

A LACK OF CLOSURE ON BOT DISCLOSURE



Richard A. Schwartz

On September 28, 2018, California enacted a first-of-its-kind law that will regulate the activity of automated social media accounts, commonly referred to as “bots.” Starting on July 1, 2019, SB-1001 mandates that automated social media accounts disclose that they are bots to the extent they are used to influence commercial transactions or elections. However, SB-1001 does not specify what penalties a bot-operator might face for noncompliance, nor is it clear how SB-1001 will fit into the landscape of civil or criminal litigation. That ambiguity will require that practitioners navigate some uncertainty in order to advise clients about the risks or litigation options when faced with the ever-increasing influence of automated online activity.

What Bots Are Within Reach of SB-1001?

SB-1001’s reach is limited to “bots,” which it defines as “an automated online account where all or substantially all of the actions or posts of that account are not the result of a person.” Cal. Bus. & Prof. Code § 17940(a). But what constitutes “substantially all” or “the result of a person” remains to be determined. For example, a semi-automated customer-service account, where a human employee takes over the interaction after a few information-gathering exchanges, might not fall within the definition of a bot, even though many of its interactions are automated. Moreover, the statute addresses only bots on social media platforms with 10 million or more users, leaving bots on retail websites unaffected.

In enacting SB-1001, the Legislature was explicitly and primarily concerned with the kinds of bots that could be used to influence elections or commercial activity through deception. A Senate Floor Analysis specifically noted that organizations used bots and fake social media accounts to make contentious opinions appear more popular or widespread in the run-up to the 2016 election, and that “Russian agents published more than 131,000 messages on Twitter, uploaded over 1,000 videos to YouTube, and disseminated inflammatory posts that reached 126 million users on Facebook.” S. Rules Comm. Office of S. Floor Analyses, S. Floor Analyses, SB 1001, at 4 (Cal. Aug. 30, 2018) (http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1001, last visited Dec. 19, 2018) (“Floor Analysis”). Similarly, the Floor Analysis took note of the potential for commercial abuses that bots enable, especially when used to amplify the perceived popularity of people, products and services online. *Id.* For example, bots sold in bulk allow users to pad their follower-counts and bolster their online presence. *Id.* Likewise, bots can be programmed to leave online reviews, and bots have been found posting links that are designed to game search engine results rankings.

Of course, not all bots are used for nefarious ends. Some businesses use fully- or semi-automated online accounts to assist in customer service or sales. Other bots are programmed to distribute generally-useful information, like automated alerts about California Highway Patrol activity (@chp_la) or about earthquakes occurring in Los Angeles (@earthquakesLA). Others are the experiments of creatives tinkering around with the medium, such as @GreatArtBot, a bot that generates images based on an algorithm and poses the tacit question of whether bot-generated (*i.e.*, fully-automated) images can be art. While these

public-service-oriented bots may be within the definitional purview of SB-1001, they are unlikely to run afoul of SB-1001's prohibition on influencing commercial or electoral decision-making and therefore are largely unaffected.

What Does SB-1001 Do, Exactly?

SB-1001 makes it illegal for anyone to use a bot to communicate with another person “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” unless the bot comes with a clear and conspicuous disclosure reasonably designed to give notice that it is a bot. Cal. Bus. & Prof. Code § 17941.

Practitioners quickly will recognize that there are a number of significant limitations built into SB-1001's prohibition. Perhaps most importantly, SB-1001 offers a safe harbor for any bot-operators who identify the bot as such in a clear and conspicuous manner. That's yet another unclear description, but it likely will be enough to label the social media account as a “bot” in its name, biography, or similarly visible description.

As for bot operators who do not disclose the bot's true identity, there are still more obstacles to the imposition of liability. There are two intent requirements a bot operator must meet in order to be liable under SB-1001. First, the operator must intend to mislead message recipients about the identity of the bot, *i.e.*, to try to convince ordinary users that the bot is not actually a bot. Second, the purpose of the identity deception must be to knowingly deceive the person in order to “incentivize” some behavior in connection with a commercial transaction or to influence an election. So, hypothetically, even if @chp_la was not labeled as a bot, and its operator intended to mislead users about @chp_la's true identity, the operator would not violate SB-1001 without the additional intent to induce a user into a commercial transaction or to affect a vote in an election.

Is This Blade Runner A Private Investigator Or Government Detective?

Conspicuously absent from SB-1001's own self-

description is any indication of precisely who can enforce SB-1001's prohibition. Most troublingly for practitioners, SB-1001 does not state whether private persons can sue for being misled by a bot, nor does it state any particular measure of relief, let alone whether compensatory or punitive damages are recoverable. Instead, SB-1001 merely recites that it is intended to have a cumulative effect with other applicable laws and duties.

When some lawsuit raises the question of whether SB-1001 provides a private right of action, a reviewing court likely would apply the same analysis the California Supreme Court applied in *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592, 596 (2010). There, the Court analyzed a provision of the Labor Code that set forth a prohibition, but no particular method of enforcement. *Id.* at 597-601. The Court noted that the existence of a private right of action to redress a statutory violation depends on “whether the Legislature has ‘manifested an intent to create such a private cause of action’ under the statute.” *Id.* at 596 (quoting *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287, 305 (1988)). Finding no express instruction in the statute, the Court moved on to consider the legislative history and held that “the fact that neither the Legislative Analyst nor the Legislative Counsel acknowledged that a private right of action existed . . . ‘is a strong indication the Legislature never intended to create such a right of action.’” *Id.* at 601.

Such an analysis of SB-1001 would likely reach the same result. Nowhere in the legislative history is there any indication that the Legislature contemplated a private right of action. The only indication about who would enforce SB-1001 came from the Assembly Appropriations Committee, which estimated that SB-1001 “will result in costs in the tens of thousands of dollars to the Department of Justice to investigate and prosecute violations.” Floor Analysis, at 5. That estimate seems to assume that the state would spend less than one full-time attorney's worth of resources per year to enforce the prohibition, but it still says nothing about what the penalties might be for a violation, let alone whether private enforcement is an option.

Previous versions of SB-1001 would have imposed an obligation on social media platforms to implement a reporting scheme involving investigation and removal of

malicious bots following users' reports, but the final version of SB-1001 omitted that more onerous regime. *See SB 1001*, 2017-2018 Sess. (as amended in Senate May 25, 2018). Without some indication in the legislative history that private parties can bring a SB-1001 claim on their own, it is unlikely a court would hold that SB-1001 confers a private right of action under *Lu*.

That being said, consumers are not left without remedy if they are misled by a bot in a commercial context. Given the intent requirements imposed by SB-1001, any fact pattern presenting an actionable violation of the act likely would meet the requirements for a common law action based on fraud or negligent misrepresentation, as the only additional element required under those claims is justifiable reliance on the misrepresentation. *See, e.g., Serv. by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807 (1996) (setting forth the elements of a cause of action for fraud); *Shamsian v. Atl. Richfield Co.*, 107 Cal. App. 4th 967 (2003) (setting forth the elements of a cause of action for negligent misrepresentation).

Likewise, consumers can avail themselves of other consumer-protection statutes, such as the False Advertising

Law (Cal. Bus. & Prof. Code § 17500), the Consumer Legal Remedies Act (Cal. Civ. Code § 1770(a)), or the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200). Indeed, consumers' claims may even be enhanced by SB-1001, as it provides an independent standard of wrongful conduct on which a consumer might, for example, base an Unfair Competition Law claim. On the other hand, voters conceivably could have a tougher time proving either justifiable reliance or damages that might result from being influenced by a bot in an election. Despite SB-1001's efforts, there may not be an adequate remedy at law for that kind of injury.

Conclusion

While SB-1001 may be lauded as an effort to combat a cutting-edge problem, it remains to be seen whether or not the bill will have any substantive effect apart from being a cumulative obligation not to defraud.

Richard A. Schwartz is a partner at Browne George Ross LLP.