

**Court of Appeal, Second Appellate District, Division 3**  
**TENTATIVE RULING**

**B350578 *Variety Media, LLC v. Superior Court***

We have received a request for oral argument. Our tentative decision is to grant the petition in part, direct the trial court to vacate its order overruling Variety's demurrer, and direct the trial court to enter a new order sustaining the demurrer with leave to amend.

Plaintiff and real party in interest alleges that when a user visits Variety's website, Variety causes third-party software he calls "Trackers" to be installed on the visitor's browser, and that these Trackers transmit the visitor's IP address and other device information to third-party data brokers, who use the data to identify visitors and compile profiles for sale to advertisers. Plaintiff alleges this conduct violates the pen register provisions of the California Invasion of Privacy Act (CIPA), which prohibit installing or using a "pen register" without a court order or the user's consent. (Pen. Code, § 638.51, subd. (a).)<sup>1</sup> Variety demurred, principally arguing CIPA's pen register provisions apply only to telephonic surveillance devices and do not reach internet-based tracking technology. The trial court overruled the demurrer, and Variety petitioned this court for a writ of mandate.

We tentatively reject Variety's principal argument and conclude CIPA's definition of "pen register" is coextensive with the federal definition on which the Legislature modeled it, reaching a device or process that records or decodes metadata associated with either telephonic or online communications. The Legislature added the pen register provisions to CIPA in 2015 for the express purpose of creating a state-law mechanism that would allow California law enforcement to comply with federal law—which already extended to internet communications—while affording the heightened probable-cause protection our state Constitution requires. (See *People v. Blair* (1979) 25 Cal.3d 640.) We tentatively conclude that reading the definition to exclude internet communications would defeat this purpose, leaving California law enforcement exposed to federal liability for conduct the Legislature meant to authorize under a more protective state privacy standard.

We also tentatively reject Variety's related argument that extending CIPA's pen register provisions to internet communications would create an irreconcilable conflict with the California Consumer Privacy Act (CCPA). Even if there is overlap

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<sup>1</sup> Statutory references are to the Penal Code.

between the personal information that the CCPA protects and the metadata that a pen register records, we tentatively conclude there is no irreconcilable conflict that warrants narrowing CIPA's technology-neutral definition to telephone-only communications. The CCPA makes informing the consumer necessary, but not sufficient, for lawful collection. CIPA's consent requirement does not displace that condition; rather, it incorporates and exceeds it.

We also tentatively reject Variety's argument that the rule of lenity requires a telephone-specific construction. We tentatively conclude the statutory text is not so ambiguous as to require guess work as to the statute's meaning, and decades of consistent federal authority interpreting the identical federal definition to reach internet communications gave fair notice of this construction.

We tentatively agree, however, with the narrower argument Variety raised in its reply brief—that even if CIPA's pen register provisions reach internet communications generally, the Trackers as alleged in the operative complaint do not qualify, because they collect information identifying the sender of a communication (a visitor's IP address) rather than the destination to which the communication is directed. Consistent with the historical understanding of how a pen register operates and the parallel trap and trace definition's focus on source-identifying information, we tentatively conclude section 638.50, subdivision (b) reaches only a device or process that records or decodes metadata likely to identify the destination of an outgoing communication.

Applying this construction, we tentatively conclude the operative complaint fails to state a claim. Plaintiff's theory, as alleged in both iterations of his complaint, has always been that his IP address satisfies the pen register definition's metadata component. We tentatively conclude it does not, because the user's IP address identifies the source of the communication—not its destination. We also tentatively conclude plaintiff's reliance on screenshots purportedly showing the Trackers recorded "domain," "Origin," and "Referer" fields identifying variety.com do not resolve this deficiency, because it remains unclear from the pleading whether the Trackers were positioned to record destination-identifying metadata about an outgoing communication as it occurred, or whether this data reflects only a separate communication the Trackers generated about a past communication after the fact, as Variety suggests.

We tentatively conclude, however, that dismissal with prejudice is not warranted. Because Variety raised its destination-identifying-metadata argument for the first time in its reply brief, plaintiff has not had an opportunity to plead

his case under the construction of section 638.50, subdivision (b) that we tentatively adopt, nor to plead, for example, how the “domain,” “Origin,” and “Referer” fields may satisfy this construction or how the Trackers’ operate to capture outgoing metadata about the destination of a communication. We tentatively conclude plaintiff is entitled to attempt to amend his complaint on remand.

The court will not entertain further briefing or grant a continuance based on the issuance of this tentative ruling.