SIIA Accelerating Innovation in Technology, Data & Media

April 17, 2017

Hon. William Botzow
Chair
House Commerce Committee
Vermont State House
115 State Street
Montpelier, VT 05633-5301

Re: Opposition to HB 467

Dear Representative Botzow:

On behalf of the Software and Information Industry Association, I am writing to oppose HB 67, "The Data Broker Protection Act."

SIIA is the principal trade association of the software and information industries and represents over 800 companies that develop and market software and digital content for business, education, consumers, the Internet, and entertainment. SIIA's members range from start-up firms to some of the largest and most recognizable corporations in the world.

Our members include:

- software publishers and creators of graphics, and photo editing tools;
- financial trading and investing services, news, and commodities exchanges;
- corporate database and data processing software;
- business to business and specialized publishers; and
- education software and online education services.

On pain of civil penalties and injunctive relief, the bill requires "data brokers" to register with the state. A data broker, in turn, is defined as a "commercial entity" that sells or exchanges "personal information" "for consideration" to register with the state, but only if the information does not relate to a "customer." HB 467, § 2246a(1),(2).

The definition of personal information is extremely broad. It includes any "information" that "is *capable* of being associated" with an individual from several discrete categories (emphasis supplied). These categories include "any … financial information," "physical characteristics or descriptions," "legal history, including criminal records, civil actions and judgments," "profile that includes personality, characteristics, or mental health," "social media history," "licensing or real property history," "vital statistics," and so on. *Id.* § (a)(2)(A)-(L).

So-called data brokers must register with the state every year, and have to create written procedures that create a reasonable belief over the true identity of each purchaser and that the customer is not purchasing the information for an illegal purpose. *Id.* §§ 2446b, 2446c. The undeniable effect of this legislation is to make it illegal to disseminate so-called "personal information" without registering with the state.

We understand that other industry groups have indicated their opposition to this measure, and share many of those concerns. SIIA opposes the bill not only for those reasons, but also because of the burdens it would place on its members' protected First Amendment activity. The bill is inconsistent with the most basic First Amendment principles—its practical and constitutional problems are intertwined.

The Dissemination of Information Is Protected First Amendment Activity

The dissemination of information is, of course, protected speech. "[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct" (some internal quotation marks omitted)). *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). There is no allegation or suggestion that the information that so-called "data brokers" collected is inaccurate, defamatory, unlawfully acquired or intrusive on individual privacy. The state seems primarily concerned with the concept that some information may, at some unknown time and through an unknown means, be used for an illegal purpose.

First Amendment speakers are not required to obtain licenses to publish accurate information based simply on the undifferentiated fear that misuse of the information might possibly occur. We are aware of no state statute or case law precedent that permits the government to regulate the dissemination of information in this way. Even assuming—generously—that the legislation would receive the lesser scrutiny afforded commercial speech, it cannot hope to pass that test.

The Legislation is not Tailored to a Substantial State Interest.

In order for a statute to pass commercial speech scrutiny, it must be supported by a substantial state interest. In addition, the restriction on speech must directly advance the state interest, not provide ineffective support for the government's purpose. If the state can advance its interests with a more tailored statute, "the excessive restrictions cannot survive." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 564 (1980) (cited in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

The interests ostensibly protected by this bill include Vermonters' privacy, and the state's general interest in minimizing crime. But the definition of "personal information" excludes direct customer lists, which can be sold without registration and which contain information that actually identifies individuals—information that could be far more damaging to privacy. Indeed, the definition—by its terms—applies to information that is *"capable"* of being associated with an individual, which is virtually anything at all. Its terms would sweep in a number of SIIA's members, including:

- Newspapers that publish pictures and descriptions of people who are "not their customers".
- Securities clearing houses that record dates and sales of trades—financial information that "could" be associated with a third party.
- Almost any kind of newsletter, blog, for-profit or non-profit publication that uses internet advertising.

- Publishers of volumes of court opinions, annotations, law reviews and treatises.
- Aggregated, de-identified marketing data routinely used in scholarship as well as commercially.

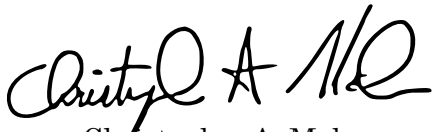
Whether such coverage is "intended" or not is entirely irrelevant, given the words used in the bill: the bill requires SIIA members to comply with its burdensome requirements, which are triggered by the publication of information that poses no threat to personal privacy.

Providing the "sources" of such information could not only lead to a chilling effect in information gathering, but the compromise of valuable intellectual property— many "sources" of information are typically trade secrets. The provisions do little or nothing to protect against actual misuse of the data.

That said, we acknowledge that there may be cases in which information is collected and misused. We respectfully suggest that the proper way to regulate such misuse is through regulation targeted at offending conduct, such as anti-stalking laws and common-law causes of action involving disclosure of private facts and intrusions on seclusion. Such laws are effective, and do not affect important protected interests. In short, while sympathetic to the ends that the state seeks to achieve, we must regretfully oppose the means.

Thank you for your consideration of our views.

Respectfully submitted,



Christopher A. Mohr

Vice President for Intellectual Property and
General Counsel