

1 James G. Snell (CA State Bar No. 173070)
JSnell@perkinscoie.com
2 Timothy M. Carter (CA State Bar 335212)
TCarter@perkinscoie.com
3 **PERKINS COIE LLP**
3150 Porter Drive
4 Palo Alto, California 94304-1212
Telephone: +1.650.838.4300
5 Facsimile: +1.650.838.4350

6 Mikella M. Hurley (Admitted *pro hac vice*)
MHurley@perkinscoie.com
7 **PERKINS COIE LLP**
700 Thirteenth Street, N.W., Suite 800
8 Washington, D.C. 20005-3960
Telephone: +1.202.654.6200
9 Facsimile: +1.202.654.6211

10 Attorneys for Defendant MASHABLE, INC.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

DAWN FREGOSA, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

MASHABLE, INC.,

Defendant.

Case No. 3:25-CV-01094-CRB

[Removed from the Alameda County Superior
Court, Case No. 24CV103566]

**DEFENDANT MASHABLE, INC.’S
MOTION TO DISMISS PLAINTIFF’S
SECOND AMENDED COMPLAINT**

[*Request for Judicial Notice filed concurrently
herewith*]

DATE: August 8, 2025
TIME: 10:00 a.m.
CTRM: 6, 17th Floor

Complaint Filed: December 17, 2024
Action Removed: February 3, 2025

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 8, 2025, at 10 a.m. or as soon thereafter as the matter may be heard, Defendant Mashable, Inc. (“Mashable”) will bring on for hearing in Courtroom 6 (17th Floor) of the above-captioned court located at 450 Golden Gate Avenue, San Francisco, California 94102, a Motion seeking an Order to Dismiss Plaintiff’s Second Amended Complaint.

STATEMENT OF RELIEF SOUGHT - L.R. 7-2(B)(3)

Mashable moves for dismissal pursuant to Fed. Rules of Civ. Proc., Rule 12(b)(6), on the grounds that Plaintiff fails to satisfy the basic pleading standards required to state a claim for relief.

This Motion is based upon this Notice of Motion, the supporting Memorandum of Points and Authorities, the Request of Judicial Notice and attached exhibits, the pleadings and other papers on file herein, and upon such oral argument as the Court may entertain at the hearing on this Motion.

SUMMARY OF ARGUMENT

Plaintiff Dawn Fregosa’s Second Amended Complaint must be dismissed pursuant to Fed. Rules of Civ. Proc., Rule 12(b)(6) for the following reasons:

1. ***California’s pen register law does not apply here.*** As evident from its legislative history, text, and recent legislative developments, California’s Pen Register Trap and Trace Act (the “Pen Register Act” or the “Act”) does not apply to the conduct Plaintiff alleges in this suit. The Pen Register Act, like the federal law upon which it is based, was only intended to apply to person-to-person communications, i.e., communications between or among people that occur on services like phone, text messages, email, and the like. It was never intended to govern commercial websites that do not provide people with any means to communicate with one another, meaning that the Act simply does not govern Mashable’s ability to collect information about site visitors.

1 2. ***The SAC fails to state a pen register claim.*** Even if the Pen Register Act applied
2 to the conduct alleged in the SAC, Plaintiff still fails to state a claim for at least four independently
3 sufficient reasons:

4 a. The conduct alleged in the SAC does not meet the basic definition of a “pen
5 register.” Plaintiff alleges that Mashable (and several third parties) installed and used a pen
6 register to capture Plaintiff’s IP address, her “Device Metadata,” and other identifiers associated
7 with Plaintiff’s browser. Plaintiff analogizes this data to her own phone number. But this is not
8 the type of information that a pen register captures. The law is clear: in telephonic terms, pen
9 registers capture the *outgoing* numbers that someone dials from a monitored phone, and not the
10 caller’s own phone number.

11 b. In order to state a claim for an unlawful pen register, Plaintiff must allege
12 that she engaged in some form of communication with content. She has not done so. Instead, the
13 SAC merely alleges that Plaintiff visited Mashable’s website. Simply accessing a public website
14 is not a communication with content, and is insufficient to state a claim for a pen register.

15 c. Even if Plaintiff alleged a communication with content, her claim would
16 still fail because Mashable would be the intended recipient of that communication. And as
17 Plaintiff has previously conceded to this Court, the Pen Register Act does not prohibit a party to
18 a communication from capturing information about those who contact them or communicate with
19 them.

20 d. Most of the SAC’s allegations pertain to the alleged actions of third parties
21 who are not before this Court. None of these allegations can provide a basis for Mashable’s
22 liability because the Pen Register Act does not recognize aiding and abetting liability.

23 3. ***The rule of lenity requires dismissal with prejudice.*** Even if Plaintiff had a
24 colorable pen register claim against Mashable, the Pen Register Act is, at a minimum, grievously
25 ambiguous as to its applicability here. The Act does not contain any language clearly indicating
26 that it applies to the use of web-based technologies like those at issue here, as contrasted with
27 the California Consumer Privacy Act (“CCPA”), which unequivocally does. Recent legislative
28 developments further demonstrate that the California Legislature never intended the Act to apply

1 to the conduct alleged here. Because the Pen Register Act is a penal statute, the rule of lenity
2 requires that the Court read it narrowly and to limit it to conduct clearly covered, meaning that
3 Plaintiff's claim must be dismissed.

4
5 Dated: June 4, 2025

PERKINS COIE LLP

6
7 By: */s/ James G. Snell*

8 James G. Snell
9 Mikella M. Hurley
10 Timothy M. Carter

11 Attorneys for Defendant MASHABLE, INC.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
MEMORANDUM OF POINTS AND AUTHORITIES	1
I. INTRODUCTION	1
II. STATEMENT OF ISSUES TO BE DECIDED – L.R. 7-4(3)	2
III. BACKGROUND	2
IV. ARGUMENT	3
A. The Pen Register Act is Not Applicable to the Mashable Website.....	4
1. The Pen Register Act, Like its Federal Analog, Was Only Intended to Apply to Person-to-Person Communications.....	4
2. The Act’s Text Confirms That It Does Not Apply Here.....	6
3. Recent Legislative Activity Confirms the Act Does Not Apply.....	8
B. Even if the Act Applies Here, the SAC Still Fails to State a Claim	8
1. The SAC Does Not Allege a Pen Register.....	9
2. The Complaint Does Not Allege A “Communication” With Content.....	10
3. Parties to the “Communication” are Exempt	10
4. The Pen Register Act Does Not Extend to Aiding and Abetting.....	11
C. The Rule of Lenity Requires Dismissal	12
V. CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Augustine v. Great Wolf Resorts, Inc.</i> , No. 3:23-cv-00281, 2024 WL 3450967 (S.D. Cal. July 18, 2024)	10
<i>Boim v. Holy Land Found. for Relief & Dev.</i> , 549 F.3d 685 (7th Cir. 2008).....	12
<i>Capitol Recs. Inc. v. Thomas-Rasset</i> , No. CIV 06-1497(MJD/RLE), 2009 WL 1664468 (D. Minn. June 11, 2009)	11
<i>Casillas v. Cypress Ins. Co.</i> , 770 F. App’x 329 (9th Cir. 2019)	7
<i>Casillas v. Transitions Optical, Inc.</i> , No. 23STCV30742, 2024 WL 4873370 (Cal. Super. Sep. 9, 2024).....	13
<i>Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.</i> , 511 U.S. 164 (1994).....	1,11, 12
<i>Crowley v. Cybersource Corp.</i> , 166 F. Supp. 2d 1263 (N.D. Cal. 2001)	7
<i>Gonzales v. Uber Techs., Inc.</i> , 305 F. Supp. 3d 1078 (N.D. Cal. 2018)	6, 10
<i>Heiting v. Taro Pharms. USA, Inc.</i> , 709 F. Supp. 3d 1007 (C.D. Cal. 2023).....	6
<i>In re Application of U.S. for an Ord. Authorizing use of A Pen Reg. & Trap On (XXX) Internet Serv. Acct./User Name, (xxxxxxx@xxx.com)</i> , 396 F. Supp. 2d 45 (D. Mass. 2005).....	7
<i>In re Carrier IQ, Inc.</i> , 78 F. Supp. 3d 1051 (N.D. Cal. 2015)	12
<i>In re U.S. for an Ord. Authorizing Roving Interception of Oral Commc’ns</i> , 349 F.3d 1132 (9th Cir. 2003).....	2, 7, 9
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004).....	12
<i>Licea v. Hickory Farms LLC</i> , No. 23STCV26148, 2024 WL 1698147 (Cal. Super. Mar. 13, 2024)	13
<i>Lopez v. Apple, Inc.</i> , 519 F. Supp. 3d 672 (N.D. Cal. 2021)	7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES (continued)

	Page(s)
<i>Mirmalek v. L.A. Times Commc’ns LLC</i> , No. 24-CV-01797-CRB, 2024 WL 5102709 (N.D. Cal. Dec. 12, 2024).....	4
<i>People v. Sephora, USA, Inc.</i> , No. CGC-22-601380 (Cal. Super. Ct. S.F. Cty. filed Aug. 23, 2022)	14
<i>Rodriguez v. Plivo Inc.</i> , No. 24STCV08972, 2024 WL 5184413 (Cal. Super. Oct. 2, 2024)	10
<i>Sanchez v. Cars.com Inc.</i> , No. 24STCV13201, 2025 WL 487194 (Cal. Super. Jan. 27, 2025)	5
<i>Twitter, Inc. v. Garland</i> , 61 F.4th 686 (9th Cir. 2023).....	10
<i>United States v. Ellis</i> , 270 F. Supp. 3d 1134 (N.D. Cal. 2017)	9
<i>United States v. Gonzalez</i> , 412 F.3d 1102 (9th Cir. 2005).....	9
<i>United States v. Lanier</i> , 520 U.S. 259 (1997).....	12, 13, 15
<i>United States v. N.Y. Tel. Co.</i> , 434 U.S. 159 (1977).....	2, 9
<i>United States v. Nosal</i> , 676 F.3d 854 (9th Cir. 2012).....	12, 13, 14
<i>United States v. Taketa</i> , 923 F.2d 665 (9th Cir. 1991).....	9
<i>Vita v. New Eng. Baptist Hosp.</i> , 243 N.E.3d 1185 (Mass. 2024)	6, 13
<i>Wis. Pro. Police Ass’n v. Pub. Serv. Comm’n of Wis.</i> , 555 N.W.2d 179 (Wis. Ct. App. 1996)	11
<i>Yoon v. Lululemon USA, Inc.</i> , 549 F. Supp. 3d 1073 (C.D. Cal. 2021).....	6, 10
STATUTES	
18 U.S.C. § 3123	5
18 U.S.C. § 3127(3)	3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES (continued)

	Page(s)
Cal. Civ. Code § 1798.120.....	13
Cal. Code Regs. tit. 11 § 7000	14
Cal. Penal Code § 631(a)	12
Cal. Penal Code §§ 638.50(a), (b).....	6, 7, 8, 10
Cal. Penal Code § 638.50(c)	3, 9
Cal. Penal Code §§ 638.51(a)-(b)	8, 11
Cal. Penal Code §§ 638.52(d)(1), (3).....	6
Cal. Penal Code § 1546(e)	7
California Consumer Privacy Act	2, 13
California Privacy Rights Act	14
OTHER AUTHORITIES	
147 CONG. REC. S10990-02	4
<i>Assembly Bill Policy Committee Analysis: Hearing on A.B. 929 Before the Assemb. Comm. on Pub. Safety, 2015-2016 Reg. Sess. (Cal. 2015).....</i>	5
<i>Senate Public Safety Committee Analysis: Hearing on S.B. 690 Before the Sen. Comm. on Pub. Safety, 2025-2026 Reg. Sess. (Cal. 2025)</i>	8
<i>Senate Floor Analysis – Third Reading of S.B. 690 Before the S. Rules Comm., 2025-2026 Reg. Sess. (Cal. 2025).....</i>	8

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Court should dismiss Plaintiff Dawn Fregosa’s (“Plaintiff’s”), Second Amended
4 Complaint (“SAC”) without leave to amend pursuant to Rule 12(b)(6) because it fails to state a
5 claim. Plaintiff, on behalf of a putative class of visitors to the Mashable.com website, alleges that
6 Mashable, Inc. (“Mashable”) violated the law because, like most websites, it used common
7 technology like pixels and cookies (which Plaintiff refers to as “Trackers”) to collect IP addresses
8 and other information that visitors broadcast when they visit the website. Plaintiff has already
9 admitted to this Court that Mashable has the right to capture this information from visitors to its
10 website. Nevertheless, Plaintiff asserts that Mashable installed and used the so-called Trackers,
11 which Plaintiff claims are illegal “pen registers,” in violation of the California Pen Register Trap
12 and Trace Act, Cal. Penal Code § 638.51 (2024) *et seq.* (the “Pen Register Act” or the “Act”).

13 Plaintiff’s claim fails. At the outset, Plaintiff ignores both statutory language and
14 legislative history that establish that the Pen Register Act applies only to person-to-person forms
15 of communication (such as phone calls and emails), and not the collection of basic information
16 about visitors to commercial websites.

17 But even if the Act plausibly applied here (it does not), Plaintiff fails to state a claim for
18 several, independently sufficient reasons. *First*, by definition, a “pen register” captures the
19 *outgoing numbers a person dials* (or equivalent information), rather than that person’s own phone
20 number (or, as alleged in this case, Plaintiff’s own IP address, “Device Metadata,” and certain
21 “unique user identifiers” generated through the use of the so-called Trackers). *Second*, the SAC
22 fails to allege a “communication” with content, which is an essential element of a claim under the
23 Pen Register Act. *Third*, even if Plaintiff had alleged a communication with content, Mashable
24 would be the intended recipient of that communication. And as Plaintiff conceded in prior
25 briefing, like the user of caller ID, the Pen Register Act does not prohibit parties from capturing
26 the phone numbers, IP addresses, or similar identifiers of those who communicate with them.
27 *Fourth*, to the extent that Plaintiff seeks to hold Mashable liable for the alleged acts of third
28 parties, the Pen Register Act does not authorize aiding-and-abetting claims.

1 And finally, even if there were colorable arguments that the Pen Register Act applies here
2 and Plaintiff had alleged the essential elements of a pen register claim, the Act’s scope is highly
3 ambiguous at a minimum, meaning that the SAC must still be dismissed with prejudice pursuant
4 to the rule of lenity.

5 **II. STATEMENT OF ISSUES TO BE DECIDED – L.R. 7-4(3)**

6 Whether this Court should dismiss Plaintiff’s Complaint against Mashable with prejudice
7 under Fed. Rules of Civ. Proc., Rule 12(b)(6), for failure to state a claim upon which relief can be
8 granted.

9 **III. BACKGROUND**

10 The Pen Register Act is California’s version of a decades-old federal criminal statute
11 developed to govern “pen registers” and “trap and trace” devices. Pen registers and trap and trace
12 devices are common law-enforcement surveillance tools that first emerged in the era of wire
13 communications, and particularly telephonic communications. In popular parlance, a “pen
14 register,” or a “dialed number recorder” (“DNR”), is “a device that registers the numbers dialed
15 from a telephone.” *Pen Register*, MERRIAM-WEBSTER.COM, <https://www.merriam->
16 [webster.com/dictionary/penregister](https://www.merriam-webster.com/dictionary/penregister) (last visited May 30, 2025). Courts consistently apply this
17 same definition, describing a “pen register” as a “device that records the [outgoing] numbers
18 *dialed* on a telephone,” but that “does not overhear oral communications.” *United States v. N.Y.*
19 *Tel. Co.*, 434 U.S. 159, 161 n.1 (1977) (emphasis added); *see also, e.g., In re U.S. for an Ord.*
20 *Authorizing Roving Interception of Oral Commc’ns*, 349 F.3d 1132, 1136 n.7 (9th Cir. 2003) (“A
21 pen register is a mechanical device that *records the numbers dialed on a telephone* by monitoring
22 the electrical impulses caused when the dial on the telephone is released.”) (emphasis added). As
23 communications technologies evolved, the federal statutory definition of a “pen register” was
24 broadened to encompasses more modern, electronic forms of communication like email, voice
25 over Internet protocol (“VoIP”) calls, and web-based chats, as discussed in greater detail below.
26 California’s Pen Register Act, which substantively adopted the definition of its federal analog,
27 defines a “pen register” as:

28 [A] device or process that records or decodes dialing, routing, addressing, or
signaling information transmitted by an instrument or facility from which a

1 wire or electronic communication is transmitted, but not the contents of a
2 communication.

3 Cal. Penal Code § 638.50(c); *see also* 18 U.S.C. § 3127(3).

4 Plaintiff accuses Mashable of a single count of violating the Pen Register Act. *See* SAC
5 ¶¶ 4, 218-30. But the SAC’s 230 paragraphs and 64 pages of allegations say relatively little about
6 Mashable. Instead, Plaintiff dedicates the lion’s share of the SAC to the alleged conduct of third
7 parties not before the Court. *See, e.g.*, SAC ¶¶ 54, 61, 63, 65-81, 86, 88, 90-93, 98-108, 110-11,
8 115, 117-21, 126-137, 141-44, 146-47, 150-53.

9 Plaintiff’s allegations about Mashable’s conduct are limited, and essentially boil down to
10 the following:

- 11 ● Mashable operates the mashable.com website, “which is a digital news and entertainment
12 offering with focus areas such as tech, science, social media, and shopping.” SAC ¶ 1.
- 13 ● Plaintiff visited the Mashable website using her desktop browser. SAC ¶ 187.
- 14 ● Code that Mashable “programmed” on its website “cause[d] the Trackers to be installed”
15 on Plaintiff’s browser, which “then cause[d] the browser to send [Plaintiff’s] identifying
16 information” to Mashable and third parties, including Plaintiff’s IP address, “Device
17 Metadata” (consisting of device type, browser type, and unique and persistent identifiers),
18 and certain “unique user identifier[s]” that the Trackers set on Plaintiff’s browser. *Id.* ¶¶ 2,
19 22-25, 188-89, 223-26.
- 20 ● Mashable (along with the third parties) then received this information and used it “for
21 targeted marketing and advertising” purposes, among other things. *Id.* ¶¶ 2, 22-25, 188-89,
22 226.
- 23 ● Mashable thereby violated the Pen Register Act “[b]y installing and using the Trackers
24 without Plaintiff’s prior consent and without a court order.” *Id.* ¶ 4, *see also, e.g.*, ¶¶ 191,
25 218-30.

26 **IV. ARGUMENT**

27 The Court should dismiss the SAC with prejudice pursuant to Rule 12(b)(6) because
28 Plaintiff does not (and cannot state a claim) for multiple, independently sufficient reasons.

1 **A. The Pen Register Act is Not Applicable to the Mashable Website**

2 The Court should dismiss the SAC with prejudice because the Act does not apply to the
3 routine collection of information generated when people visit commercial websites like
4 Mashable’s, which do not facilitate person-to-person communications. To the contrary, the Pen
5 Register Act’s legislative history, statutory language, and recent legislative developments make
6 clear that the Act is intended to address communications between and among *people* on services
7 like telephone and email, and not the collection of IP addresses and Device Metadata from an
8 individual visiting a website.¹

9 **1. The Pen Register Act, Like its Federal Analog, Was Only Intended to**
10 **Apply to Person-to-Person Communications**

11 Congress enacted the country’s first pen register statute—the federal Pen Register Act, 18
12 U.S.C. § 3121 *et seq.*—in 1986. The federal Pen Register Act established a baseline prohibition
13 on capturing outbound calling information (subject to certain, limited exemptions), while
14 providing law enforcement a mechanism to obtain pen registers. *See id.* §§ 3121-3125. The
15 federal Act’s legislative history reflects that Congress originally understood that pen registers
16 only captured information about who was speaking with whom—i.e., person-to-person
17 communications—on telephone lines. *See, e.g.,* S. REP. NO. 99-541, at 10 (1986), as reprinted in
18 1986 U.S.C.C.A.N. 3555, 3564 (pen registers “record the telephone numbers to which calls have
19 been placed from a particular telephone”).

20 Congress expanded the federal Act in 2001 to account for emerging technologies such as
21 cellular networks and email, but the legislative history reflects Congress’s continued intent that
22 the law apply only to communications between or among *people*. *See* 147 CONG. REC. S10990-
23 02, S10999-1000 (daily ed. Oct. 12, 1999 (statement of Sen. Leahy), 2001 WL 1297566 (the
24 “rapid computerization of the *telephone system* has changed the tracing process,” and functions

25 ¹ To be clear, Mashable does not maintain that the Act is limited only to telephones. *See*
26 *Mirmalek v. L.A. Times Commc’ns LLC*, No. 24-CV-01797-CRB, 2024 WL 5102709 at *3-4
27 (N.D. Cal. Dec. 12, 2024) (rejecting defendant’s argument that the Pen Register Act applies only
28 to telephone communications). Mashable contends that the Act governs the collection of dialing,
routing, addressing, and signaling information for communications that occur on services like
phone, email, and other services that allow people to engage in substantive communications with
one another.

1 “normally accomplished by physical hardware components attached to *telephone lines*” were now
2 “typically performed by computerized collection and retention of *call routing information passing*
3 *through a communications system*”) (emphasis added). Indeed, the text of the federal Act says
4 nothing about its application to collection of information related to visits to commercial websites
5 that do not allow people to communicate directly with one another.

6 California law enforcement could not obtain pen register orders until 2015, when the
7 Legislature enacted the Pen Register Act. *See* A.B. 929, 2015-2016 Reg. Sess. (Cal. 2015). The
8 Legislature adopted the structure, text, and definitions of the federal Act with few substantive
9 changes, and the California Pen Register Act’s prohibitions and exemptions are virtually identical
10 to those in the federal Act. *Compare* 18 U.S.C. § 3123 *with* Cal. Penal Code § 638.51.

11 As with the federal Act, the legislative history of California’s Pen Register Act also
12 reflects its focus on person-to-person communications, and particularly, on telephonic
13 communications. A 2015 bill analysis states that pen registers and trap and trace devices
14 “generally track incoming and outgoing telephone calls,” and show “which *people*” are
15 “*communicating with one another* and at what times.” *Assembly Bill Policy Committee Analysis:*
16 *Hearing on A.B. 929 Before the Assemb. Comm. on Pub. Safety*, 2015-2016 Reg. Sess. (Cal.
17 2015) at 10-11 (emphasis added).

18 In sum, nothing in the legislative history of the Pen Register Act (or its federal analog)
19 suggests that the drafters intended to ensnare the operators of publicly accessible commercial
20 websites like Mashable’s that do not enable person-to-person communications through services
21 like phone, email, and the like. *See* RJN, Ex. A, *Sanchez v. Cars.com Inc.*, No. 24STCV13201,
22 2025 WL 487194, at *3 (Cal. Super. Jan. 27, 2025) (“the legislative history of the CIPA suggests
23 that “pen register” and “track and trace devices” refers to devices or processes that are used to
24 record or decode dialing, routing, addressing, or signaling information from telephone numbers”).
25 Instead, everything suggests that the legislatures intended to cover telephone and other similar
26 communications between people. The Mashable website is a “digital news and entertainment
27 offering,” SAC ¶ 1, and Plaintiff does not (and cannot) allege that Mashable offers website
28

1 visitors anything remotely approaching the types of communication services that the Act's
2 drafters anticipated would be within the Act's scope.

3 2. The Act's Text Confirms That It Does Not Apply Here

4 This same limited focus is evident from the text of the Pen Register Act itself. For
5 example, the Act's requirements for pen register orders refer to "subscribers" and "telephone
6 line[s]," language that only logically applies to person-to-person communication services. *See*
7 Cal. Penal Code §§ 638.52(d)(1), (3) (order must identify "the person to whom is leased or in
8 whose name is listed the *telephone line*," and the "number" and "physical location of the
9 *telephone line*") (emphasis added); *see also id.* § 638.52(d)(5)(g) ("the person owning or leasing
10 the line" must not notify the "listed subscriber").

11 By definition, a pen register operates on a communication that conveys some "content."
12 *See* Cal. Penal Code § 638.50(b) (a pen register records "information transmitted by an
13 instrument or facility from which a wire or electronic communication is transmitted, but not the
14 *contents of a communication*." (emphasis added); §§ 638.52(d)(1), (3), (5)(g). This "content"
15 involves the "substance, purpo[rt], or meaning" of an "intended message" that is distinct from
16 "record information regarding the characteristics of the message." *Heiting v. Taro Pharms. USA,*
17 *Inc.*, 709 F. Supp. 3d 1007, 1017-18 (C.D. Cal. 2023) (cleaned up). People convey the substance,
18 purport, or meaning of a message when, for example, they talk on the phone or exchange emails.
19 There is no support for stretching a statute designed to address person-to-person communications
20 like telephone calls and their equivalents to the collection of information from visitors to
21 commercial websites. As one court recently noted with respect to a similar statute, instead of
22 "having a personal conversation or sending a personal message," website visitors simply
23 "access[] publicly available data." *Vita v. New Eng. Baptist Hosp.*, 243 N.E.3d 1185, 1205 (Mass.
24 2024) (no wiretapping claim for web-tracker under state law because interactions with a
25 commercial website did not entail "person-to-person" communication); *see also, e.g., Gonzales v.*
26 *Uber Techs., Inc.*, 305 F. Supp. 3d 1078, 1086 (N.D. Cal. 2018) ("opening a webpage" is "not a
27 communication with content"); *Yoon v. Lululemon USA, Inc.*, 549 F. Supp. 3d 1073, 1082 (C.D.
28 Cal. 2021) ("keystrokes, mouse clicks, pages viewed" are not "contents" of a "communication").

1 The fact that the Act’s exemptions apply only to “electronic or wire communication
2 service providers” further confirms the Pen Register Act’s limited scope. Cal. Penal Code
3 §§ 638.51(b)(1)-(5). Related provisions of California law define an “electronic communications
4 service” as one that provides subscribers “the ability to send or receive electronic
5 communications.” Cal. Penal Code § 1546(e).² Courts interpreting the same term under federal
6 law consistently hold that such services include, e.g., “email provider[s]” because they “permit
7 users to communicate directly with one another,” *Casillas v. Cypress Ins. Co.*, 770 F. App’x 329,
8 330 (9th Cir. 2019), and “internet service providers” that enable users to engage in
9 “communications over the internet.” *In re Application of U.S. for an Ord. Authorizing use of A*
10 *Pen Reg. & Trap On (XXX) Internet Serv. Acct./User Name, (xxxxxxx@xxx.com)*, 396 F. Supp.
11 2d 45, 47 (D. Mass. 2005).

12 But courts consistently hold that ordinary websites do not qualify among these services.
13 *See, e.g., In re U.S. for an Ord. Pursuant to 18 U.S.C. § 2705(b)*, 289 F. Supp. 3d 201, 210
14 (D.D.C. 2018) (unlike “a user-to-user messaging service,” a “service that merely allows users to
15 contact or interact with the company electronically” is not an electronic communication service);
16 *Crowley v. Cybersource Corp.*, 166 F. Supp. 2d 1263 (N.D. Cal. 2001) (online retailer was not
17 electronic communication service). Indeed, the argument “that sending information to servers”
18 makes something an electronic communication service would expand the term to “all online
19 services and thus render [it] meaningless.” *Lopez v. Apple, Inc.*, 519 F. Supp. 3d 672, 687 (N.D.
20 Cal. 2021). And it would be illogical to find that the Act applies to individual websites, but that
21 such websites cannot not rely on the Act’s exemptions.

22 Like the federal Act, the text of California’s Pen Register Act says nothing about whether
23 or how it applies to ordinary commercial websites that do not facilitate person-to-person forms of
24 communication using services like phone or email. And to hold that it does so would read
25 language into the Act that would expose any website to claims it violated criminal law by
26

27 ² The term “wire communication service” encompasses services that “use[] wire and cable
28 connections to connect calls.” *In re U.S. for an Ord. Authorizing Roving Interception of Oral*
Commc’ns, 349 F.3d 1132, 1139 n.14 (9th Cir. 2003) (interpreting the federal Wiretap Act, which
shares common definitions with the federal Pen Register Act).

1 engaging in routine commercial functions. *See, e.g.*, Cal. Penal Code §§ 638.51(b)(1)-(3)
 2 (service-provider exemptions for routine commercial purposes). Because Mashable.com is
 3 alleged to be a “digital news and entertainment offering,” SAC ¶ 1, and not a communication
 4 service that allows people to speak with one another or exchange messages, the Pen Register Act
 5 is inapplicable and Plaintiff’s sole claim must be dismissed with prejudice.

6 **3. Recent Legislative Activity Confirms the Act Does Not Apply**

7 A recent legislative initiative in California—Senate Bill 690—also demonstrates that
 8 members of the California Legislature disagree with Plaintiff’s theory that the Pen Register Act
 9 extends to the conduct alleged here. *See* S.B. 690, 2025-2026 Reg. Sess. (Cal. 2025) (“SB 690”).
 10 According to the bill’s sponsor, SB 690 aims to stop “stop the thousands of shakedown letters and
 11 lawsuits against California businesses of all sizes for typical business activities, like website
 12 analytics or online advertising that are already governed by” other laws. *Senate Floor Analysis –*
 13 *Third Reading of S.B. 690 Before the S. Rules Comm.*, 2025-2026 Reg. Sess. (Cal. 2025) at 8. As
 14 a proponent of the bill testified at a recent hearing of the Senate Committee on Public Safety, the
 15 provisions of the Act, which were developed to protect the privacy of peoples’ phone calls,
 16 “w[ere] never intended to apply” to the use of commercial tools for “website analytics or online
 17 advertising.” *Senate Public Safety Committee Analysis: Hearing on S.B. 690 Before the Sen.*
 18 *Comm. on Pub. Safety*, 2025-26 Reg. Sess. (Cal. 2025) at 10-11.

19 **B. Even if the Act Applies Here, the SAC Still Fails to State a Claim**

20 Even if the Pen Register Act was not limited to services that facilitate person-to-person
 21 communications, the Court should still dismiss the SAC with prejudice because it fails to state a
 22 claim. The Act contains a single, narrow prohibition that makes it unlawful to “install or use” a
 23 pen register without either a court order or one of the Act’s enumerated exemptions for service
 24 providers. Cal. Penal Code §§ 638.51(a)-(b).³ Plaintiff’s pen register claim—which is the sole
 25 basis for her suit against Mashable—fails for at least four independently sufficient reasons.

26 _____
 27 ³ The Pen Register Act does not govern the collection of any personal data beyond the narrow
 28 category of “dialing, routing, addressing, and signaling” information. *See* Cal. Penal Code
 §§ 638.50(a), (b). Nor does it govern the subsequent disclosure of any such information once
 collected. *See id.* § 638.51.

1 **1. The SAC Does Not Allege a Pen Register**

2 Plaintiff’s core allegation is that Mashable programmed code on its website that allowed
 3 Mashable and third parties to collect *Plaintiff’s IP address* (along with Device Metadata and other
 4 identifiers)—which she alleges is the Internet equivalent of her phone number—when Plaintiff
 5 accessed the website. *See, e.g.*, SAC ¶¶ 2, 22-25, 52-54, 188-89, 223-26. This allegation, even if
 6 true, does not meet the definition of a pen register. In the Ninth Circuit and across the country,
 7 courts have long agreed that, by definition, a pen register records *the called party’s information*,
 8 and not the calling party’s information. Here, Plaintiff is claiming she is the equivalent of the
 9 “calling party,” not the “called party.” Because a pen register is “a device that records the
 10 *numbers dialed* from a monitored telephone,” Plaintiff’s pen register claim is nonsensical. *United*
 11 *States v. Taketa*, 923 F.2d 665, 668 n.1 (9th Cir. 1991) (emphasis added); *see also, e.g., N.Y. Tel.*
 12 *Co.*, 434 U.S. at 161 n.1 (pen register “records the numbers dialed on a telephone”); *In re U.S.*,
 13 349 F.3d at 1136 n. 7 (“A pen register is a mechanical device that records the numbers dialed on a
 14 telephone by monitoring the electrical impulses caused when the dial on the telephone is
 15 released.”).⁴

16 Plaintiff admits that “[h]istorically, law enforcement used ‘pen registers’ to record the
 17 numbers of outgoing calls from a particular telephone line.” SAC ¶ 17. But Plaintiff then
 18 misconstrues this clear and settled law, suggesting that “for example, if a user sends an email, a
 19 ‘pen register’ might record the email address it was sent from because this is the user’s *outgoing*
 20 information.” *Id.* ¶ 18. Not so. The “email address [an email] was sent from” is equivalent to a
 21 calling party’s number, not “the *numbers dialed* from a monitored telephone.” *Taketa*, 923 F.2d at
 22 668 n.1 (emphasis added). As one California court recently concluded when dismissing a similar
 23 claim, “Plaintiff’s IP address is not the type of information collected by pen registers,” because

24 ⁴ By contrast, a “trap and trace device”—which the SAC does not allege and is not at issue here—
 25 captures the “incoming electronic or other impulses that *identify the originating number* or other
 26 dialing, routing, addressing, or signaling information reasonably likely to identify the *source* of a
 27 wire or electronic communication, but not the contents of a communication”). Cal. Penal Code
 28 § 638.50(c) (emphasis added). In other words, a trap and trace device “record[s] the [numbers of]
 incoming calls” to a monitored telephone. *United States v. Gonzalez*, 412 F.3d 1102, 1112 (9th
 Cir. 2005); *see also, e.g., United States v. Ellis*, 270 F. Supp. 3d 1134, 1148 (N.D. Cal. 2017)
 (defining a “trap and trace” as “a device which captures information from incoming calls made to
 the target phone”).

1 pen registers “collect outgoing information, such as outgoing telephone numbers, outgoing email
2 addresses.” RJN, Ex. B, *Rodriguez v. Plivo Inc.*, No. 24STCV08972, 2024 WL 5184413, at *2
3 (Cal. Super. Oct. 2, 2024).

4 2. **The Complaint Does Not Allege A “Communication” With Content**

5 Plaintiff also does not allege that she engaged in any form of communication with content,
6 as required to state a pen-register claim. By definition, a pen register must capture information
7 about a *communication*, but not that communication’s contents. *See* Cal. Penal Code § 638.50(b)
8 (pen register records information “transmitted by an instrument or facility from which a wire or
9 electronic *communication* is transmitted, but not the *contents*”) (emphasis added). *See, e.g.*,
10 *Twitter, Inc. v. Garland*, 61 F.4th 686, 691 n.2 (9th Cir. 2023) (“Pen registers and trap and trace
11 devices, respectively, capture the phone number associated with an outgoing or incoming call (or
12 other communication) on a given communication line.”).

13 Accordingly, to state a pen-register claim, Plaintiff must allege that she exchanged some
14 sort of communication with Mashable that contained content. She has not. While the SAC
15 broadly asserts that IP addresses are “the *means* through which [a] user actually communicates
16 with [a] website and the Internet at large,” SAC ¶¶ 32, 34 (emphasis added), it does not allege any
17 actual “communications” or “content” of communications with Mashable or anyone else. Instead,
18 the SAC merely alleges that Plaintiff “visited” the website. *See, e.g., id.* ¶¶ 52-53. But simply
19 “opening a webpage or mobile application is not a communication with content.” *Gonzales*, 305
20 F. Supp. 3d at 1086; *see also, e.g., Augustine v. Great Wolf Resorts, Inc.*, No. 3:23-cv-00281,
21 2024 WL 3450967, at *6 (S.D. Cal. July 18, 2024) (plaintiff “fail[ed] to show *communications*
22 between Plaintiff” and the website and did not allege that she “intended to convey a message”)
23 (emphasis original). Nor are keystrokes and mouse clicks. *See, e.g., Yoon*, 549 F. Supp. 3d at
24 1082 (“keystrokes, mouse clicks, pages viewed” are not “contents” of a “communication”).
25 Accordingly, Plaintiff’s claim fails.

26 3. **Parties to the “Communication” are Exempt**

27 Even if the SAC alleged any sort of “communication” with content (it does not),
28 Plaintiff’s claim would still fail because Mashable, as the website operator, would be the other

1 party to that supposed communication. Since the advent of technologies like caller ID (which are
 2 devices or processes that capture and display to the called party the telephone number of a calling
 3 party), courts have recognized that PRTT laws do not prohibit the recipient of a communication
 4 from capturing information about the identity of someone who calls or contacts them. *See Wis.*
 5 *Pro. Police Ass’n v. Pub. Serv. Comm’n of Wis.*, 555 N.W.2d 179, 188 (Wis. Ct. App. 1996). As
 6 one court explained nearly three decades ago, pen register laws were “designed to protect
 7 telephone users from unauthorized third-party or governmental intrusions,” and not “to protect
 8 telephone users from one another.” *Id.* Courts have applied this same logic to the more recent
 9 technologies and have held that PRTT laws “cannot be intended to prevent individuals who
 10 receive electronic communications from recording the IP information sent to them.” *Capitol Recs.*
 11 *Inc. v. Thomas-Rasset*, No. CIV 06-1497(MJD/RLE), 2009 WL 1664468, at *3 (D. Minn. June
 12 11, 2009) (applying federal PRTT Act in context of peer-to-peer file sharing). Indeed, Plaintiff
 13 conceded this point in prior briefing in this case, stating that “[l]ike a party to the
 14 communication,” Mashable “is not liable for its own collecting of IP addresses,” and that
 15 “Plaintiff’s claim is about the collection of her information by *third parties*—as caused by
 16 Defendant’s actions.” Plfs’ Opp. to Mashable’s Mot. to Dismiss Plfs’ First Amend. Compl. (ECF
 17 No. 14), at 11. Plaintiff’s allegation that Mashable installed and used a pen register therefore fails
 18 for the additional reason that Mashable, as a party to the supposed “communication” is exempt
 19 from the Pen Register Act’s prohibitions.

20 4. The Pen Register Act Does Not Extend to Aiding and Abetting

21 Plaintiff’s SAC contains voluminous allegations about the supposed actions of third
 22 parties. *See, e.g.*, SAC ¶¶ 54, 61, 63, 65-81, 86, 88, 90-93, 98-108, 110-11, 115, 117-121, 126-
 23 137, 141-44, 146-47, 150-53. Those allegations are irrelevant to the claim against Mashable and
 24 the Court should ignore them because the Pen Register Act does not authorize aiding and abetting
 25 liability. *See* Cal. Penal Code § 638.51(a) (prohibiting, in relevant part, only the “install[ation] or
 26 use a pen register,” except under certain conditions). Legislatures “kn[ow] how to impose aiding
 27 and abetting liability” when they wish to do so. *Cent. Bank of Denver, N.A. v. First Interstate*
 28 *Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994). When a legislature “enacts a statute under which

1 a person may sue and recover damages from a private defendant for the defendant's violation of
2 some statutory norm, there is no general presumption that the plaintiff may also sue aiders and
3 abettors.” *Id.* at 182. And the California Legislature did so in other portions of CIPA that govern
4 wiretapping. *See* Cal. Penal Code § 631(a) (making it crime for “[a]ny person” to “aid[], agree[]
5 with, employ[], or conspire[] with any person or persons to” engaged in unlawful wiretapping).
6 “[S]tatutory silence on the subject of secondary liability means there is none.” *Boim v. Holy Land*
7 *Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008). For example, courts construing the
8 federal Wiretap Act dismiss secondary aiding-and-abetting claims because that law, like the Pen
9 Register Act, does not expressly authorize them. *See, e.g., In re Carrier IQ, Inc.*, 78 F. Supp. 3d
10 1051, 1089 (N.D. Cal. 2015) (“[C]ourts should presume that Congress does not create a cause of
11 action for aiding and abetting unless it specifically says so in the text.”) (cleaned up). The same
12 result applies here.

13 C. The Rule of Lenity Requires Dismissal

14 Even if the Court finds that the SAC could potentially state a colorable pen register claim
15 against Mashable, the Court should still dismiss this case under the rule of lenity. When a penal
16 statute is ambiguous, the “rule of lenity” requires courts to limit its reach “to conduct clearly
17 covered.” *See United States v. Lanier*, 520 U.S. 259, 266 (1997). This rule applies with equal
18 force “in a criminal or noncriminal context” to ensure consistency. *Leocal v. Ashcroft*, 543 U.S. 1,
19 11 n.8 (2004). When in doubt, the Court “must choose the interpretation least likely to impose
20 penalties unintended” by the drafters. *United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012)
21 (citation omitted).

22 For the reasons detailed at length above, the Pen Register Act is at a minimum highly
23 ambiguous as to whether it applies to Mashable in the ways Plaintiff alleges, and none of the
24 alleged conduct is “clearly covered” by the Pen Register Act. When the Legislature enacted the
25 Pen Register Act in 2015, the web-based tools at issue here were commonplace, and the
26 Legislature could have drafted the Act to clearly cover them if it had wanted to do so. But
27 nowhere does the Pen Register Act expressly indicate that it governs the use of web-based tools
28 used to capture or log traffic on publicly available websites, meaning that it is at least highly

1 ambiguous. *See Nosal*, 676 F.3d at 863; *Vita*, 494 Mass. at 848 (applying the rule of lenity to
2 wiretapping claim because “the transmission of data about a user’s web browser configuration
3 and IP address bear little resemblance” to the contexts for which wiretapping laws were
4 developed). To hold that the Pen Register Act applies here would have the further effect of
5 criminalizing the use of numerous tools and technologies that permit the modern Internet to
6 function smoothly, for example, traffic-monitoring software that captures IP addresses to detect
7 malicious traffic and protect websites against cyber-attacks. As one California court recently
8 admonished, “[t]he pen register statute did not, and does not, criminalize the process by which all
9 websites communicate with all users who choose to access them.” RJN, Ex. C, *Casillas v.*
10 *Transitions Optical, Inc.*, No. 23STCV30742, 2024 WL 4873370, at *4 (Cal. Super. Sep. 9,
11 2024); *see also* RJN, Ex. D, *Licea v. Hickory Farms LLC*, No. 23STCV26148, 2024 WL
12 1698147, at *4 (Cal. Super. Mar. 13, 2024) (“public policy strongly disputes Plaintiff’s potential
13 interpretation of privacy laws as one rendering every single entity voluntarily visited by a
14 potential plaintiff, thereby providing an IP address for purposes of connecting the website, as a
15 violator”). For the Act to apply here, there must be at least some indication in its text that this
16 conduct is “clearly covered.” *Lanier*, 520 U.S. at 266. There is none.

17 In addition to the ambiguity in the Pen Register Act itself, the existence of the California
18 Consumer Privacy Act (“CCPA”)—a more specific California law, which clearly does apply to
19 the so-called Trackers and websites like Mashable’s—further demonstrates why the rule of lenity
20 requires dismissal. *See* Cal. Civ. Code § 1798.100 (2024) *et seq.* The California Legislature
21 passed the CCPA in 2018, just three years after the Pen Register Act took effect. Unlike the Pen
22 Register Act, the CCPA comprehensively governs businesses’ collection, use, and sharing of
23 “personal information,” which includes IP addresses, “Internet or other electronic network
24 activity information,” and “information regarding a consumer’s interaction with an internet
25 website.” *See id.* § 1798.140(v)(1)(F). And instead of prohibiting websites from collecting IP
26 addresses without visitors’ opt-in consent (as Plaintiff alleges is required), the CCPA allows such
27 collection subject to a notice and *opt-out* regime. *See, e.g.*, Cal. Civ. Code § 1798.120 (right to
28 opt out of sales and sharing of personal information); *id.* § 1798.135 (establishing acceptable opt-

1 out mechanisms and prohibiting sales/sharing after consumer opts out). It would have made no
 2 sense for the California Legislature to adopt an opt-out system under the CCPA if it believed that
 3 the Pen Register Act already required opt-in consent to collect information about website visits.
 4 And the CCPA has since been amended through a ballot measure and supplemented by
 5 regulations, none of which did anything to disturb the CCPA’s opt-out regime or its application to
 6 web-browsing data. *See* Cal. Prop. 24 (Nov. 3, 2020) (the “California Privacy Rights Act”); Cal.
 7 Code Regs. tit. 11 § 7000 *et seq.* In sum, the CCPA’s use of an opt-out regime confirms that the
 8 California Legislature, the electorate, and regulators did not believe the Pen Register Act applies
 9 here.⁵

10 Recent legislation pending in the California Senate further underscores the Pen Register
 11 Act’s fundamental ambiguity. As described above in Section IV.A.3., SB 690 would amend the
 12 Pen Register Act to clarify that the Legislature intended for the CCPA (and not the Pen Register
 13 Act) to govern websites’ collection, use, and sharing of “information regarding a consumer’s
 14 interaction with an Internet website.” *See id.* § 1798.140(v)(1); *see* Senate Comm. on Pub. Safety,
 15 Analysis of SB 690, at 10. It would do so by exempting any mechanism used to collect personal
 16 data from, e.g., visitors to a website, from, among other things, the Pen Register Act’s definition
 17 of a “pen register” if that mechanism is “consistent with a commercial business purpose”
 18 including because it is “subject to a consumer’s opt-out rights under” the CCPA. SB 690, Sec. 5.
 19 But even if not enacted, the fact that the drafters contend that the Pen Register Act was never
 20 intended to cover collection of information individuals visiting commercial websites visits
 21 demonstrates the Pen Register Act’s fundamental ambiguity here.

22 The California Legislature could have clearly stated that the criminal Pen Register Act
 23 applies to the conduct alleged here. It did not. The Court should not allow Plaintiff to rewrite
 24 California law to “turn ordinary citizens into criminals.” *Nosal*, 676 F.3d at 862-63. The rule of

25 _____
 26 ⁵ A recent enforcement action against online-retailer Sephora further confirms this. *See* Compl.,
 27 *People v. Sephora, USA, Inc.*, No. CGC-22-601380 (Cal. Super. Ct. S.F. Cty. filed Aug. 23,
 28 2022). In that matter, the California AG faulted Sephora for failing to provide visitors with CCPA
 required notice and the ability to opt out of sharing information about their visits with third
 parties. *See id.* ¶ 2. The California AG did not raise a Pen Register Act claim. Nor is Mashable
 aware of any instance in which the California AG has sought to enforce the Pen Register Act
 against a website for the conduct that Plaintiff alleges here.

1 lenity limits the Act “to conduct clearly covered,” and requires dismissal of Plaintiff’s claim.
2 *Lanier*, 520 U.S. at 266.

3 **V. CONCLUSION**

4 For the reasons stated above, the Court should dismiss Plaintiff’s Second Amended
5 Complaint with prejudice.

6
7 Dated: June 4, 2025

PERKINS COIE LLP

8
9 By: */s/ James G. Snell*

10 James G. Snell
11 Mikella M. Hurley
12 Timothy M. Carter

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28 Attorneys for Defendant MASHABLE, INC.