



ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

June 13, 2018

The Honorable Ed Chau, Chair
Assembly Committee on Privacy and Consumer Protection
1020 N Street, Room 156A
Sacramento, CA 95814

Re: SB 1001 (B.O.T. Act of 2018) – Oppose Unless Amended

Dear Assemblymember Chau:

I write to you on behalf of the Electronic Frontier Foundation (EFF) to advise you of our concerns with SB 1001. EFF is a San Francisco-based, non-profit organization that works to protect civil liberties in the digital age. EFF represents more than 40,000 active donors and members, including thousands of supporters in California.

EFF respectfully opposes SB 1001. As an organization dedicated to protecting the rights of all Internet users, we recognize that ill-intentioned bots, such as the Russian bots that interfered with the 2016 U.S. elections or spambots used for fraud or commercial gain, can cause real-life harm. But any law aimed at protecting against harmful bots must be crafted with precision—to avoid sweeping in lawful speech, to prevent the law from being abused as a tool for censoring or unmasking Internet users, and to ensure that the law will actually help prevent the harms it aims to protect against.

SB 1001 unfortunately fails in this regard. The bill applies to all “bots” on any public-facing websites, regardless of whether or not they cause harm, and will therefore sweep up perfectly lawful speech—such as speech from parody or artist accounts. As a result, the bill will not withstand First Amendment scrutiny. The bill also mandates a user-reporting system, ripe for abuse by those seeking to censor speech or unmask anonymous human speakers. Finally, due to the bill’s confusing definition of “bot”—“an online account that is designed to mimic or behave like the account of a natural person”—it would seem to apply to things like scheduled tweets, but not to auto-generated posts from fake organizational accounts, such as the Russian-controlled @Ten_GOP rogue account purporting to be the “unofficial Twitter of Tennessee Republicans.”¹

SB 1001 would silence or diminish the very voices it hopes to protect. Any law of this type, which restrains Internet speech, must be narrowly tailored to address proven harms; it is not appropriate to cast a wide net and sort it out later. If the California Legislature views this as an important issue meriting legislation, it should take the time to craft a carefully defined and

¹ See “Tennessee GOP Complained About Rogue Twitter Account,” <https://www.newschannel5.com/news/newschannel-5-investigates/tennessee-gop-complained-about-rogue-twitter-account>.

thoughtfully tailored bill designed to address the precise harms the bill seeks to protect against. SB 1001 does not satisfy these criteria, and EFF therefore urges the Assembly to vote “No” on the bill.

I. SB 1001 Would Sweep Up First Amendment Protected Speech and Would Not Pass Even Intermediate Scrutiny

Bots often represent the speech of natural persons, processed through a computer program. The human speech underlying bots is protected by the First Amendment. It is also long settled that the computer code, including the code behind parody, art, or poetry bots on social media, is a form of protected speech under the First Amendment.² Code consistently receives First Amendment protection because code, like a written musical score, “is an expressive means for the exchange of information and ideas.”³

SB 1001’s across the board bot-labeling mandate would sweep up all bots—including not only harmful bots, but also bots used for First Amendment protected activities. This includes poetry,⁴ political speech,⁵ parody,⁶ and satire—such as poking fun at people who cannot resist arguing, even with bots.⁷ By targeting all bots—instead of just the specific type of harmful bots driving the legislation—SB 1001 would chill the use of bots for such protected speech activities. The bill would, for example, restrict the speech of parodists or artists whose projects necessitate not disclosing that a bot is a bot.

SB 1001 would also compel speech by making it unlawful for any person to use a bot to communicate or interact with natural persons online without disclosing that the bot is not a natural person. The First Amendment requires courts to closely scrutinize laws that compel speech,⁸ especially when the compulsion hinders the speaker’s ability to communicate its desired message; courts recognize that “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech.”⁹

² *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449 (2d Cir. 2001); *Junger v. Daley*, 209 F.3d 481, 484 (6th Cir. 2000); *Bernstein v. DOJ*, 176 F.3d 1132, 1146 (9th Cir. 1999), vacated on other grounds, 192 F.3d 1308 (9th Cir. 1999).

³ *Junger*, 209 F.3d at 484.

⁴ https://twitter.com/soft_focuses (tweets poetry, without identifying itself as a bot).

⁵ <https://fivethirtyeight.com/features/introducing-censusamericans-a-twitter-bot-for-america/> (introducing a Twitter bot that tweets short biographies based on Census data)

⁶ <https://twitter.com/lenadunhamapols> (Lena Dunham Apology Generator).

⁷ <https://www.sbs.com.au/comedy/article/2016/10/13/hilarious-genius-has-built-twitter-bot-tricks-idiots-arguing-it-hours>.

⁸ The Supreme Court has repeatedly held that “it is . . . a basic First Amendment principle that ‘freedom of speech prohibits the government from telling people what they must say.’” *Agency for Int’l Development v. Alliance for Open Society Int’l*, 133 S. Ct. 2321, 2327 (2013) (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 61 (2006)).

⁹ *Riley v. Nat’l Federation of the Blind of N.C.*, 487 U.S. 781, 795 (1988) (“Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.”).

Courts would apply at least intermediate scrutiny to SB 1001. The bill cannot pass this test. Time, place, and manner restrictions on speech must be content-neutral, narrowly tailored to serve a significant government interest unrelated to the suppression of speech, and leave open ample alternative channels of communication.

First, while addressing consumer and/or political manipulation may be a significant government interest, SB 1001 is not narrowly tailored to address these interests. For example, a concern over consumer or political manipulation does not justify a requirement that parodists or artists tell us whether a person or a bot is behind their latest creation.¹⁰

Second, SB 1001 does not leave open ample alternative channels of communication. In the context of art bots, for example, “it seems unlikely that an algorithmic artist whose work hinges on the uncertainty of whether her account is human-run could effectively communicate her message through alternative channels of communication.”¹¹

II. SB 1001 Would Result in Censorship of Legitimate Speech and Threaten Online Anonymity

SB 1001 also would require platforms to create a system whereby users can report suspected bots. Platforms must then “determine whether or not to disclose that the bot is not a natural person or remove the bot” in less than 72 hours. On its face, this may sound like a positive step in improving public discourse, but years of attempts at content moderation by large platforms show that things inevitably go wrong—in many ways.¹²

A. Platforms Will Mislabel or Takedown Lawful Speech

First, SB 1001 would predictably cause innocent human users to have their accounts incorrectly labeled by platforms as bots, or deleted altogether. It is not always easy to determine whether an account is controlled by a bot, a human, or a “centaur” (*i.e.*, a human-machine team). Platforms can try to guess based on the account’s IP addresses, mouse pointer movement, or keystroke timing, but these techniques are imperfect and could sweep in individuals using VPNs or Tor for privacy or those with special accessibility needs who use speech-to-text input; their speech could be mislabeled by a mouse or keyboard heuristic. Platforms can also try to administer various sorts of Turing tests,¹³ but those don’t work against centaurs, and bots themselves are getting quite good at tricking their way through Turing tests.¹⁴

¹⁰ See Madeline Lamo & Ryan Calo, *Anonymous Robot Speech* (early draft), at 2 (April 2018), <https://conferences.law.stanford.edu/werobot/wp-content/uploads/sites/47/2018/02/Anonymous-Robot-Speech-We-Robot-2018.pdf> (hereinafter “Anonymous Robot Speech”).

¹¹ See *supra*, *Anonymous Robot Speech*, at 18.

¹² <https://www.eff.org/deeplinks/2018/04/platform-censorship-wont-fix-internet>.

¹³ Turing tests involve a human judge trying to tell the difference between a human and computer.

¹⁴ <https://www.eff.org/ai/metrics#Conversation:-Chatbots-&-Conversational-Agents>.

B. SB 1001 Would Be Abused As a Tool to Censor or Diminish Lawful Speech

SB 1001 would result in the takedown or mislabeling of lawful speech not only as a result of mistakes, but also as a result of abuse. Platforms' content moderation policies are widely abused in order to censor speech. Those seeking to censor speech have become experts at figuring out precisely how to use platforms' policies in order to silence or otherwise discredit their opponents on social media platforms.¹⁵ Platforms are, on the whole, terrible at enforcing their content moderation policies,¹⁶ and online trolls and others who wish to silence dissenting viewpoints take advantage of this: online trolls figure out which key indicators will trigger a platform to take something down or flag it as false or unreliable, and then report legitimate posts that contain these indicators. There is no reason to think they won't figure out how to game SB 1001's system as well.

The targets of such abuse have been the sorts of voices the supporters of SB 1001 would likely want to protect—including Muslim civil rights leaders,¹⁷ pro-democracy activists in Vietnam,¹⁸ and Black Lives Matter activists, whose posts have been censored due to efforts by white supremacists.¹⁹

Platforms have proven that they cannot adequately enforce their own *self-imposed* content moderation policies to prevent abuse and censorship of legitimate speech. Their track record is even worse when it comes to preventing abuse of *legally mandated* takedown policies. Take, for example, the federal Digital Millennium Copyright Act (DMCA), which requires platforms to remove content accused of violating copyright. Platforms generally err on the side of caution, automatically complying with even absurd takedown requests, rather than risk legal penalties. This has made copyright law a tempting tool for unscrupulous censors. EFF has seen abusive DMCA takedown notices from a would-be Senate candidate, small businesses, and even Ecuador's President.²⁰

Like the DMCA, SB 1001 creates a quick and easy way to make speech disappear from the Internet without clear standards or meaningful recourse,²¹ and it will result in platforms acting first and asking questions later. Platforms have little incentive to complete a thorough

¹⁵ See, e.g., "Facebook's reporting algorithm abused by antivaccinationists to silence pro-science advocates," <https://sciencebasedmedicine.org/facebook-s-reporting-algorithm-abused-by-antivaccinationists-to-silence-pro-science-advocates/>.

¹⁶ See, e.g., "Online Censorship," <https://onlinecensorship.org>.

¹⁷ "How Do Facebook 'Community Standards' Ban a Muslim Civil Rights Leader and Support Anti-Muslim Groups?," <http://chicagomonitor.com/2016/06/how-do-facebook-community-standards-ban-a-muslim-civil-rights-leader-and-support-anti-muslim-groups/>.

¹⁸ "Vietnam activists question Facebook on suppressing dissent," <http://www.dailymail.co.uk/news/article-5597481/Vietnam-activists-question-Facebook-suppressing-dissent.html>.

¹⁹ "Civil rights groups urge Facebook to fix 'racially biased' moderation system," <https://www.theguardian.com/technology/2017/jan/18/facebook-moderation-racial-bias-black-lives-matter>.

²⁰ "Copyright, The First Wave of Internet Censorship," <https://www.eff.org/deeplinks/2018/01/copyright-first-wave-internet-censorship>.

²¹ *Id.*

investigation into whether a reported account is actually operated by a bot—particularly given that (a) SB 1001 requires platforms to complete their investigation in under 72 hours, and (b) taking an account offline or marking it as a bot would quickly and easily fulfill the platform’s legal obligations under the bill.

Supporters of SB 1001 have argued that the bill will not necessarily result in the takedown of legitimate speech, because platforms have the option of labeling accounts as bots.²² But being incorrectly labeled as a bot could, by diminishing a person’s speech, be just as harmful to someone’s ability to speak as taking down their account or forbidding them from speaking in the first place; people simply may not listen to a human labeled as a bot.

C. SB 1001 Would Be Abused to Unmask Anonymous Speakers

SB 1001 would also reduce the ability of individuals to speak anonymously online. The bill will be hard to enforce in practice without unmasking anonymous human speakers. While merely labeling an account as a bot does not pierce anonymity, platforms may require identify verification in order for a human to challenge their decision to either takedown their account or label it as a bot. Those seeking to unmask anonymous speakers could abuse this system, forcing human speakers to decide between disclosing their identities and being censored or diminished.

We also expect bot-labeling mandates to lead to demands for verification of whether or not an account is controlled by a bot, which will result in piercing anonymity.

Anonymous speech is not only fully protected by the First Amendment,²³ but it constitutes an “honorable tradition of advocacy and of dissent.”²⁴ As the Supreme Court has recognized, “Anonymity is a shield from the tyranny of the majority.”²⁵ As a result, just as government mandates that one speak or publish, laws that infringe on the right to anonymity in “core political speech,” are subject to close judicial scrutiny.²⁶

Simply put, SB 1001 will not achieve its author’s intent and will have serious negative unintended consequences. We strongly urge you to vote “NO” on SB 1001.

Thank you for the opportunity to highlight our concerns about SB 1001. If you have any questions, please feel free to contact me at either (415) 436-9333 x164 or jamie@eff.org.

²² “California Lawmakers Want Twitter Bots Branded With Disclaimers,” https://motherboard.vice.com/en_us/article/9kgv4y/california-levine-lawmakers-want-twitter-social-media-bots-branded-with-disclaimers.

²³ *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 200 (1999).

²⁴ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

²⁵ *Id.*

²⁶ *Id.* at 334–35.

Sincerely,

A handwritten signature in black ink, appearing to read "Jamie Williams".

Jamie Williams
Staff Attorney
Electronic Frontier Foundation

cc: The Honorable Members of the Assembly Committee on Privacy and Consumer Protection