Computer & Communications Industry Association
Tech Advocacy Since 1972

July 29, 2022

Senate Appropriations Committee
Room 2206
State Capitol
Sacramento, CA 95814

Re: AB 587, Social Media Companies - Terms of Service (Oppose)

Dear Chair Portantino and Members of the Senate Appropriations Committee:

On behalf of the Computer & Communications Industry Association (CCIA),[1] I write to express concerns about AB 587 in advance of the Senate Appropriations Committee hearing on August 1, 2022.[2]

CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. Proposed regulations on the interstate provision of digital services therefore can have a significant impact on CCIA members. Recent sessions have seen an increasing volume of state legislation related to the regulation of what digital services host and how they host it. While recognizing that policymakers are appropriately interested in the digital services that make a growing contribution to the U.S. economy, these bills require study, as they may raise constitutional concerns,[3] conflict with federal law, and risk impeding digital services companies in their efforts to restrict inappropriate or harmful content on their platforms.

We appreciate the sponsors' goals and the thoughtful approach to this legislation. Of note, the revised January 1, 2024 deadline will provide industry stakeholders and technical experts from both small and large firms alike more time to review and implement the lengthy compliance obligations. Nevertheless, industry maintains several concerns with AB 587 and its potential unintended consequences.

1. **Businesses operating online depend on clear regulatory certainty across jurisdictions nationwide.**

[1] For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at https:// www.ccianet.org/members.

[2] CCIA refers to AB 587 in its amended form as of June 30, 2022.

[3] Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 Hastings L. J. 1203 (2022), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3985&context=hastings_law_journal.

Existing U.S. law provides websites and online businesses with legal and regulatory certainty that they will not be held liable for third-party content and conduct. By limiting the liability of digital services for misconduct by third-party users, U.S. law has created a robust Internet ecosystem where commerce, innovation, and free expression thrive — all while enabling providers to take creative and aggressive steps to fight online abuse. Ambiguous and inconsistent regulation at the state level would undermine this business certainty and deter new entrants, harming competition and consumers.

2. **Overly prescriptive regulation of terms of service could harm vulnerable users.**

Responsible digital services providers already take aggressive steps to moderate dangerous and illegal content, consistent with their terms of service. The companies deliver in the commitments made to their user communities with a mix of automated tools and human review. Last year, a number of online businesses announced that they have been voluntarily participating in the Digital Trust & Safety Partnership (DTSP) to develop and implement best practices to ensure a safer and more trustworthy Internet, and have recently reported on the efforts to implement these commitments.[4]

As digital services invest significant resources in developing and carrying out trust and safety operations to protect users from harmful or dangerous content, they require flexibility in order to address new challenges as they emerge. While the legislation has been amended to exclude training materials from disclosure, the proposed requirements would still mandate that services disclose internal content moderation practices. Without further definition of "terms of service", the provisions may be both overly prescriptive and counterproductive to the legislation's intended goals — rather than protecting consumers from harmful content, they might have the adverse unintended consequence of giving nefarious foreign agents, purveyors of harmful content, and other bad actors a playbook for circumventing digital services' policies.

3. **The reporting requirement is redundant and could disproportionately impact smaller companies.**

AB 587 would require companies to compile and submit a quarterly transparency report to the California Attorney General. Many online platforms already voluntarily and regularly generate such reports and make them publicly available on their websites. Doing so is in fact an evolving industry practice: since its launch 16 months ago, DTSP has quickly developed and executed initial assessments of how its member companies are implementing the DTSP Best Practices Framework,

[4] Margaret Harding McGill, *Tech giants list principles for handling harmful content*, Axios (Feb. 18, 2021), https://www.axios.com/tech-giants-list-principles-for-handling-harmful-content-5c9cfba9-05bc-49ad-846a-baf01abf5976.html.

which provides a roadmap to meaningfully increase trust and safety online. This roadmap includes several commitments to transparency and content moderation disclosures, in addition to others, to which DTSP members are expected to adhere.[5]

However, the development of such reports is extremely labor-intensive, and requiring detailed documentation with this frequency could disproportionately burden smaller companies with limited resources. CCIA recommends that the reporting requirement be limited to annually instead of quarterly to offset the time and labor necessary to produce such detailed reports.

4. **Compliance obligations should not be designed around revenue thresholds or carveouts.**

CCIA urges legislators to reconsider a statutory definition gerrymandered around particular businesses with revenue thresholds and an assortment of carveouts, and instead to craft compliance obligations that are manageable by all entities operating in the relevant sector.

In any event, the application of such definitions regularly leads to ambiguities about scope. The current definition, for example, leaves ambiguous how to treat revenues in international markets and currencies, and raises questions about whether businesses that convey email or direct messaging but also advertising are "exclusively" providing service. Given the disproportionate penalties contemplated for compliance failures, these definitions demand greater clarity.

5. **Further, the proposed penalties for violations are overly burdensome and may, again, disproportionately impact smaller companies.**

AB 587 specifies that applicable social media companies in violation of the bill's provisions may be subject to a civil penalty of up to $15,000 per violation, per day. In addition, CCIA notes that a previous version of AB 587 provided a 30-day cure period for digital services to come into compliance before incurring penalties. We encourage legislators to include at least a 30-day cure period, as this allows digital services the opportunity to correct and address any compliance issues before accumulating penalties. Smaller companies, in particular, who may already struggle to meet the labor-intensive transparency reporting requirement may subsequently be additionally strained with the financial burden imposed. Because these statutory penalties are unmoored from any actual injury to users, they are inherently arbitrary. Penalties for non-compliance should instead have some relationship to the injury to users.

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[5] *See, e.g.*, DTSP, *The Safe Assessments: An Inaugural Evaluation of Trust & Safety Best Practices* at 37 (July 2022), https://dtspartnership.org/wp-content/uploads/2022/07/DTSP_Report_Safe_Assessments.pdf (Appendix III: Links to Publicly Available Company Resources).

Separately, although the bill has been amended to establish enforcement authority with the state attorney general, it also authorizes county counsel and some city district attorneys to bring actions for relief – including financial penalties – in certain instances. If the action is brought by a district attorney or county counsel, the collected penalty would be paid to the treasurer of the county in which the judgment was entered. Similarly, if the action is brought by a city attorney or city prosecutor, the collected penalty would be split equally among the treasurer of the city and the treasurer of the county in which the judgment was entered. This provision creates a punitive financial incentive for district, county, and city officials to seek out formalistic violations in order to supplement local resources, while not necessarily supporting efforts to increase transparency.

We appreciate your consideration of these comments, and stand ready to provide additional information as the legislature considers proposals related to technology policy.

Sincerely,

Khara Boender
State Policy Director
Computer & Communications Industry Association