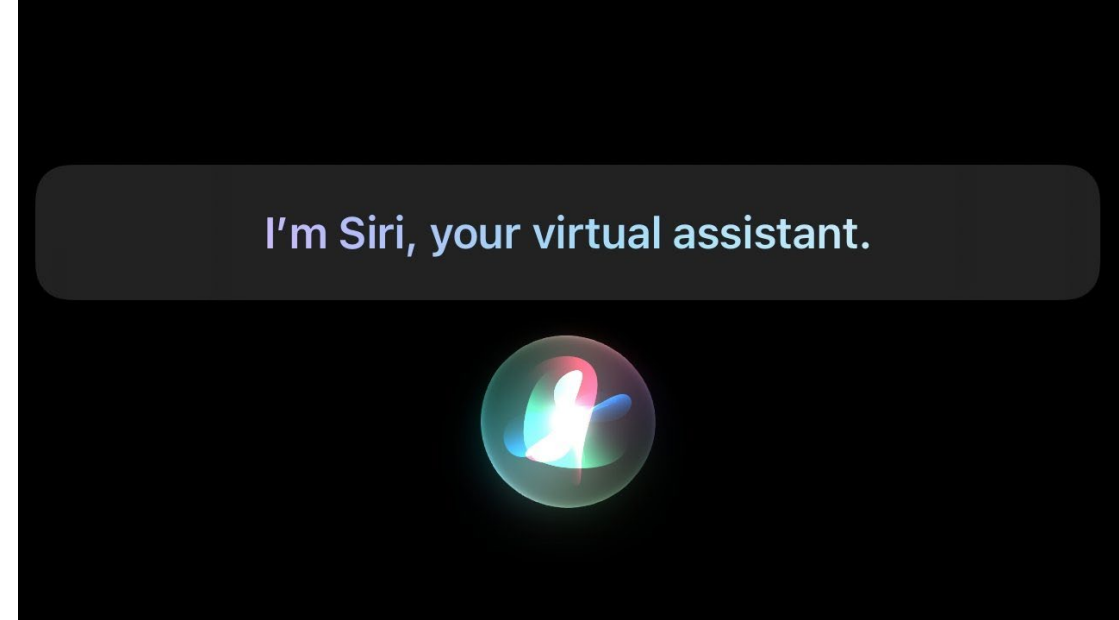


CONSENT

Scope of CIPA



Recording Statements to Siri



Lopez v. Apple, Inc., 519 F. Supp. 3d 672, 689 (N.D. Cal. 2021)

Siri records some of what is said and transmits it to consultants who evaluate Siri's response and work to make Siri's responses better. The Court held that Section 631 did not apply to oral communications, which prohibits wire tapping and interception of communications over a wire. Because there was no evidence whether Siri recorded statements made in private, as opposed to public situations, Section 632 did not apply.



Unclear Whether VOIP Calls Are Within Scope of CIPA

- *Kahn v. Outrigger Enterprises, Inc.*, case no. 2:13-cv-03802-SVW-JCx, 2013 U.S. Dist. Lexis 201817, *18 (C.D. Cal., Oct. 29, 2013)
- *Montantes v. Inventure Foods*, case no. CV-14-1128-MWF (RZx), 2014 U.S. Dist. Lexis 95266, *19 (C.D. Cal., July 2, 2014)
- *Roberts v. Wyndham Int'l, Inc.*, case nos. 12-CV-5180-PSG, 12-CV-5083-PSG, 2012 U.S. Dist. Lexis 170719, pp. *13–*14 (N.D. Cal. Nov. 30, 2012)
- *Gruber v. Yelp Inc.*, 55 Cal. App. 5th 591, 612-13 (2020)

Section 632.7 – Interception of a Call?



- LoanMe called plaintiff’s wife regarding her loan payments, but reached her husband.
- LoanMe sought to reach wife, but reached husband. Through a “right party confirmation,” LoanMe learned that it had not reached the wife. The call ended in 18 seconds, but there were repeating beeps which began 3 seconds into the call, indicating the call was recorded. The caller never advised the husband that the call was being recorded.
- The trial court believed that the beeps were sufficient to deem continuation of the call as consent and granted judgment in favor of LoanMe.

Smith v. LoanMe, 11 Cal. 5th 183 (2021)

Section 632.7 – Interception of a Call?

- Defendant had argued that an employer could not intercept a call between its employee and another party.
- The California Supreme Court focused its analysis on the language of the statute: the prohibition addresses intercepted calls and received calls. Not limited to when a third party “intercepts” a call between two people. Scope also covers when one of the parties records the other.
- The Court focused on the privacy interest protected by this statutory scheme – if you receive a call, you have consented to the communication with the other party to the call, but not a recording of the call.
- Notably, the Court did not address the beeping/consent issue – remanding the case back to the Appellate Court to address that.



Smith v. LoanMe, 11 Cal. 5th 183 (2021)

What About
Reasonable
Expectation of
Confidentiality?





Reasonable expectation that call is confidential?:

- Messages (probably not)
- Training calls??
- Calls with the pizza place around the corner?
- Calls with vendors?
- Calls with your attorney?
- Calls when one party is in a restaurant?

Safari Club Int'l v. Rudolph, 862 F.3d 1113, 1116 (9th Cir. 2017)

Reasonable expectation that call is confidential?:

- Conversations involving more than 2 people?

Lieberman v. KCOP Television, Inc., 110 Cal. App. 4th 156, 161-62 (2003)

- Internet chat room?

- “Shoppers”?

Vera v. O'Keefe, 2012 U.S. Dist. LEXIS 112406 (S.D. Cal. Aug. 9, 2012)

- Employees when told they can make personal calls?

Rojas v. HSBC Card Services Inc., 20 Cal. App. 5th 427 (2018)



Are CIPA Claims Suitable for Class Action Treatment



CLASS ACTION

Class Actions?

Individual proof whether there was consent

- *In re Google, Inc. Gmail Litig.*, 2014 U.S. Dist. LEXIS 36957, at *17-18 (N.D. Cal. Mar. 18, 2014) (finding that individual inquiries into consent would be necessary where Google pointed out that putative class members could have learned of Google's email scanning from various Google and third-party service provider disclosures as well as widespread media coverage of Google's scanning practices)
- *Torres v. Nutrisystem, Inc.*, 289 F.R.D. 587, 595 (C.D. Cal. 2013) (many putative class members had likely heard a disclosure of recording on a prior call before bypassing the disclosure on a subsequent call)
- *Mendell v. Am. Med. Response, Inc.*, 2021 U.S. Dist. LEXIS 54854, *24 (S.D. Cal. Mar. 22, 2021) (not everyone followed the call script, creating individualized inquiries)

Class Actions?

- Individual proof that conversation was confidential for Section 632
 - *Kight v. CashCall, Inc.*, 231 Cal. App. 4th 112 (2014).
- Individual proof that conversation was on a cell phone
 - *Hataishi v. First American Home Buyers Protection Corp.*, 223 Cal. App. 4th 1454 (2014)



- Callers should remember: (1) disclosure must be given at the outset of each call; (2) disclosure must be given to each person on the call; and (3) consent must be obtained from each person.
- Think about the advisement as a part of your introduction – which you share with each new person you speak with on the phone:

Hi. My name is Jane Doe, and you are on a recorded line.



JUST DO IT.



KEY TAKEAWAYS

How else can consent be obtained?

- Beeps?
- Contracts/Applications?

Maghen v. Quicken Loans Inc., 94 F. Supp. 3d 1141, 1146 (C.D. Cal. 2015) *aff'd*, (9th Cir. Cal. 2017), 680 Fed. Appx. 554.

- Letters
- Websites? Privacy Policies?



JUST DO IT.



KEY TAKEAWAYS

Q & A

You Have
Questions
We Have
Answers

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