

Date of Hearing: April 23, 2013

ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND
INTERNET MEDIA

Ian C. Calderon, Chair

AB 370 (Muratsuchi) – As Amended: March 19, 2013

SUBJECT: Consumers: online tracking.

SUMMARY: Requires an operator of a commercial Web site or online service collecting personally identifiable information (PII) to disclose in its online privacy policy whether or not it honors requests by consumers to disable online tracking. Specifically, this bill:

- 1) Requires an operator of a commercial Web site or online service that collects PII about California consumers through the Internet to disclose in its online privacy policy whether or not the operator honors or complies with a Web browser's signal or other similar mechanism that indicates a request to disable online tracking of the individual consumer who uses or visits its commercial Web site or online service.
- 2) Requires an operator to disclose if it does not allow third parties to conduct online tracking on the Web site or online service.
- 3) Defines the term "online tracking" to mean "the practice of collecting personally identifiable information about an individual consumer's online activities over time and across different Web sites and online services."

EXISTING LAW:

- 1) Requires an operator of a commercial Web site or online service that collects PII through the Internet about consumers residing in California who use or visit its commercial Web site or online service to conspicuously post its privacy policy on its Web site or online service and to comply with that policy. [Business and Professions Code Section 22575(a).]
- 2) Requires, among other things, that the privacy policy identify the categories of PII that the operator collects about individual consumers who use or visit its Web site or online service and third parties with whom the operator shares the information. [Business and Professions Code Section 22575(b).]
- 3) Requires, subject to specified exceptions, a business that discloses a customer's personal information to a third party for direct marketing purposes to provide the customer, within 30 days after the customer's request, as specified, in writing or by e-mail the names and addresses of the recipients of that information and specified details regarding the information disclosed. (Civil Code Section 1798.83)

FISCAL EFFECT: None. This bill is keyed non-fiscal.

COMMENTS:

- 1) Stated Need for Legislation and Support: According to the author, "Since the California Online Privacy Protection Act (CalOPPA) took effect [in 2004], online commerce has burgeoned and evolving technology and new business practices have raised new privacy concerns. One practice that raises privacy concerns is online tracking, also called online behavioral tracking. This is the monitoring of an individual across multiple websites to build a profile of behavior and interests. In the age of smart phones and tablets, similar tracking is also done by monitoring individuals as they use different apps and different phone features. The resulting profiles are commonly used to deliver targeted advertisements. ...

"This bill would increase consumer awareness of the practice of online tracking by websites and online services, such as mobile apps. This bill will allow consumers to learn from a website's privacy policy whether or not that website honors a Do Not Track signal. This will allow the consumer to make an informed decision about their use of the website or service."

The bill's sponsor, the California Attorney General's Office, adds, "This bill is a transparency proposal - not a Do Not Track proposal. When a privacy policy discloses whether or not an operator honors a Do Not Track signal from a browser, individuals may make informed decisions about their use of the site or service."

Consumer Watchdog strongly believes there must ultimately be a legal do-not-track requirement. But they support this bill, saying, "However, in the absence of such legislation, transparency about a service's practices is a step in the right direction. Requiring transparency could well prompt more companies to honor do-not-track requests. At the least it will give consumers more information about whether data about their online activity is gathered."

- 2) Background:

- a) Recent Growth in Tracking and Marketing of Consumer Online Behavior: Wall Street Journal Articles Detail the Tracking Taking Place on the 50 Most Popular Websites:

On June 17, 2012, the Wall Street Journal published an article about user-tailored advertising and the explosion in demand for consumer data collected through web browsers. The article notes, "... [the] rapid rise in the number of companies collecting data about individuals' Web-surfing behavior is testament to the power of the \$31 billion online-advertising business, which increasingly relies on data about users' Web surfing behavior to target advertisements." This tracking often goes unnoticed by consumers and is made possible by the use of "cookie" files that record the sites visited by the consumer's Web browser. The Journal notes that in one study, the average visit to a Web page triggered 56 instances of data collection. The data collected by these cookies are so valuable that online auctions have sprung up among advertisers to compete for the data.

According to the article, "Despite rising privacy concerns, the online industry's data-collection efforts have expanded in the past few years. One reason is the popularity of online auctions, where advertisers buy data about users' Web browsing. [One firm] estimated that such auctions, known as real-time bidding exchanges, contribute to 40% of online data collection.

"In real-time bidding, as soon as a user visits a Web page, the visit is auctioned to the highest bidder, based on attributes such as the type of page visited or previous Web browsing by the user. The bidding is done automatically using computer algorithms." This is how pop-up ads for clocks and Web sites with clocks for sale begin showing up on your browser as you are looking online at clocks.

b) California Online Privacy Protection Act (CalOPPA).

In 2003, the Legislature passed AB 68 (Simitian), Chapter 829, Statutes of 2003, which generally requires operators of Web sites and online services that collect PII about the users of their site to conspicuously post their privacy policies on the Web site and comply with them. As it stands today, CalOPPA requires privacy policies to identify the categories of PII collected, the categories of third-parties with whom that PII may be shared, the process for consumers to review and request changes to his or her PII, and the process for notification of material changes to the policy. An operator has 30 days to comply after receiving notice of noncompliance with the posting requirement. Failure to comply with the CalOPPA requirements or the provisions of the posted privacy policy, if knowing and willfull, or negligent and material, is actionable under California's Unfair Competition Law and may result in penalties of up to \$2,500 for each violation. Any violation of this bill would be enforceable as a violation of CalOPPA.

c) Federal Efforts to Regulate Do-Not-Track: Basis for AB 370 Implementation:

The Federal Trade Commission in December 2010 released a preliminary staff report, *Protecting Consumer Privacy in an Era of Rapid Change*, that endorsed the idea of an easy-to-use, persistent, and effective Do Not Track system. In practice, a consumer wishing to communicate a Do Not Track signal to Web sites would generally do so via their Web browser controls, the presence of which would signal to a visited Web site that it should disable its tracking for that visit. The signal or "field" communicates that the consumer either opts in to or opts out of data tracking; if a choice is not made, the default would presumably communicate that the consumer has not opted out of tracking.

According to the California Attorney General's Office, "[s]ubsequently, all the major browser companies have offered Do Not Track browser headers that signal to websites an individual's choice not to be tracked. There is, however, no legal requirement for sites to honor the headers." There was no data immediately available to suggest how frequently Web sites decline to honor a Do Not Track signal, although one list maintained by researchers at Stanford reflects a running list of Web sites that honor the Do Not Track signal - that list shows only 20 Web sites, most of which are not commonly known with the exception of Twitter. This bill would mandate that Web sites that track users must also disclose if they are honoring the voluntary Do Not Track signal.

3) Prior and Related Legislation:

- a) AB 242 (Chau), of the 2013-14 Legislative Session, would require online privacy policies mandated under CalOPPA to be no more than 100 words, written in clear and concise language, written at no greater than an 8th grade reading level, and include a statement indicating whether the PII may be sold or shared with others, and if so, how and with

whom the information may be shared. Status: AB 242 is currently pending in the Assembly Judiciary Committee.

- b) AB 257 (Hall) of the 2013-14 Legislative Session, would expressly include mobile applications in the provisions of CalOPPA, and require operators to satisfy various privacy policy requirements for mobile applications, including allowing consumers to access their own collected and retained PII, imposing safeguards to protect PII, requiring a supplemental privacy policy if an application collects information not essential to the application's basic function, and a requirement that the operator provide a special notice if the application accesses specified devices and information. This bill would also require mobile application markets and advertising networks to comply with specified privacy procedures. Status: AB 257 is currently set for hearing April 23, 2013 in the Assembly Judiciary Committee.
- c) SB 501 (Corbett) of the 2013-14 Legislative Session, would require a social networking Web site to remove the personal identifying information of any registered user within 96 hours after his or her request, and would also require removal of that information in that same manner regarding a user under 18 years of age upon request by the user's parent. SB 501 would also impose a civil penalty, not to exceed \$10,000, for each willful and knowing violation of these provisions. Status: SB 501 is currently set for hearing on April 23, 2013, in the Senate Judiciary Committee.
- d) SB 761 (Lowenthal) of the 2011-12 Legislative Session, would have required the Attorney General, by July 1, 2012, to adopt regulations that would require online businesses to provide California consumers with a method for the consumer to opt out of the collection or use of his or her information by the business. SB 761 was returned to the Secretary of the Senate from the Senate Appropriations Committee pursuant to Joint Rule 56.
- e) AB 68 (Simitian), Chapter 829, Statutes of 2003, requires operators of Web sites and online services that collect PII about the users of their site to conspicuously post their privacy policies on the Web site and comply with them.

REGISTERED SUPPORT / OPPOSITION:

Support

California Department of Justice, Office of the Attorney General (sponsor)
Consumer Watchdog

Opposition

None on file

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