
ATTORNEY-CLIENT COMMUNICATION
 PRIVILEGED & CONFIDENTIAL

TO IAB DATE September 9, 2013
 FROM Venable LLP EMAIL singis@venable.com
 PHONE 202.344.4613
 RE California Governor Expected to Sign Do Not Track Disclosure Bill

A.B. 370, an amendment to the California Online Privacy Protection Act that was introduced by Assemblyman Muratsuchi and supported by CA Attorney General Kamala Harris, was presented to Governor Jerry Brown on September 3rd. He has until September 16th to sign the bill or return it to the CA Legislature with any objections. The bill automatically becomes law if the Governor does not return it to the Legislature during this time.¹

As detailed further below, when the amendment becomes effective, California law will require operators of websites and online services to publicly disclose how they respond to “do not track” (“dnt”) signals, though the exact requirements vary depending on whether an entity is a first party (*e.g.*, web publisher) or third party (*e.g.*, ad network). The new law will not require companies to honor dnt signals.

I. Current Law

A.B. 370 amends California’s current online privacy policy law located at Cal. Bus. & Prof. Code 22575, which requires online operators to post privacy policies stating: (1) the categories of personally identifiable information (“PII”)² collected through their website or online service, (2) the categories of third parties with whom the operator may share PII, (3) the process by which a consumer may review and request changes to PII collected through the site or service if such a process is maintained, (4) a description of how operators notify consumers of material changes to the privacy policy, and (5) the effective date of the privacy policy.³ A.B. 370 will not change these requirements or the meaning of PII, but adds additional disclosure obligations described in the next section.

¹ California Constitution, Article IV, Section 10.

² The term PII means individually identifiable information about an individual consumer collected online by the operator from that individual and maintained by the operator in an accessible form, including any of the following: (1) A first and last name; (2) A home or other physical address, including street name and name of a city or town; (3) An e-mail address; (4) A telephone number; (5) A social security number; (6) Any other identifier that permits the physical or online contacting of a specific individual; and (7) Information concerning a user that the website or online service collects online from the user and maintains in personally identifiable form in combination with an above mentioned identifier described in this subdivision. Section 22577 of the Business and Professional Code

³ Section 22575 of the Business and Professional Code.

II. Amended Law

Who is covered. Operators of commercial websites and online services are required to make disclosures related to dnt signals and other choice mechanisms in their privacy policy. However, the specific disclosure requirements vary for (1) operators engaged in data collection across sites and over time (*i.e.*, third parties such as ad networks), and (2) operators of websites or online services where PII is collected (*i.e.*, web publishers and other first parties).

Third Party Disclosure Obligations. Operators engaged in the collection of PII about an individual consumer's online activities over time and across third-party websites or online services are covered by the new law. These entities are known as third parties under the industry self-regulatory program administered by the Digital Advertising Alliance ("DAA").⁴ Examples of third parties covered by this law are ad networks and analytics providers. A.B. 370 requires these third parties to disclose in their privacy policy how they respond to web browser dnt signals *or* other mechanisms that provide consumers the ability to exercise choice regarding collection of the PII about an individual consumer's online activities over time and across third-party sites or online services.⁵ A third party covered by this law may satisfy this requirement by providing a clear and conspicuous hyperlink in its privacy policy that leads to an online location containing a description, including the effects, of any programs or protocols the operator follows that offers the consumer that choice.⁶ Including a link to the Digital Advertising Alliance (DAA) at www.aboutads.info/choices should satisfy this requirement.

A.B. 370 appears to require third parties to *either* disclose: (1) how it responds to web browser dnt signals *or* (2) other mechanisms that provide consumers the ability to exercise choice regarding PII collection. In cases where the third party links to an "other mechanism," while the law does not require third parties to affirmatively state that they do not respond to dnt signals (if that is the case), third parties may still elect to make such disclosures as a defense to potential frivolous assertions that such entities have not disclosed how they respond to dnt signals.

First Party Disclosure Obligations. A first party operator (*i.e.*, a web publisher that permits third parties to collect data from its site) will be required under the new law to disclose whether other parties (*i.e.*, ad networks, analytics providers *etc.*) may collect PII about an individual consumer's online activities over time and across different sites when the consumer uses the first party's website or service.⁷ Although it will not be required by this law, it is industry practice and consistent with the DAA Principles for first parties to include a link to www.AboutAds.info/choices in their privacy policy.

* * *

Please contact us with any questions.

⁴ The DAA principles govern the collection of web viewing data.

⁵ A.B. 370, Sec. 1(b)(5).

⁶ A.B. 370, Sec. 1(b)(7).

⁷ A.B. 370, Sec. 1(b)(6).