Pixels and (Session) Reply and Chat Bots, Oh My!
Recent Federal Rulings + the New Wave of Data Privacy Litigation
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Goals
- Understand the overlap with traditional tort theories of liability.
- Explain the technology.
- Discuss the law (legal theories/defenses; strategic considerations; chronology).
- Provide risk mitigation techniques.

Traditional Negligence to Data Breach

Successful use of contractual risk allocation provisions to defend against first and third-party lawsuits.
- Waiver of subrogation
- Limitation of liability
- Limitation on time to sue

Overlapping common law negligence with data breach/data privacy as a way to avoid application of contractual provisions.
- *Nat'l Union Fire Ins. Co. of Pittsburgh v. ADT*

As alarm service companies pivot to smart home technologies – additional risk considerations arise.
- Role of IT Security and CIO expand further into customer-facing technologies and applications.
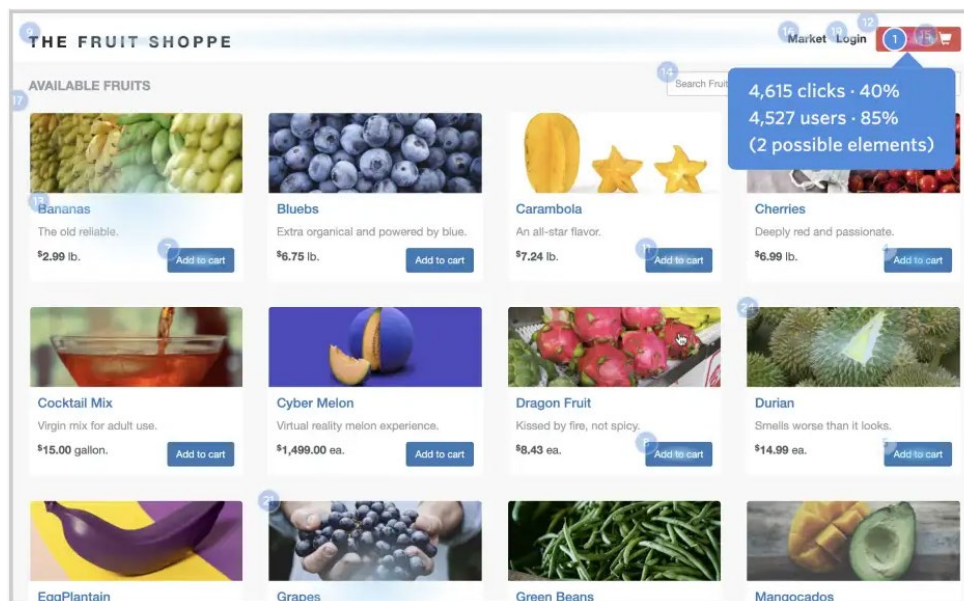
Session Replay

How Does It Work?

- User **loads website**.
- Her **browser sends a "GET request"** to the website's server.
- The **server sends HTML code to the user's browser**. The browser interprets the code to allow the website to appear on the user's screen.
- The **code tells the browser to send *another* GET request** to the server of a session replay provider.
- The **SR provider sends its own JavaScript code** to the browser. When the browser loads the code:
  - Cookies are placed on the user's browser to create a visitor ID; and
  - The user's browser starts sending info to the SR provider about the user's visit.
- **Reproduces** a user's interactions on a website or app using **logged user events** such as:
  - Mouse movements

- Clicks
- Page visits
- Scrolling
- Tapping
- It is a reconstruction, **not an actual recording**.

Heatmaps

Clickmaps

Why Use It?
- Improve **user experience** on website.
- Identify and address **technical issues**.
- Identify ways to improve **conversion**.

<u>Session Replay – Litigation Waves</u>

Florida
(First Wave – Early 2021)
- Over 50 class actions filed in state courts.
  - Many removed to federal court.
- *Cardoso v. Whirlpool*
  - No "interception" of **"contents"** of electronic communication.
  - Interception was **not "contemporaneous."**
  - **No expectation of privacy.**
- Other cases
  - ***Connor v. Whirlpool***; ***Jacome v. Spirit Airlines, Inc.***; *Goldstein v. Luxottica*; ***Goldstein v. Costco***; *Swiggun v. EAN Servs.*
- **Tried to amend to focus on "chat bots"** as the technology. Courts still dismissed.
  - See, e.g., Whirlpool decisions.
- Wave of **voluntary dismissals** with prejudice.

Second Wave
(Fall 2022)
- Based primarily on chat bot technology but also on session replay.
- New class actions lawsuits against *Bass Pro Shops, Cabela's, Lowes,* and others.
- Primarily motivated by recent 9th and 3rd Circuit decisions.
- Filed by different plaintiffs' firms.
- Jan 2023
  - Florida *Bass Pro* cases voluntarily dismissed.

California
(Initially)
- *Javier v. Assurance IQ, LLC* (ND Cal):
  - Plaintiff **consented** to having information collected by affirmatively agreeing to website's privacy policy.
- *Graham v. Noom and Fullstory, Inc.* (ND Cal):
  - **No eavesdropping.**
  - Since no eavesdropping nothing to aid and abet.
  - IP address, location, browser type and operating system is **not "contents of communications."**
  - Privacy Policy not separate grounds to dismiss.

- *Johnson v. Blue Nile and Fullstory, Inc.* (ND Cal):
    - Same as *Graham*.

Then
- *Javier v. Assurance IQ, LLC* (9th Cir., May 31, 2022):
    - Reversed SJ. Authorization after recording has begun is **not retroactive.**
    - Implication
        - You need a banner/pop-up.
    - Questions left unanswered
        - Whether P **impliedly consented** to the data collection.
        - **Whether the SR provider is a third party** under CIPA.
        - Whether the **statute of limitations** has run.

PA Jumps In
- Popa v. Harriet Carter Gifts (3d Cir. Aug. 2022)
    - Reversed SJ and **allowed a session replay lawsuit to proceed**.
    - You **can intercept your own communication**.
    - The **interception occurs at the location where the user accessed the website**.
    - Door is open to argument that the privacy policy would have resulted in the requisite consent.

Since *Popa*
- *Smidga v. Meta Platforms, Inc.*, W.D. Pa. No. 22-cv-01231 | 08.25.22
- *Hasson v. Fullstory, Inc.*, W.D.Pa. No. 22-cv-01246 | 08.30.22
- *Huber v. Zillow Group, Inc.*, E.D. Pa. No. 22-cv-03572 | 09.07.22
- *Huber v. Lowe's Companies, Inc.*, E.D. Pa. No. 22-cv-03571 | 09.07.22
- *Huber v. Expedia Group, Inc.*, E.D. Pa. No. 22-cv-03570 | 09.07.22
- *Cook v. GameStop, Inc.*, W.D. Pa. No. 22-cv-01292 | 09.08.22
- *Popa v. Zillow Group, Inc.*, W.D. Pa. No. 22-cv-01287 | 09.08.22
- *Farst v. Chewy, Inc.*, M.D. Pa. No. 22-cv-01434 | 09.14.22
- *Farst v. Michaels Stores, Inc.*, M.D. Pa. No. 22-cv-01433 | 09.14.22
- *Farst v. Autozone, Inc.*, M.D. Pa. No. 22-cv-01435 | 09.14.22

Marketing Tags - "Pixels"

What Are They?
- Code that companies insert into their sites that help target advertising on third-party platforms.
    - Facebook, Twitter, Google
- FB - c_user cookie and disclosures
    - When user visits sites containing Meta Pixel, data on the user is shared with third party (e.g., Meta) about the page they visited.
    - Info shared may include FB ID, IP address, URLs

- Can include more if Advanced Automated Matching (AAM) is turned on, which impacts users not logged in to FB.
- All information is provided to FB *by the user.*
- Google – far more anonymized.
  - No equivalent to FB ID shared.

Why Use Them?
Find new customers
- E.g., to tell Meta to show ads to similar customers.

Retarget visitors
- E.g., to show ads for the site when the user is accessing his/her Facebook/IG account.

Exclude certain individuals from advertising campaigns
- E.g., those that have already subscribed.

Pixel Litigation Overview

Overview of the Lawsuits
- Over 140 "pixel" class actions against healthcare providers.
- Another dozen "pixel" class actions against non-healthcare entities.
- Over 150 pixel class actions against companies using videos on their sites.
- Dozens of session replay cases.

Marketing Tag Litigation Waves
- Lawsuits against:
  - Meta;
  - Healthcare providers;
  - Video streaming services; and
  - Healthcare-related entities.
- Counts include
  - **Invasion of privacy,**
  - **Violation of medical information confidentiality**,
  - Violation of **state consumer protection statutes**,
  - Unjust enrichment,
  - Negligence,
  - Breach of contract,
  - Computer Data Access and Fraud Act, and
  - **Wiretapping statutes**.
- Some lawsuits arise from allegations the pixels share subscription status and are using a **VPPA** claim.
  - Prohibits **video tape service providers** from sharing of **identifiable info** about an individual's video viewing habits.
  - It has a PRA of potentials $2,500 per individual.

Sample of Key Decisions
- Plaintiff-friendly

- Motions to dismiss denied in *Boston Globe, WebMD,* and *Epoch Times*.
  - Defense-friendly
    - *Kurowski v. Rush Systems* (N.D. Ill.)
    - *Martin v. Meredith Corp.* (S.D. N.Y.)
    - *Doe v. Medstar* (Baltimore City Cir. Ct.)
    - *Katz v. Oracle* (N.D. Cal)
  - MDL against Meta

Theories of Liability

Statutory
- Wiretap laws
  - State and fed
- Video Privacy Protection Act (VPPA)
- Consumer protection laws
- Confidentiality laws
  - E.g., CMIA, CCRA, firearm laws

Common Law
- Negligence
- Breach of fiduciary duty
- Breach of implied/express contract
- Invasion of privacy
- Unjust enrichment

Two-Party Consent Wiretapping Laws
- FL, CA, PA, MA
  - Florida Security of Communications Act (FSCA)
  - California Invasion of Privacy Act (CIPA)
  - Pennsylvania Wiretapping and Electronic Surveillance Act (WESCA)
- Generally, prohibit the surreptitious interception of contents of communication, where there is an expectation of privacy.
- Statutory damages can range from $1k to $5k "per violation" (per visit).

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