



Who's that bot? California requires clear disclosure starting 7/1/2019

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By: Carissa L. Bouwer

Starting July 1, 2019, California will require clear and conspicuous disclosures when bots are used to communicate or interact online with people in California.

Ecommerce offers consumers convenience – the ability to shop for a vast selection of products from the comfort of home. However, one thing that has frequently been missing from ecommerce websites is interactivity – the ability for consumers to ask questions, learn more about a product, or connect with the store where they are shopping.

In recent years, many stores, ecommerce platforms and service providers have begun providing messaging options that allow consumers to ask questions and interact with the seller. What consumers may not realize is that the "person" they are communicating with is not actually a flesh and blood person, but rather a software program – a bot. Bots are common on the Internet, used for everything from search engine crawling to identifying infringing content to pushing out content on social media platforms. The type of bot that simulates conversations online is called a chat bot.

Chat bots are not confined to ecommerce – far from it. In recent years, it has become clear that chat bots have moved powerfully into social media, where these automated accounts have frequently been used to confuse or deceive. And the number of such bots is soaring. Indeed, in 2018, when Twitter began purging spam bots from its site, it found itself deleting 9.9 million accounts a week.

A new California law that goes into effect on July 1, 2019 attempts to tackle this problem directly by making it "unlawful for any person to use a bot to communicate or interact with another person in California online, with the intent to mislead the person about its artificial identity for the purpose of knowingly deceiving the person about the content of the communication in order to incentivize a purchase or sale of goods or services in a commercial transaction or to influence a vote in an election."

Notably, a person using a bot will not be liable *if the person discloses that it is using a bot*. California Business and Professions Code § 17940.

In passing the law, the California legislature pointed to the 2016 presidential election as an example of how bots can spread damaging misinformation. While the law applies to all use of bots online, there is a carveout for online platforms, such as web hosting providers and Internet service providers, that have 10 million or more unique monthly United States users for a majority of months during the preceding 12 months.

A core principle in advertising law is that advertisers must refrain from making misleading or false statements and must disclose information that may be material to a consumer's decision making. Existing California law prohibits companies from making statements that are untrue or misleading in connection with communications regarding the sale of goods or services, including over the Internet. Although not explicit in the statute, legislative analysis leading to passage of the bot law indicated that failing to disclose a bot could itself constitute an intent to mislead.

The new bot law requires disclosures to be clear, conspicuous, and reasonably designed to inform persons with whom the bot communicates or interacts that it is a bot. While the law does not provide the form the disclosure must take, legislative history points to the Federal Trade Commission (FTC) guidelines for online advertising. When evaluating a disclosure, these guidelines consider placement and prominence of the disclosure and how close it is to the related claim; whether the disclosure is unavoidable; whether other parts of the ad distract from the disclosure; whether the disclosure needs to be repeated to ensure it is seen; and whether the language is understandable. Under the FTC guidance about required disclosures, scrolling and pop-up disclosures are discouraged. The law appears to require an affirmative statement that a bot is a bot (*ie*, "I am a bot" as opposed to "I am not a person"). Earlier versions of the bill had provided for use of "auto-generated" as an acceptable form of disclosure, but the legislature removed that language to make it clear that the law requires a clear, overt disclosure of being a bot.

Failure to disclose a bot appears to be considered misleading under the new law. While enforcement mechanisms are not explicitly provided by the new law, if violations are actionable under California's false advertising law, for example, then penalties for misleading advertising would include imprisonment up to six months (a misdemeanor offense) and/or fines not to exceed \$2,500 per violation. Business and Professions Code § 17500.

If you have questions about this law or would like assistance in drafting disclosures for use of bots online, please contact the authors.

AUTHORS



Carissa L. Bower

Associate

Sacramento | T: +1 916 930 3200

carissa.bower@dlapiper.com
