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April 14, 2015

To: Chair Prozanski and Senate Judiciary Members
From: Carl Szabo, Policy Counsel, NetChoice
RE: Opposition to SB 369 and all proposed amendments

Dear Senate Judiciary Members,

NetChoice is a trade association of e-Commerce and online businesses. We represent over 18 companies including Facebook, Google, Yahoo who have offices or data centers in Oregon. We thank Chair Prozanski and Judiciary Committee Administrator Channa Newell for holding a work group with one representative from the Uniform Law Commission, tech, and privacy perspectives. We remain extremely concerned about the amendments to SB 369 because they violate the federal privacy law Electronic Communications Privacy Act (ECPA) and create inappropriate or unworkable obligations for online service providers.

The proposed amendments require online communication service providers to turn over records and subject lines without express consent from the recipient or sender. This is a violation of the federal law ECPA, which defines content as any information concerning the substance, purport, or meaning of that communication (18 USC § 2510.) This includes subject lines.

The United States Justice Department views subject lines as content that can only be disclosed through expressed consent or with a valid court order or other legal authority under the wiretap statute. This position is validated in a California 2013 court decision that said subject line is “nothing less than a pithy summary of the message’s content”¹ – it considered the a subject line as a way to convey a message about the substance of the communication.

The amendments would also require businesses to create an afterlife management tool that Oregon residents fill out upon sign up. This creates clear privacy concerns for users of many types of online communication services. Such systems are inappropriate for many tools that center on anonymity, privacy, or provide tools that are not meant to transfer to a next of kin – text messaging, dating services like OK Cupid, forums for mothers with newborns or online support groups for people experiencing depression, a disability, or an addiction. It also raises questions about whether a user will be forced upon sign-up to decide what they want to happen upon their death as a requirement for that service, as well as what would be required of people who move to Oregon after signing up for an account.

Moreover, creation of these tools is a major undertaking that could require hundreds of hours of work and testing - something difficult for large online service providers and virtually impossible for smaller ones. Behind any webpage is thousands to millions of lines of existing code; implementing a new feature is often a major overhaul of existing code. Further, online services can have billions of users and changes to accommodate one state in the world can be difficult. Finally, a change such as this can require significant updates to privacy policies (perhaps requiring new opt-in consent), creation of segmented databases, and inundating users with notifications.

We strongly encourage you vote no on SB 369 and the proposed amendments. Please let me know if I can provide further information.

Sincerely,

Carl Szabo
Policy Counsel, NetChoice

¹ *Optiver Australia Pty. Ltd. & Anor. v. Tibra Trading Pty. Ltd. & Ors.*, 2013 WL 256771 (N.D.Cal., Jan. 23, 2013)