May 16, 2011

The Honorable Ellen Corbett
California State Senate
State Capitol, Room 313
Sacramento, CA 94248-0001

Subject: SB 242 (Corbett) — OPPOSE

Dear Senator Corbett:

The companies and organizations signed below are writing to strongly oppose SB 242. As amended in the Senate Judiciary Committee on May 10, SB 242 would significantly undermine the ability of Californians to make informed and meaningful choices about use of their personal data, and unconstitutionally interfere with the right to free speech enshrined in the California and United States Constitutions, while doing significant damage to California's vibrant Internet commerce industry at a time when the state can least afford it.

SB 242 would decrease overall consumer privacy

Many social networking sites currently offer what are known as "contextual" or "just-in-time" privacy or visibility controls. This practice, recognized in a recent report of the Federal Trade Commission as a best practice, lets the user make decisions about use of their data within the context of the use of that data[1]. These options give users real-time information and decision-making power about specific uses of information.

Sections 60(a) and (b) of SB 242 would require social networking sites to force users to make decisions about privacy and visibility of *all* of their information well before they have ever used the service. Known as "privacy shrink wrap," this practice results in users clicking quickly through the available options without contextual understanding of or serious thought to the case-by-case implications of the choices being made. A common just-in-time, contextual privacy notice on a popular social networking site has fewer than forty words, describes exactly the information to be shared and with whom, and is easily understood by a layperson. A description of all availability privacy and visibility options to a consumer who has never used the service in question could take thousands of words and up to half an hour to read. Making abstract, acontextual choices about privacy would be quite difficult for an educated adult; that difficulty would be even greater in the case of minor users of social networking sites.

[1] "Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers," December 2010. http://www.ftc.gov/os/2010/12/101201privacyreport.pdf

SB 242 is unnecessary

The May 10 version of SB 242 gratuitously singles out social networking sites without demonstration of any harm. There is no indication that California users of social networking sites are less sophisticated or more vulnerable than those Californians who do not use social networking sites, or that social networking sites are failing to appropriately communicate existing choices to their users. Quite to the contrary, research by the Pew Internet and American Life Project has found that two-thirds of users of social networking sites have made adjustments to privacy settings (including adjustments toward more visibility and adjustments toward less visibility) while more than 75% of users who are concerned about the availability of personal information online have done so[2]. That study also found that the most visible and engaged Internet users are also most active in adjustment of their settings.

Additionally, there is no indication that Californians want to have personal information removed from social networking sites but are unable to. Pew's study found that only 8% of social networking site users had ever asked that information about posted about them be removed, and reported no indication that such requests were being denied in droves. The major social networking sites already remove personal information when the requestor specifies the information to be removed and the information is not already widely available.

SB 242 would do significant damage to California's technology sector

California leads the world in Internet commerce; the sector employs an estimated 162,000 people, generates billions of dollars in revenue and is the fastest growing source of jobs in the state. SB 242 would dramatically limit social networking sites' growth potential in California by imposing additional operating costs and raising barriers to consumer participation in social networking services, all while exposing those services to massive and unwarranted civil liability. This would, in turn, create significant confusion and uncertainty for investors, business partners and consumers. Further, SB 242 will stifle innovation and prevent companies from bringing new and useful privacy tools to market, including the new employees required to create and service those products.

Moreover, the requirements of Sections 60(c) and 60(d) would impose a duty on social networking sites difficult or impossible to discharge using existing technologies. Social networking websites host billions of pieces of information with millions more added by the day. By exposing social networking sites to vast civil liability if they fail to implement what we already know to be an unrealistic process, SB 242 represents an serious threat to the viability of California's Internet commerce companies.

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[2] "Reputation Management and Social Media," Madden and Smith, May 26, 2010. http://www.pewinternet.org/Reports/2010/Reputation-Management.aspx

But the damage would not be limited to traditional social networking sites. SB 242 could also affect California-based application developers that depend on social networking platforms for their revenue and growth. The definition of "social networking sites" is so broad that SB 242 would also capture the web presence and business operations of a wide swath of Internet companies, ranging from membership-based non-profits to online dating and travel sites.

SB 242 would violate the United States and California Constitutions

SB 242 would notably interfere with the right to freedom of speech enshrined in both the First Amendment to the United States Constitution and Article 1 of the California Constitution. Specifically, Section 60(a) of the Social Networking Privacy Act would establish a barrier between an existing California user of a social networking site and her ability to continue speaking as desired. By hiding from view of all existing users' information until they made a contrary choice, the State of California would be significantly limiting those users' ability to "freely speak, write and publish his or her sentiments on all subjects." Section 60(c) would disrupt the legitimate speech of non-requestors who share some information in common with a requestor. For example, hundreds of Californians can rightly claim the California Senate as their place of employment. Under SB 242, any one of those individuals would have the right to demand that any other mention of California Senate by another user be taken down.

Internet commerce is an inherently interstate activity and SB 242 would regulate businesses far beyond California's borders. Social networking sites cannot reliably know if a visitor is a California resident. Therefore every covered site in the world would need to change their practices in order to comply with California law. By forcing out-of-state users to limit their sharing as required by 60(a) and to clear the thresholds to speech established by Sections 60(b) and (c), SB 242 would limit the ability of non-Californians to freely enter into in a commercial relationship with social networking sites. As a result, any out-of-state company affected by the law would be entitled to bring a Commerce Clause challenge under 42 U.S.C. §1983.

As these are federal constitutional issues, once SB 242 was declared unconstitutional, the plaintiffs would qualify for an award of attorneys' fees against California under 42 U.S.C. §1988. Enactment of this legislation would result in California taxpayers paying both the plaintiffs' attorneys' fees as well as the state's defense costs, wasting taxpayer dollars at a time when California can least afford it.

The undersigned encourage a "no" vote

There are legitimate debates happening in California and around the world about the nature of online privacy and use of personal information on the Internet. These are important discussions. However, rather than establishing a floor for online privacy which social networking sites must meet or exceed, SB 242 would establish a ceiling,

undermining meaningful consumer choice while incentivizing this growing industry to expand their operations anywhere but California.

Sincerely,

California Cable & Telecommunications Association