

Trends in Mobile, Internet, Cloud and Digital Law and Litigation Strategy 2015

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Available Channels

The following channels are accessible with an Aereo remote antenna in

New York, NY

Major Networks

CBS WCBS (2.1)	NBC WNBC (4.1)	FOX WNYW (5.1)	ABC WABC (7.1)	The CW WPIX (11.1)	PBS WNET (13.1)
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Syndicated Programs & Movies

ION WPXN (31.1)	MyNetworkTV WWOR (9.2)	This TV WPIX-DT3 (11.3)	Antenna TV WPIX-DT2 (11.2)	Bounce TV WWOR-DT3 (9.3)	Cozi TV WNBC-DT2 (4.2)
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Lifestyle & Local Interest

ION Life WPXN-DT3 (31.3)	The Live Well Network WABC-DT2 (7.2)	NYC Life WNYE (25.1)	NYC Gov WNYE-DT2 (25.2)
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Children's Programming

Home Shopping

Retransmission of Television Broadcasts

- American Broadcasting Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014)
- Aereo *transmitted* and therefore *publicly performed* television transmissions by supplying the equipment that allowed individual users to access free, over-the-air television signals and watch them over the Internet on its subscription service
- Rejected Aereo's argument that it merely leased access to television antennas that picked up television signals because one of Congress' primary purposes in amending the Copyright Act in 1976 was to cover by the transmit clause services like the community antenna television (CATV) systems at issue in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1975) and overturn the Court's holdings in those cases.
- The Court explained that "an entity that acts like a CATV system itself performs, even if when doing so, it simply enhances viewers' ability to receive broadcast television signals."
- In contrast to a CATV system, Aereo did not transmit television signals continuously; it remained inert until a subscriber affirmatively sought to watch a program (which the dissent argued evidenced that subscribers, not Aereo, were responsible for any performances). The majority in *Aereo*, however, held that "this sole technological difference . . . [did] not make a critical difference"
- The performances were *public*, even though individual subscribers used antennas dedicated only to themselves to make personal copies that could not be shared with other users because "an entity may transmit a performance through one or several transmissions, where the performance is of the same work."
 - "when an entity communicates the same contemporaneously perceptible images and sounds to multiple people [who are "unrelated and unknown to each other"], it transmits a performance to them regardless of the number of discrete communications it makes."
- The Court likewise rejected as irrelevant the point that Aereo's subscribers could receive the same programs at different times and locations, noting that "'the public' need not be situated together, spatially or temporally."
- Caveat: "In other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act. But the many similarities between Aereo and cable companies, considered in light of Congress' basic purposes in amending the Copyright Act, convince us that this difference is not critical here."
- Dissent: Guilt by resemblance
 - A test based on evaluating how close a system appears to be to a traditional CATV service leaves more ambiguity in its potential application than a bright-line test for determining whether the technology provider or user could be held directly liable for copyright infringement.

Retransmission of Television Broadcasts

- American Broadcasting Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014)
- Dissent: Guilt by resemblance
 - A test based on evaluating how close a system appears to be to a traditional CATV service leaves more ambiguity in its potential application than a bright-line test for determining whether the technology provider or user could be held directly liable for copyright infringement.
- Implications
 - Businesses based on Internet transmissions of over-the-air services must be licensed
 - Compulsory license *not* available to Aereo
 - Continuing validity of *Cartoon Network's* analysis of the public performance right?
 - Not explicitly overruled
 - Distinguishable because the content in that case was licensed?
 - The majority conceded that “[i]n other cases involving different kinds of service or technology providers, a user’s involvement in the operation of the provider’s equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act.” Not critical in *Aereo* because of “the many similarities between Aereo and cable companies, considered in light of Congress’ basic purposes in amending the Copyright Act . . .”
 - *Aereo* only addressed the public performance right – what about reproduction?
 - *Cartoon Network*
 - The majority agreed with the Solicitor General that that questions involving cloud computing and remote storage DVRs were not before the Court in *Aereo*
 - Does this decision change the standard for imposing direct liability on intermediaries?
 - No
 - The dissenter’s argument
 - The issue presented on cert. was narrowly focused on what constitutes a public performance, not the standard for imposing direct liability

SECURITY BREACH LAW AND LITIGATION

U.S. x Facebook x Hackers use a x Florida Cop Lo x Inbox (1,503) - x http://www.us x OfficeMax Sen x Westlaw Sign x

www.slate.com/blogs/business_insider/2014/01/17/hackers_use_a_refrigerator_to_attack_businesses.html

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For the First Time, Hackers Have Used a Refrigerator to Attack Businesses

By Julie Bort

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Slate

Should AI Makers Be Legally Responsible for Emotionally Manipulating Customers?

Why Did Google Buy a Thermostat Company? Hint: It's Not About the Thermostat.

FROM TIME

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SECURITY BREACH
PUTATIVE CLASS
ACTION LITIGATION

Security Breach Litigation

■ Standing – In General

- Clapper v. Amnesty International USA, 133 S. Ct. 1138 (2103)
- Edwards v. First American Corp., 610 F.3d 514 (9th Cir. 2010), cert. dismissed, 132 S. Ct. 2536 (2012)
- Robins v. Spokeo, Inc., 742 F.3d 409, 412-14 (9th Cir. 2014)

■ Putative Data Security Class Actions – risk of harm, cost to mitigate, loss of value

- Lambert v. Hartman, 517 F.3d 433 (6th Cir. 2008) (finding standing where plaintiff's information was posted on a municipal website and then taken by an identity thief, causing actual financial loss fairly traceable to d's conduct)
- Resnick v. AvMed, Inc., 693 F.3d 1317 (11th Cir. 2012) (standing where plaintiffs had both been identity theft victims))
- Pisciotta v. Old National Bancorp., 499 F.3d 629 (7th Cir. 2007) (finding standing in a security breach class action suit against a bank based on the threat of future harm)
- Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010) (finding standing in a suit where plaintiffs unencrypted information (unencrypted names, addresses and social security numbers of 97,000 employees) was stored on a stolen laptop, based on possibility of future harm)
- Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011) (finding no standing in a suit by law firm employees against a payroll processing firm alleging negligence and breach of contract relating to the risk of identity theft and costs to monitor credit activity), cert. denied, 132 S. Ct. 2395 (2012) - distinguished environmental and toxic tort cases
- In re LinkedIn User Privacy Litig., 932 F. Supp. 2d 1089 (N.D. Cal. 2013)
- Galaria v. Nationwide Mut. Ins. Co., 998 F. Supp. 2d 646 (S.D. Ohio 2014)
- In re Barnes & Noble Pin Pad Litig., 12-CV-8617, 2013 WL 4759855 (N.D. Ill. Sept. 3, 2013) (rejecting argument that the delay or inadequacy of breach notification increased the risk of injury)
- Remijas v. Neiman Marcus Group, 2014 WL 4627893 (N.D. Ill. Sept. 16, 2014)
- Moyer v. Michael's Stores, Inc., No. 14 C 561 (N.D. Ill. July 14, 2014) (dismissing claims for breach of implied contract and state consumer fraud statutes based on Michael's alleged failure to secure their credit and debit card information during in-store transactions)

■ Ways to address? Credit monitoring services; reimburse fees so no out of pocket losses

Security Breach Litigation

- Claims don't always fit well into existing federal statutes – CL and state statutes
- Is there any damage or loss?
- Can the plaintiffs establish causation?
- At the same time – expanding concepts of duty and breach
 - Patco Construction Co. v. People's United Bank, 684 F.3d 197 (1st Cir. 2012) (holding defendant's security procedures to not be commercially reasonable)
 - Anderson v. Hannaford Brothers Co., 659 F.3d 151 (1st Cir. 2011)
 - Allowing negligence, breach of contract and breach of implied contract claims to go forward
 - Implied contract by grocery store to undertake some obligation to protect customers' data
 - Class certification denied: In re Hannaford Bros. Co. Customer Data Sec. Breach Litigation, 293 F.R.D. 21 (D. Me. 2013)
 - Lone Star National Bank v. Heartland Payment Systems, Inc., 729 F.3d 421 (5th Cir. 2013)
- Potential MDL treatment
 - In re: Target Corp. Customer Data Security Breach Litig., 2014 WL 1338473 (MDL 2014): 50+
- Recent cases:
 - In re Sony Gaming Networks & Customer Data Security Breach Litig., 996 F. Supp. 2d 942 (S.D. Cal. 2014) (dismissing claims for negligence, negligent misrepresentation and breach of implied warranty (disclaimed in user agreements) and under NY and Michigan consumer protection laws, but allowing plaintiffs' California Legal Remedies Act claim to proceed)
 - In re SAIC Corp., __ F. Supp. 2d __, 2014 WL 1858458 (D.D.C. May 9, 2014) (granting in part, denying in part defendant's motion to dismiss in a case brought by victims of a government data breach involving 4.7 million military members and their families)
 - In re Adobe Systems, Inc. Privacy Litig., __ F. Supp. 2d __, 2014 WL 4379916 (N.D. Cal. Sept. 4, 2014) (user names, passwords, credit and debit card numbers, expiration dates, email addresses for 38 million customers)
 - Cal Civil Code 1798.81.5 claim for failure to maintain *reasonable* security, dec. relief
 - No claim for alleged delay in providing consumer notice where no traceable harm; UCL

Security Breach Litigation

- In re Target Corp. Customer Breach Litigation. __ F. Supp. 3d __, 2014 WL 7192478 (D. Minn. 2014)
 - Standing based on allegations of unlawful charges, restricted or blocked access to bank accounts, inability to pay other bills and late payment charges or new card fees
 - Standing despite no named plaintiffs from Delaware, Maine, Rhode Island, Wyoming and DC
 - Plaintiffs stated claims under some state consumer protection laws by alleging Target
 - Failed to maintain adequate computer systems and data security practices
 - Failed to disclose the material fact that it did not have adequate computer systems and safeguards to adequately protect consumers' personal and financial information
 - Failed to provide timely and adequate notice to plaintiffs of the Target data breach
 - Continued to accept plaintiffs' credit and debit cards for payment after Target knew or should have known of the data breach and before it purged its systems of the hackers' malware
 - Claims under security breach notification statutes
 - Attorney general – only enforcement
 - Non-exclusive remedies and ambiguous language
 - No enforcement provisions
 - Negligence claims in some states barred by the economic loss rule
 - Unjust enrichment
 - no claim based on the argument that Target's purchase price included a premium for adequate security
 - The court allowed plaintiff to proceed on their "would not have shopped" theory
- Ladore v. Sony Computer Entertainment America, LLC, __ F. Supp. 2d __, 2014 WL 7187159 (N.D. Cal. 2014) (negligent misrepresentation barred by the economic loss rule, but other claims not dismissed)
- Lewert v. P.F. Chang's China Bistro, Inc., 2014 WL 7005097 (N.D. Ill. 2014) (no standing)

DATA PRIVACY
PUTATIVE CLASS
ACTION LITIGATION

Privacy Class Action Litigation

- August 2010: Flash cookie suits against Quantcast and Clearspring
 - June 2011: Final court approval of settlement class action \$2.4M
- August 2011: Bose v. Interclick, Inc., No. 10 Civ. 9183, 2011 WL 4343517 (S.D.N.Y. Aug. 17, 2011): Advertisers (including CBS, Microsoft, Mazda and McDonald's) dismissed w/prejudice
- Targets
 - App and mobile providers
 - Social networks (UUID)
 - Any advertiser
 - Any company that collects information from its consumers (from vs on)
- Trends in 2015
- Common weakness: Standing? Injury?
 - Clapper v. Amnesty International USA, 133 S. Ct. 1138, 1147 (2013)
 - In re Google Android Consumer Privacy Litigation, 2013 WL 1283236 (N.D. Cal. Mar. 26, 2013)
 - In re Google Privacy Policy Litig., 2012 WL 6738343 (N.D. Cal. Dec. 28, 2012)
 - PRobins v. Spokeo, Inc., 742 F.3d 409, 412-14 (9th Cir. 2014) irozzi v Apple Inc., 2012 WL 6652453 (N.D. Cal. Dec. 20, 2012)
 - In re iPhone Application Litig., Case No. 11-MD-02250-LHK, 2011 WL 4403963 (N.D. Cal. Sept. 20, 2011) (dismissing for lack of Article III standing, with leave to amend, a putative class action suit against Apple and various application providers alleging misuse of personal information without consent)
 - Edwards v. First American Corp., 610 F.3d 514 (9th Cir. 2010), cert. dismissed, 132 S. Ct. 2536 (2012)
 - Robins v. Spokeo, Inc., 742 F.3d 409, 412-14 (9th Cir. 2014)

Privacy Class Action Litigation

- ECPA – 18 U.S.C. §§ 2500, 2700 *et seq.*
 - Only protects the *contents* of communications
 - In re Zynga Privacy Litig., 750 F.3d 1098 (9th Cir. 2014)
 - In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1062 (N.D. Cal. 2012) (geolocation data not the contents of a communication)
 - Also: no interception (Wiretap Act) and for advertisers no access (Stored Communications) (alleged communication is between widget provider and user's hard drive); for many websites and advertisers, consent (including from TOU or Privacy Policy)
 - Kirch v. Embarq Management Co., 702 F.3d 1245 (9th Cir. 2012) (no aiding and abetting liability under Title I)
 - Lazette v. Kulmatycki, 949 F. Supp. 2d 748 (N.D. Ohio 2013) (Blackberry device is not a facility; the facility was a Gmail server)
 - In re Google Inc. Gmail Litig., Case No. 13–MD–02430–LHK, 2013 WL 5423918 (N.D. Cal. Sept. 26, 2013) (no express or implied assent based on TOU)
 - Joffe v. Google, 746 F.3d 920 (9th Cir. 2013) (holding that payload data transmitted over unencrypted Wi-Fi networks that was inadvertently collected by Google on public roads, incident to capturing photographs for its free Street View service, was not “readily accessible to the public”), cert. denied, 134 S. Ct. 2877 (2014)
 - Telecommunications Regulatory Board v. CTIA, 752 F.3d 60 (1st Cir. 2014) (holding Puerto Rican law preempted by ECPA)
 - In re CarrierIQ Inc. Consumer Privacy Litigation, C-12-md-2330 EMC (N.D. Cal. Jan 21, 2015)

Privacy Class Action Litigation

- CFAA - 18 U.S.C. § 1030
- \$5,000 minimum injury
- Bose v. Interclick, Inc., No. 10 Civ. 9183, 2011 WL 4343517 (S.D.N.Y. Aug. 17, 2011)
- Access vs. Use restrictions
 - United States v. Nosal, 676 F.3d 854 (9th Cir. 2012) (*en banc*) (the prohibition on exceeding authorized access under the CFAA applies to access restrictions, not use restrictions such as violating TOU or employment policies)
 - WEC Carolina Energy Solutions LLC v. Miller, 687 F.3d 199 (4th Cir. 2012) (CFAA fails to provide a remedy for misappropriation of trade secrets or violation of a use policy where authorization has not been rescinded)), cert. dismissed, 133 S. Ct. 831 (2013)
 - But see
 - U.S. v. John, 597 F.3d 263, 271 (5th Cir. 2010) (holding that an employee of Citigroup exceeded her authorized access when she accessed confidential customer information in violation of her employer's computer use restrictions and used that information to commit fraud, writing that a violation occurs "at least when the user knows or reasonably should know that he or she is not authorized to access a computer and information obtainable from that access in furtherance of or to perpetrate a crime")
 - U.S. v. Rodriguez, 628 F.3d 1258, 1263 (11th Cir. 2011) (holding that a Social Security Administration employee exceeded authorized access by obtaining information about former girlfriends and potential paramours to send flowers to their houses, where the Administration told the defendant that he was not authorized to obtain personal information for nonbusiness reasons)
 - International Airport Centers, LLC v. Citrin, 440 F.3d 418, 420-21 (7th Cir. 2006) (reversing dismissal of a claim against an employee who accessed plaintiff's network and caused transmission of a program that caused damage to a protected computer where the court held that an employee who had decided to quit and violate his employment agreement by destroying data breached his duty of loyalty to his employer and therefore terminated the agency relationship, making his conduct unauthorized (or exceeding authorized access))
 - See also EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577 (1st Cir. 2001) (concluding that where a former employee of the plaintiff provided another company with proprietary information in violation of a confidentiality agreement, in order to "mine" his former employer's publically accessible website for certain information (using scraping software), he exceeded the authorization he had to navigate the website).

Privacy Class Action Litigation

- Video Privacy Protection Act – 18 U.S.C. § 2710
 - In re Hulu Privacy Litig., No. C 11-03764 LB, 2012 WL 3282960 (N.D. Cal. Aug. 10, 2012)
 - In re Hulu Privacy Litig., No. C 11-03764 LB, 2013 WL 6773794 (N.D. Cal. Dec. 20, 2013) (holding statutory damages mandatory if a violation is found under a statute that provides that damages *may* be awarded)
 - In re Hulu Privacy Litig., No. C 11-03764 LB, 2014 WL 1724344 (N.D. Cal. Apr. 28, 2014)
 - n re Hulu Privacy Litig., No. C 11-03764 LB, 2015 WL 1503506 (N.D. Cal. Mar. 31, 2015)
 - In re Nickelodeon Consumer Privacy Litigation, Case No. CIV.A. 12-07829, CIV.A. 13-03729, CIV.A. 13-03731, CIV.A. 13-03755, CIV.A. 13-03756, CIV.A. 13-03757, 2014 WL 3012873, at *5-7 (D.N.J. July 2, 2014)
 - Ellis v. Cartoon Network, Inc., 2014 WL 5023535 (N.D. Ga. Oct. 8, 2014) (dismissing VPPA claim)
- State claims (CAFA)
 - Unfair competition, contract claims: Need injury and damage. In re Facebook Privacy Litig., 791 F. Supp. 2d 705 (N.D. Cal. 2011)
 - Breach of contract – must be more than nominal damages. Rudgayer v. Yahoo! Inc., 2012 WL 5471149 (N.D. Cal. Nov. 9, 2012)
 - Unjust enrichment is not a claim in California and some other states
 - Common law invasion of privacy: no claim if disclosed in Privacy Policy
 - California Legal Remedies Act
 - California Invasion of Privacy Act (section 631)
 - Campbell v. Facebook, __ F. Supp. 3d __, 2014 WL 7336475 (N.D. Cal. 2014) (alleging that Facebook scans the contents of private messages and if there is a link contained in the message treats the link as a “liked” page and increases that page’s like counter and further uses the data to deliver targeted ads to the plaintiffs)
 - Rights of Publicity
 - Perkins v. LinkedIn Corp., __ F. Supp. 2d __, 2014 WL 2751053 (N.D. Cal. 2014) (holding that plaintiffs had Article III standing to bring a common law right of publicity, UCL, and section 502 causes of action because an individual’s name has economic value where the name is used to endorse or advertise a product to the individual’s friends and contacts)
 - In re LinkedIn User Privacy Litigation, Case No. 5:12–CV–03088–EJD, 2014 WL 1323713 (N.D. Cal. Mar. 28, 2014) (holding that plaintiff had sufficiently established standing under Article III and the UCL because she alleged that she purchased her premium subscription in reliance on LinkedIn’s alleged misrepresentation about the security of user data)
 - Fraley v. Facebook, Inc., 830 F. Supp. 2d 785 (N.D. Cal. 2011) (holding that plaintiffs had standing to bring a class action suit where they alleged entitlement to compensation under California law based on Facebook’s alleged practice of placing members’ names, pictures and the assertion that they had “liked” certain advertisers on other members pages, which plaintiffs alleged constituted a right of publicity violation, unfair competition and unjust enrichment)
 - Cohen v. Facebook, Inc., No. C 10-5282 RS, 2011 WL 5117164 (N.D. Cal. Oct. 27, 2011) (dismissing with prejudice plaintiffs’ statutory right of publicity claims over the use of the names and likenesses of non-celebrity private individuals without compensation or consent in connection with Facebook’s “Friend Finder” tool, for failing to allege injury sufficient to support standing, where plaintiffs could not allege that their names and likenesses had any general commercial value and did not allege that they suffered any distress, hurt feelings, or other emotional harm)

Privacy Class Action Litigation

■ Class certification

- Harris v. Comscore, Inc., 292 F.R.D. 579 (N.D. Ill. 2013) (certifying a class of users who downloaded Comscore software since 2005; SCA, ECPA I, CFAA)(alleged browser tracking through downloaded software)
- In re Google Inc. Gmail Litig., 13-MD-02430-LHK, No. 2014 WL 1102660 (N.D. Cal. Mar. 18, 2014) (denying certification)
- In re Hulu Privacy Litig., No. C 11-03764 LB, 2014 WL 2758598 (N.D. Cal. June 17, 2014) (denying class certification)

■ Arbitration provisions as a way to avoid class action suits

- AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)
- American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)
- Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010)
 - Challenge to the enforceability of an agreement (arbitrable) vs. challenge to the agreement to arbitrate
 - Clause: arbitrator, not a court, must resolve disputes over interpretation, applicability, enforceability or formation, including any claim that the agreement or any part of it is void or voidable
- Rahimi v. Nintendo of America, Inc., 936 F. Supp. 2d 1141 (N.D. Cal. 2013)

■ Settlement

- How do you structure s settlement where no one has been injured?
- Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012), cert. denied, 134 S. Ct. 8 (2013) (fee award of \$2,364,973.58 and \$95. million *cy pres* award)
 - Dissent by Chief Justice Roberts

TELEPHONE
CONSUMER
PROTECTION ACT
CLASS ACTION
LITIGATION

TCPA Suits

- Suits filed over text message advertisements and confirmatory opt-out messages
- The TCPA prohibits and person from making a call (including a text message)
 - other than for emergency purposes or with the “prior express consent of the called party”
 - using an *automatic telephone dialing system* 47 U.S.C. § 227(b)(1)(A)(iii)
- *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd. 1830 (2012) (express written consent)
- ATDS: equipment which has the capacity—**(A)** to store or produce telephone numbers to be called, using a random or sequential number generator; and **(B)** to dial such numbers.
- Mims v. Arrow Financial Services, LLC, 132 S. Ct. 740 (2012)
- Gager v. Dell Financial Services, LLC, 727 F.3d 365 (3d Cir. 2013)
- Lawyer-driven cases (opt in, opt out and lawsuit all in less than a month)
- Ibey v. Taco Bell Corp., Case No. 12-CV-0583-H, 2012 WL 2401972 (S.D. Cal. June 18, 2012)
 - TCPA does not impose liability for a single confirmatory text message
 - Insufficient allegation of use of an ATDS
 - Strategy
- In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act, Docket No. 02-278 (FCC Nov. 26, 2012)

TCPA Suits

- The TCPA prohibits and person from making a call (including a text message)
 - other than for emergency purposes or with the “prior express consent of the called party”
 - using an *automatic telephone dialing system* 47 U.S.C. § 227(b)(1)(A)(iii)
- Up to \$500 “per violation” – trebled where the defendant violated the statute “willfully or knowingly”
- Potential defenses:
 - Consent
 - Arbitration
 - No grounds for class certification
 - No use of an ATDS
- ATDS: equipment which has the capacity—**(A)** to store or produce telephone numbers to be called, using a random or sequential number generator; and **(B)** to dial such numbers.
 - Satterfield v. Simon & Schuster, 569 F.3d 946, 951 (2009)
 - Dominguez v. Yahoo! Inc., 8 F. Supp. 2d 637 (E.D. Pa. 2014)
 - Gragg v. Orange Cab Co., 2014 WL 494862 (W.D. Wash. Feb. 7, 2014)
 - Marks v. Crunch San Diego LLC, __ F. Supp. 3d __, 2014 WL 5422976 (S.D. Cal. 2014)
- Reassigned/ recycled numbers
- Vicarious liability
 - Thomas v. Taco Bell Corp., __ F. App'x __, 2014 WL 2959160 (9th Cir. 2014)

ONLINE AND MOBILE CONTRACT FORMATION

Online and Mobile Contract Formation

- Trend: Characterizing Click-Through + a link as browserwrap
 - Dawes v. Facebook, Inc., 885 F. Supp. 2d 894 (S.D. Ill. 2012)
 - Fteja v. Facebook, Inc., 841 F. Supp. 2d 829 (S.D.N.Y. 2012) (hybrid)
- Continued Hostility to implied contracts
 - Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175-79 (9th Cir. 2014) (declining to enforce arbitration clause where website provided terms of use on every page of the website but provided no notice to users or prompts to demonstrate assent to those terms).
 - In re Zappos.com, Inc. Customer Data Securities Breach Litig., 893 F. Supp. 2d 1058 (D. Nev. 2012) (links to TOU on every page)
 - Cvent, Inc. v. Eventbrite, Inc., 739 F. Supp. 2d 927 (E.D. Va. 2010)
- Click through contracts
 - Nicosia v. Amazon.com Inc., __ F. Supp. 3d __, 2015 WL 500180 (E.D.N.Y. 2015) (analyzing and upholding the process for entering a Conditions of Use agreement containing a mandatory arbitration clause where the hyperlink was placed conspicuously on the checkout page, the checkout page contained a warning that purchases were subject to the current Conditions of Use, and the plaintiff explicitly agreed to be bound by Conditions of Use when plaintiff signed up for an Amazon.com account)
- Reservation of Unilateral Rights to Amend TOU
 - Grosvenor v. Qwest Corp., 854 F. Supp. 2d 1021 (D. Colo. 2012) (“[b]ecause Qwest retained an unfettered ability to modify the existence, terms and scope of the arbitration clause, it is illusory and unenforceable.”), appeal dismissed, 733 F.3d 990 (10th Cir. 2013)
 - In re Zappos.com, Inc. Customer Data Securities Breach Litig., 893 F. Supp. 2d 1058 (D. Nev. 2012) (unilateral right to amend the TOU at any time rendered the agreement illusory)
 - Bassett v. Electronic Arts, __ F. Supp. 3d __, 2015 WL 1298632 (E.D.N.Y. 2015) (validating amended terms where defendant’s practice was to provide users with actual notice and the opportunity to opt-out of changes by sending defendant written notice within thirty days of the change in terms)

Online and Mobile Contract Formation

■ Arbitration and Class Action Waivers

- AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)
- American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)
- In re CarrierIQ, Inc. Consumer Privacy Litig., No. C-12-MD-2330 (EMC), 2014 WL 1338474 (N.D. Cal. Mar. 28, 2014)

■ Drafting tips

- Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010)
 - Challenge to the enforceability of an agreement (arbitrable) vs. challenge to the agreement to arbitrate
 - Clause: arbitrator, not a court, must resolve disputes over interpretation, applicability, enforceability or formation, including any claim that the agreement or any part of it is void or voidable
- Rahimi v. Nintendo of America, Inc., 936 F. Supp. 2d 1141 (N.D. Cal. 2013)

CHILDREN AND THE USE OF MOBILE DEVICES

Children and the Use of Mobile Devices

- Pew Internet March 2013: 78% of teens have mobile phones (47% owned their own device)
- Children, who are either *per se* or presumptively incompetent to enter into contracts (depending on which state's law applies), regularly enter into TOU and other mobile contracts that account for millions of dollars in revenue.
 - Age of majority is 18 except in Alabama, Nebraska and Mississippi
- Contracts with minors are either void or voidable under the laws of most states
 - I.B. v. Facebook, 905 F. Supp. 2d 989 (N.D. Cal. 2012) (allowing claims by minors for reimbursement of credit card charges for Facebook credits based on the California law that provides that certain contracts with minors are void)
 - I.B. v. Facebook, NO. C 12-1894 CW, 2013 WL 6734239 (N.D. Cal. Dec. 20, 2013) (granting in part, denying in part motion to dismiss Third Amended Complaint)
 - But see
 - Dawes v. Facebook, Inc., 885 F. Supp. 2d 894 (S.D. Ill. 2012) (enforcing choice of forum clause; infancy cannot be used as a sword rather than a shield)
 - A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473, 481 (E.D. Va. 2008), aff'd in part and rev'd in part on other grounds, 562 F.3d 630, 639 (4th Cir. 2009) (minors equitably estopped from denying agreement to the terms of use of a plagiarism verification site)
- COPPA regulations apply to those under age 13.
- The FTC has stated its intention to study privacy issues relating to teens.
- California's "Online Eraser" law (took effect Jan. 1, 2015)
 - Cal. Bus. & Prof. Code §§ 22580, 22581
- Age verification

Trends in Mobile, Internet, Cloud and Digital Law and Litigation Strategy 2015

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