

## Expert Analysis

# No Bots About It: California's Crackdown On Chatbots

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On Sept. 28, 2018, California Gov. Jerry Brown signed into law first-of-its-kind legislation restricting the use of “bots” — defined as “automated online account[s] where all or substantially all of the actions or posts of that account are not the result of a person” — where a consumer cannot tell that a website or social media platform is using bot technology, as opposed to a live person, to interact with the consumer.

SB 1001 was drafted, in part, to help prevent election interference (for example, Twitter bots posting about fake news), but the new law will also impact businesses that use bots to communicate with customers to sell goods.

### Overview of SB 1001

SB 1001, which will be enacted as Business & Professions Code § 17940, et seq., takes effect July 1, 2019, and makes 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 other 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.”

The new law creates a safe harbor where the site makes a clear, conspicuous disclosure “reasonably designed to inform persons with whom the bot communicates or interacts that it is a bot.” Although the law itself does not define “clear and conspicuous,” the legislative history cites approvingly to the Federal Trade Commission standards for online advertisements, which regulate:

- Placement and prominence of the disclosure and how close it is to the related claim;
- Whether the disclosure is unavoidable;



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- 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.

The statute does not expressly provide a private right of action, but class action plaintiffs may try to bootstrap claims for alleged violations onto the “unlawfulness” prong of the California’s Unfair Competition Law.[1] Plaintiffs may also argue the use of bots to trick customers into making purchases violates the UCL’s “fraudulent” prong. Public enforcers authorized to pursue claims under the UCL may also seek statutory penalties and injunctive relief.

### **The Rise of the Bots**

As explained by the Senate Committee on Business and Professions, bots are software applications that run automated tasks on a network, such as the internet, which can interact with computer systems or users. Different types of bots can perform different tasks, such as search engine crawler bots, like GoogleBot or BingBot, that help search engines discover new content; copyright bots, such as YouTube Content ID, that help identify content posted online that violates copyright law; and chatbots that simulate conversations with human users, often in order to perform tasks such as booking a flight.

SB 1001’s intent is to help internet users distinguish between social media accounts owned and operated by “real” and “fake” persons. The bill’s author, State Sen. Robert Hertzberg, D-Los Angeles, has stated: “On the Internet where the appearance of a mass audience can be monetized, it is critical to protect users by providing the tools to understand if their information is coming from a human or a bot account disguised as one. As long as bots are properly identified to let users know that they are a computer generated or automated account, users can at least be aware of who they are interacting with and judge the content accordingly.”

A 2017 study by the University of Southern California and Indiana University found that bots make up an estimated 48 million users, or 15 percent of Twitter’s active accounts. In May 2018, Twitter said it took down 9.9 million “potentially spammy or automated accounts per week” and has placed warnings on suspicious accounts. In November 2017, Facebook disclosed to investors that it had at up to 60 million automated accounts — more than twice the number of fake users as it previously estimated.

In the social media world, bots have been used to make people or brands appear more popular than they are, thereby increasing the value of their brand. On Jan. 27, 2018, the New York Times published a detailed investigation into Devumi, a marketing company that sells a wide range of social media practices: followers, retweets and likes on Twitter; views, subscribers, likes, dislikes and shares on YouTube; plays, followers, likes, reposts

and comments on SoundCloud; followers, likes and repins on Pinterest; plays and followers on Vimeo; and followers and endorsements on LinkedIn.

Although Devumi advertises that it sells “100% Real Views from Real People,” the Times reported that it in fact uses bots to create fake accounts, and that it has created at least 3.5 million automated accounts, at least 55,000 of which use the names, profile pictures, hometowns and other personal details of real Twitter users, including minors. The Times’ investigation revealed that Devumi has more than 200,000 customers, including reality television stars, professional athletes, comedians, TED speakers, pastors and models.

On the same day the Times published its story, New York Attorney General Eric Schneiderman opened an investigation into Devumi’s practices. On Jan. 30, 2018, Sens. Jerry Moran, R-Kan., and Richard Blumenthal, D-Conn., wrote to Acting FTC Chair Maureen K. Ohlhausen asking that the FTC investigate Devumi’s practices. The FTC has not publically announced any such investigation, but the FTC has advised that buying “likes” is “clearly deceptive,” and that “both the purchaser and the seller of the fake ‘likes’ could face enforcement action.”

## **Retail Applications**

In the retail industry, bots are commonly used in customer service applications. Retail Dive reports that by 2020, about 25 percent of customer service and support operations will use virtual assistants or chatbot technology for customer engagement. The cost savings for retailers is potentially enormous: By 2023, the use of chatbots could save the retail, banking and healthcare business sectors an estimated \$11 billion. For this reason, the Wall Street Journal in 2016 declared “robots on track to bump humans from call-center jobs.”

With respect to SB 1001, retailers using bots for customer service purposes should have a reasonable argument that the law does not apply, because customer service functions do not “incentivize a purchase or sale of goods or services.”

Other retail applications abound. Numerous retailers use chatbots on their Facebook pages and/or websites to talk to customers as they explore the site — asking, for example, “Is there anything I can help you with today?” Retailers also use bots to make product recommendations; to help customers locate stores or find departments within a store; and to take or check on the status of orders.

In most of these situations, customers interacting with these services know that they are talking to a bot and not to a real person. Absent “intent to mislead the other person about its artificial identity,” the new law does not apply. Unfortunately for retailers, however, courts often hesitate to dismiss allegations of deception and intent at the pleading stage, which means that defending against potential claims could require prolonged litigation, even where the defendant has strong arguments. Thus, even where deception is unlikely, and where the retailer does not intend to deceive, a clear and conspicuous disclosure could help ward off potential claims.

## **Related Laws and Requirements**

Other states and the federal government have recently made attempts to regulate the use

of bots, and the spread of misinformation and false advertising by automated accounts, but California is the first state to require the disclosure of bots.

One area that has received significant attention is the use of bots in the online ticket marketplace — for example, to buy concert tickets immediately when they go on sale, so that they can be resold later at a markup. In 2016, President Barack Obama signed the Better Online Ticket Sales Act, or BOTS Act,[2] which prohibits the use of bots to automatically purchase event tickets online for the purpose of reselling them on secondary ticket-selling websites at a significantly higher price. On Oct. 4, 2018, the FTC announced that it will hold a public workshop on ticket marketplaces, including the use of bots, on March 29, 2019. California has its own laws prohibiting the intentional use or sale of software to circumvent security and/or control measures used by ticket selling platforms, to ensure an equitable process for ticket purchases.[3]

This year, legislators in several states, including New York, Maryland and California, as well as in the U.S. Congress, introduced legislation to regulate the purchasing of social media advertising, including by bots. In California, for example, AB 1950 (Levine) of 2018, as introduced, would have prohibited an operator of a social media site with a physical presence in California from selling advertising to a computer software account or user that performs an automated task, and which has not been verified as being controlled by a natural person (i.e., a bot). The bill ultimately died in committee.

Certain online platforms also have their own policies regarding the use of bots. Twitter, for example, introduced policies in February 2018 concerning the use of automated accounts. It permits the use of bots, and encourages developers to create useful bots that add to the platform's online community, but it now prohibits individuals from using "any form of automation ... to post identical or substantially similar content or perform actions such as Likes or Retweets across many accounts." Twitter has a variety of enforcement mechanisms, and may require an account suspected of violating its policies to verify ownership with a phone number or email address.

## **Conclusion**

Retailers should evaluate their uses of bots to assess the potential for consumer deception and the need for clarifying disclosures. Although California is currently the only state that requires the disclosure of bots, history shows that the state sets legislative trends in consumer protection laws. As more states pass laws governing bots on ticket selling platforms, regulations for other types of bots may be on the horizon.

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[1] Cal. Bus & Prof. § 17200, et seq.

[2] 114th Congress S. 3183.

[3] Cal. Bus & Prof. § 22505.5.