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PERSPECTIVE

Appellate ruling gets 2-star review for interpretation of the CIPA

By Edward Totino

Earlier this month, the 1st District Court of Appeal issued its opinion in *Gruber v. Yelp, Inc.*, 2020 DJDAR 10867 (Oct. 7, 2020). *Gruber* adheres to an unfortunate trend in some courts to stretch provisions of the California Invasion of Privacy Act to cover situations beyond the statutory text. *Gruber* also fails to address, much less mention, an important issue of statutory interpretation that is now pending before the California Supreme Court.

***Gruber* wrongly applied CIPA to recording one’s own words, failed to give any guidance whatsoever on whether Section 632.7 applies to VoIP calls, and did not mention, much less address, the important question of whether Section 632.7 applies to recording by a party, an issue now pending before the California Supreme Court.**

Some Background

Eric Gruber, a personal injury lawyer, was called a number of times by Yelp sales representatives in an attempt to sell advertising. For quality assurance and training purposes, Yelp records its sales representatives’ voices when making calls, but not the voices of the persons they are calling — so Gruber’s voice was not recorded. This is known as “one-way recording,” but more appropriately should be called “one-sided recording.” Yelp does not inform the persons being called of this one-sided recording.

When Gruber found out about these practices, he brought a class action against Yelp in San

Francisco Superior Court for violation of California Penal Code Sections 631, 632 and 632.7. Section 631 makes third-party wiretapping illegal, while Section 632 prohibits the recording of confidential communications without consent, and Section 632.7 prohibits the interception or receipt and recording of certain wireless communications without consent. Gruber sought statutory damages of \$5,000 per violation under Penal Code Section 637.2.

The court granted Yelp summary judgment, finding that

one-sided recording did not violate Sections 631, 632 or 632.7, and that the calls Yelp made to Gruber could not violate Section 632.7 because Yelp made the calls using Voice over Internet Protocol (known as VoIP) rather than a landline, cellular or cordless telephone.

The Court of Appeal reversed, holding that Sections 632 and 632.7 “prohibit recording of a communication, in whole or in part, without the consent of all parties, no matter the particular role or degree of participation that a party has in the communication.” Therefore, the one-sided recording by Yelp could violate Sections 632 and 632.7, depending on the specifics of the calls

at issue. The Court of Appeal also held that there were material issues of fact on whether VoIP calls fall under the scope of Section 632.7.

The *Gruber* opinion leaves much to be desired. It errs in concluding that one-sided recording is covered by Sections 632 and 632.7. It offers no guidance on whether VoIP calls are covered by Section 632.7. And it fails to consider whether Section 632.7 even applies to the recording of calls by Yelp, a party to the call, an issue now pending before the California Supreme Court.

One-Sided Recording Should Not Violate CIPA

Section 632(a) of the California Invasion of Privacy Act provides that “[a] person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication ... shall be punished[.]” Subsection (c) defines “confidential communication” as “any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto[.]”

Section 632.7(a) of the act provides that, “[e]very person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless

telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished[.]” And Section 632.7(c)(3) states that “[c]ommunication’ includes, but is not limited to, communications transmitted by voice, data, or image, including facsimile.” Section 632.7’s more exacting language makes for an easier analysis. It applies only to recording of “a communication *transmitted between*” certain devices. With one-sided recording, you are recording your own voice on your own side of the call. This occurs *before* your voice is transmitted to the other party’s device. Therefore, no Section 632.7 violation.

A simple example illustrates this point. Under Section 632.7(c)(3), “communication” includes a facsimile. Suppose a sales representative writes out a letter, makes a photocopy of the letter, and then faxes it to a prospect’s cellphone number. A communication (the letter) has been recorded by making the photocopy, but no one would claim that this conduct violates Section 632.7 because it was recorded before, not during, transmission. Likewise, in one-sided recording, the caller’s voice is recorded *before* it is transmitted to the other side, and there is no Section 632.7 violation. Turning to Section 632, it prohibits the recording of a *confidential* communication without consent. It does not define communication, only confidential communication, but common definitions are “[t]he interchange of messages or ideas by speech, writing, gestures, or conduct” (Black’s

Law Dictionary) and “information communicated : information transmitted or conveyed” (Merriam-Webster). Using these definitions, Section 632 should, like Section 632.7, only apply to spoken words only once they are transmitted.

Another example illustrates this point. Suppose a sales representative has scheduled a call with an important prospect. In preparation for the call, the representative writes out a script and then practices by reading the script into a voice recorder. Then, when the representative calls the prospect, he reads the script verbatim, or perhaps plays the recording to the prospect. Under the *Gruber* analysis, he used an electronic device to record his side of the communication, and if the communication is confidential, he would have violated Section 632. Again, no one would seriously claim that this conduct violates Section 632, because the sales representative did not record what was being transmitted, but instead recorded his own words before transmission. Until transmission, there is no communication and no violation.

Gruber ignores the reality that words are not communications unless and until transmitted to another party. This is explicit in the text of Section 632.7 by its requirement that the communication be “transmitted between” devices, and implicit in Section 632 by its use of the word “communication.” Since one-sided recording only records words before transmission, not during or after, *Gruber* erred in holding that such recordings violate CIPA.

Gruber Should Have Offered Guidance on How Section 632.7 Could Apply to VoIP

Section 632.7 only applies when there is a cellular or cordless telephone on one side of the call, and a cellular, cordless or landline telephone on the other side. *Gruber* reversed the superior

court’s finding that a call made using VoIP does not violate Section 632.7, stating that Yelp provided no evidence “regarding what type of phone or device VoIP actually is.” But *Gruber* should have offered some guidance on what it would take for VoIP to be a cellular, cordless or landline telephone.

VoIP is a computerized device that uses technology to transmit voice over the internet in the form of packets of data. See *Clark v. Time Warner Cable*, 523 F.3d 1110, 1112 (9th Cir. 2008). Courts have recognized that VoIP is different from a landline telephone. *Vonage Holdings Corp. v. Neb. PSC*, 564 F.3d 900, 902 (8th Cir. 2009) (discussing “VoIP-to-landline or landline-to-VoIP communications”). California law includes a definition of VoIP that distinguishes it from the public switched telephone network (i.e., landline telephones). See Cal. Pub. Util. Code Section 239. Moreover, since VoIP uses computer and data packets, all communications over VoIP are necessarily recorded at least temporarily in the computer’s memory.

Given these issues, *Gruber* should have offered the parties, not to mention the public, a framework on how to determine whether VoIP is a landline, cellular or cordless telephone or, as Yelp argued, something entirely different. Instead, *Gruber* left the parties, and the public, with no guidance on whether and, if so, when, Section 632.7 applies to VoIP calls.

Gruber Should Have Examined Whether Section 632.7 Even Applies to the Calls at Issue

Gruber also failed to address a significant question regarding the scope of Section 632.7, a question that is currently pending before the California Supreme Court in *Smith v. LoanMe, Inc.*, S260391. At issue in *LoanMe* is whether a violation of Section

632.7 occurs whenever a call where one party used a cell or cordless phone is recorded without consent, or whether to violate Section 632.7 a person must (1) intercept the communication without consent or receive the communication *without consent*, and (2) intentionally record the communication *without consent*.

Federal courts in particular have accepted the first interpretation — see, e.g., *Ramos v. Capital One, N.A.*, 17-435 (N.D. Cal. July 27, 2017); *Ades v. Omni Hotels Management Corp.*, 46 F. Supp. 3d 999 (C.D. Cal. 2014); *Simpson v. Best Western Int’l, Inc.*, 12-4672 (Nov. 12, 2012) — effectively rewriting Section 632.7 as: “Every person who, without the consent of all parties to a communication, **intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone shall be punished[.]**”

By reading words out of the statute, these courts violate a fundamental rule of statutory construction. See *Hughes Elec. Corp. v. Citibank Delaware*, 120 Cal. App. 4th 251, 259 n.18 (2004).

On the other hand, some California superior courts have carefully examined the text of Section 632.7, finding that because “without the consent” appears near the beginning of the statute before the verbs intercepts, receives and records, it necessarily modifies all three verbs. Under their interpretation, to violate Section 632.7, a person must (1) intercept the communication *without consent* or receive the communication *without consent*, and (2) intentionally record the communica-

tion *without consent*. See, e.g., *Granina v Eddie Bauer LLC*, BC569111 (L.A. Super. Ct. Dec. 01, 2015); *Burkley v Nine West Holdings Inc.*, BC641730 (L.A. Super. Ct. Sep. 05, 2017); *Monzon v. Atl. Credit & Fin.*, 2019 Cal. Super. LEXIS 1190 (L.A. Super. Ct. Oct. 25, 2019). This interpretation of Section 632.7 makes it inapplicable to a wide variety of calls between businesses and consumers because they intend to speak with each other, as *Gruber* and Yelp did. (Section 632 might still apply to those calls if they involved confidential communications.)

Gruber never addresses the issue of the scope of Section 632.7. Perhaps the parties did not present the issue, but that didn’t stop the 4th District Court of Appeal from raising the issue on its own when *LoanMe* was pending before it, and holding that the “plain language of section 632.7 clearly and unambiguously applies to third party eavesdroppers alone, not to the parties to cellular and cordless phone calls.” 43 Cal. App. 5th 844, 853 (2019).

Gruber wrongly applied CIPA to recording one’s own words, failed to give any guidance whatsoever on whether Section 632.7 applies to VoIP calls, and did not mention, much less address, the important question of whether Section 632.7 applies to recording by a party, an issue now pending before the California Supreme Court. On Yelp’s five-star scale, *Gruber* merits only two stars. ■

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