

Opaque Transparency: Why California's Supply Chain Transparency Act is Unenforceable

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Abstract

Traffickers are dynamic, fluid operators; reacting well to consumer demand, under-regulated economic sectors, and easily adapting to exploit weaknesses in prevailing laws. Corporate globalization of storefronts and extensive manufacturing supply chains have contributed to human trafficking becoming the fastest growing criminal enterprise in the world. California's legislative and social experiments are often models other governments look to for guidance. California is the first government to require businesses to disclose their anti-trafficking supply chain policies to their consumers. Under the California Transparency in Supply Chains Act of 2010 (CATSCA), large retailer sellers must conspicuously disclose on their web site their policies, *if any*, to detect and fight slave labor within their supply chain. This article explores the requirements of the CATSCA and will examine the legal effectiveness of the California transparency framework.

Key words

Human trafficking; supply chain transparency; California Forced Labor; SB657

Resumen

Los traficantes son agentes dinámicos, de gran fluidez: reaccionan bien a la demanda de los consumidores y a los sectores económicos sin regular, y se adaptan para explotar las debilidades de las leyes vigentes. La globalización corporativa de los comercios y de las grandes cadenas de suministro ha contribuido a que el tráfico de personas se haya convertido en el negocio criminal de crecimiento más rápido en el mundo. El gobierno de California ha sido el primero en exigir que los negocios revelen a sus clientes su política anti-tráfico. El llamado California Transparency in Supply Chains Act (CATSCA), de 2010, obliga a los mayoristas a publicar en sus sitios web, de forma preeminente, las políticas que siguen – *caso de que las tengan* - para detectar y combatir el trabajo en esclavitud

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dentro de su cadena de suministro. Este artículo explora los requisitos del CATSCA y examina la efectividad de las normas sobre transparencia.

Palabras clave

Trata de personas; transparencia de la cadena de suministro; trabajo forzado en California; SB657

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1. Introduction

It is widely acknowledged that human trafficking decimates the lives of victims, fractures families, and is a crime which exploits the labor of others, treating them as renewable resources. Trafficking is a highly dynamic and fluid phenomenon that reacts remarkably well to consumer demand, under-regulated economic sectors, and easily adapts to exploit weaknesses in prevailing laws (U.S. Department of State 2010). Over the past few years, governments have accelerated the formation, adoption and implementation of laws focused on the investigation and prosecution of human trafficking. In 2010, the California State Legislature initiated a novel approach - fostering greater public awareness by requiring businesses to disclose their anti-trafficking supply chain policies. Corporate globalization of storefronts and manufacturing has contributed to human trafficking becoming the fastest growing (Nagle 2008) and the third most widespread criminal enterprise in the world (Kumar 2005) by lengthening supply chains into regions of the world's vulnerable populations, whereby they are still able to provide goods to the wealthier nations at a profit. Forced labor can occur at any point of a product's manufacturing lifecycle – from the harvesting of raw materials, to assembly and production of a product, to the transportation/selling of the final product. In 2012, the United States' Department of State estimated as many as 27 million adults and children in forced labor, bonded labor, and forced prostitution worldwide (U.S. Department of State 2012). An estimated 2.5 million people worldwide are subjugated into forced labor at any given time (International Labour Organization – hereinafter: ILO- 2007). One hundred sixty-one countries are reported to be affected by human trafficking by being classified as either a source, transit or destination country (United Nations Office on Drugs and Crime 2006). Victims have originated from 127 countries, transported and exploited in 137 other countries, spanning every continent and every sector of the economy (Panjabi 2009). As manufacturing and shipping technology advances so does easier access to goods from more remote countries. This supply chain extension allows traffickers to target vulnerable and at-risk populations in attempts to lower manufacturing labor costs (Nagle 2008, Panjabi 2009). Traffickers are reaping enormous financial gain from the emerging “global manufacturing culture” where forced labor profits are estimated to be in excess of \$150 billion (U.S.) (ILO 2007).

States are often seen as laboratories of democracy: micro-economies where citizens can adopt novel social and economic experiments (*New State Ice Co. v. Liebmann* 1932). Hoping to increase consumer awareness California passed the California Transparency in Supply Chains Act of 2010 (hereinafter: CATSCA), whereby large retail sellers must conspicuously disclose on their public web site their policies, if any, to detect and fight slave labor. California's legislative and social experiments are often the foundational model upon which other governments look to follow (Gorsen and Bryden 2015). This article will highlight the newly implemented legislative measures designed to increase consumer awareness and will exam the legal framework for effectiveness.

2. Human trafficking in the United States and corporate globalization

Human trafficking is extremely broad in scope and has infested entire sectors of the world's economy (Fletcher *et al.* 2005). While every form of trafficking contains the same central motivational characteristic, the unscrupulous exploitation of another for profit, traditionally law enforcement in the U.S. has employed a myopic view solely on the sexual exploitation trade, e.g. prostitution (Kim and Chang 2004). Based on my own work and experience, the United States Federal and State governments, strongly influenced by advocacy groups, have begun to broaden their understanding of human trafficking to include the subjugation of people into forced labor. The Convention Concerning Forced or Compulsory Labor (1930) generally defines forced labor as, “all work or service which is exacted from any person under

the menace of any penalty and for which the said person has not offered himself voluntarily" (Convention Concerning Forced or Compulsory Labor 1930) and is legally treated as personal property (Locke 1689/1988). Forced labor is not only the theft of one's time and energy, but is also a fundamental attack on another's human liberty and freedom. Primarily based in the rich farming history, California has a long-established record of recognizing and valuing stolen labor (California Penal Code, section 484).

There are five main economic sectors of the United States economy that are affected by forced labor: prostitution and sexual services (46%), domestic services (27%), agriculture (10%), textile sweatshops and factories (5%), and the restaurant and hotel industry (4%) [Fletcher *et al.* 2005]. In its June 2010 Trafficking in Persons Report, the U.S. Department of State reported that "[m]ore people are trafficked for forced labor than commercial sex" and the International Labour Organization estimates that there are nine times the amount of trafficked victims subjugated into forced labor than the sex trade, (U.S. Department of State 2010, p. 5) generating profits in the billions (Human Trafficking Awareness Coalition of Sarasota County 2011). Many industries, including textile manufacturing shops, domestic labor providers, construction sites, and agricultural employment roles (DeStefano 2008) are garnering new societal and regulatory scrutiny for their overseas sourcing of cheap labor. Although slavery and involuntary servitude have been illegal for generations (U.S. Constitution Amendment XIII), state and federal governments are modernizing their consumer awareness and protection laws to specifically address and combat this developing pattern of predation (Clawson *et al.* 2006).

The largest concentrations of trafficked victims within the United States have been located in California, Oklahoma, Texas and New York (Polaris 2014). According to the 2011 National Human Trafficking Resource Center Report, California is the state with the most "potential trafficking locations" and the state with the most "caller locations" (National Human Trafficking Resource Center 2011). A 2009 study found that "eighty-two percent of foreign adult victims were labor trafficking victims, of which 58 percent were men and 42 percent were women; 15 percent were adult sex trafficking victims, all of whom were women; and 3 percent were victims of both forms" (U.S. Department of State 2010, p. 341). "Fifty-six percent of foreign child victims were labor trafficking victims, of which half were boys and half were girls; 38 percent were sex trafficking victims, of which 16 percent were boys; and 6 percent were victims of both" (U.S. Department of State 2010, p. 341). In 2016, applying a newly refined emphasis on forced labor, jurisdictions globally prosecuted 857 cases, securing 456,335 successful forced labor prosecutions and 14,262 identifiable victims (U.S. Department of State 2016, p. 45). Without robust supply chain disclosure requirements unwitting consumers will continue to support these practices with their purchase of slave made goods.

3. Corporate globalization has increased the marketplace for slave made goods

Globalization of the manufacturing and production supply chain has led to more opaque and complex product source supply chains (U.S. Department of State 2012). Across the world there are hundreds of thousands of trafficked people forced to work in trafficker controlled environments where workers are effectively isolated and dominated: remote farms, mineral quarries, raw material mines, off-shore fishing refineries and industrial textile sweatshops. Because of its ubiquity, the consumer should not consider slave labor a *niche* market phenomenon. Eradicating forced labor from the global economy requires dedication and a coordinated effort from primary stakeholders: white hat corporations; local, state and federal governments; and well-informed consumers.

Multi-national corporations all share the same legal requirements of maximizing profits. Lower labor costs permit companies to produce cheaper commodities and, in-turn, increase market share and profit margins. Since profits are a derivative of production price and consumer demand, linking trafficking awareness to the marketing of a product provides the required incentive to ensure proper corporate recognition of forced labor. A 2011 U.S. Department of Labor study found 130 products from 71 countries were made by forced and child labor (U.S. Department of Labor 2011, p. xi) – mostly originating in Asia, Africa, and South America. With California's sought-after consumer based economy, the State Legislature wanted to provide consumers with informational disclosures upon which societal pressures could be leveraged. Many anti-slavery groups hoped the California Transparency in Supply Chains Act of 2010 "would create an opportunity for California companies to demonstrate leadership in eradicating slavery and human trafficking from their supply chains and empower consumers to reward companies that proactively engage in such efforts" (Gebauer 2011).

Many large companies and retail sellers already impose internal standards and procedures to ensure quality, environmental and ethical treatment of their employees and procedures to ensure the source of their raw materials are not obtained through human rights abuses (González Marcos 2010). A fairly recent report, *Toward a Safe, Just Work Place: Apparel Supply Chain Compliance Programs* (Galland 2010), supported by a network of 20,000 retailers, analyzed and compared data on the compliance programs of major apparel companies in U.S. markets. Levi Strauss & Co., Wal-Mart Stores, Gap Inc., Hanes Brands, Nordstrom, and Gildan Active Wear fared well regarding compliance programs because they are "not only doing the basics of auditing facilities but also committing significant resources to remediation, continuous improvement, and collaboration at many levels (...). [They allow] substantive third-party critiques and furnish public reporting" (González Marcos 2010, p. 3). Where industry has demonstrated a reluctance to ensure socially responsible activity, methods utilizing monetary market forces to pressure companies into responsible practices ought to be advanced. Market forces have been significantly altered by: "[t]he corporate social responsibility movement [which] seeks to influence directly or indirectly or control corporate behavior through a combination of: (1) marketplace activism (influence over or via capital structure and sales of the corporation); (2) internal self-regulation (codes of conduct); and (3) shareholder activism" (Engle 2004, p. 106).

Marketplace activism is an attempt to apply external pressure which can include consumer boycotts, shaming consumers who do not honor the boycott, and identifying corporations that do not recognize or abide by basic human rights in their factories (Fahey 2009). This form of activism has been successfully employed forcing the DeBeers diamond cartel to endorse the Kimberley Process's certification requirements which were designed to eliminate blood/conflict diamonds from the raw mineral acquisition supply chain (Feldman 2003). Another market pressure point is found in urging consumers to purchase products which are conspicuously labeled indicating human rights abuses did not occur in the manufacture of the product. The Rugmark (RugMark Foundation North America 2008) labeling process on luxury rugs constructed in India and the FIFA labeling process on soccer balls are successful examples of corporate self-labeling standards signaling to consumers' child labor was not employed in the manufacturing process (Fahey 2009).

Notwithstanding these procedures, slave labor still supports an abundance of industries. It continues to be found in traditional fashion/textile, agricultural, and mining industries and has spread to significantly support emerging industrial base of technology manufacturing and production. A majority of companies want to be good corporate citizens. A clear and concise supply chain disclosure process would provide an opportunity to burnish a company's brand and image. "Those who know they have a lot to lose are more likely to engage in a cost-benefit analysis of the

consequences of a crime" (Harris 2009, p. 194). Numerous large companies, such as GAP, Nike, and Ford Motor Company, have already experienced the monetary consequences of a negative reputation (Locke and Romis 2007). These companies have also embraced a second chance and employed greater safeguards and are among the first to post extensive forced labor supply chain disclosures in compliance with California's law.

4. United States - State and Federal Legislation

Globalization and the diffusion of industry supply chains to developing countries have provoked a conversation on how best to monitor and improve labor standards in source countries (Locke and Romis 2007). Two main strategies have emerged. First, "monitoring for compliance with codes of conduct is currently the principal way that both global corporations and labor rights nongovernmental organizations address poor working conditions (...)" [Locke and Romis 2007]. Second, a deeper understanding of human trafficking, critically analyzing not only the criminal act, but also how to reduce the consumer demand for forced labor products. The California Transparency in Supply Chains Act of 2010 was specifically designed to accommodate both approaches. The California Legislature, in requiring businesses to provide anti-trafficking policies information on their websites, is fostering greater consumer awareness, calculating that businesses will begin to implement and/or maintain effective anti-human trafficking supply chain policies based on economics. However, to fully understand the unique and flexible qualities of this law, one must look at previous slave/forced labor made goods related legislation to under why this attempt may be successful in raising consumer awareness.

4.1. Section 307 of the Smoot-Hawley Tariff Act of 1930

Almost ninety years ago the United States Congress passed the Smoot-Hawley Tariff Act of 1930. Paragraph 1307 of the Tariff Act states:

All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor (...) shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited (...). The provisions of this section relating to goods, wares, articles and merchandise mined, produced, or manufactured by forced labor (...) [shall not be] applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States (...). *Forced labor*, as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily.

Section 307 of the Smoot-Hawley Tariff Act appears unambiguous: products made through forced labor cannot be imported into the United States. However, while convict made goods are completely barred from importation, goods produced by forced labor are allowable if consumer demand for that good is greater than the quantity currently existing in the U.S. (*China Diesel Imports Inc. v. U.S.* 1994). Even if domestic production capabilities of a product meet most of the domestic consumptive demand, any quantity of the product may still be imported (*McKinney v. U.S. Dept. of the Treasury* 1985). Additionally, importation cannot be barred even when the product is available from a country where it is not produced by forced labor (*McKinney v. U.S. Dept. of the Treasury* 1985). The courts, however, have not been consistent in the determination of the legislative intent of Section 307 (*China Diesel Imports, Inc. v. U.S.* 1994).

U.S. Courts have routinely held economic reasons, whether protecting the consumptive demands of Americans or protecting American industry, spurred the formulation and enactment of Section 307. In the Court of International Trade's discussion of Section 307, it stated humanitarian aims of amending Section 307 to include *forced labor or/and indentured labor* (emphasis added) were curbed with

the consumptive demand exception because some members of Congress felt such a flat-out ban of such goods would harm both the American consumer and fail to protect American labor (*McKinney v. U.S. Dept. of the Treasury* 1985). There is little doubt that the final formulation of section 307 was enacted with the intent to protect the economic interests of American consumers and labor. "Had Congress intended [to afford the consumer a legal right or interest in preventing, for economic, moral, or ethical reasons, the importation of foreign goods produced by forced labor], it would likely have imposed an absolute bar (...) rather than a conditional exclusion to be lifted in the event of unfulfilled domestic demand" (*McKinney v. U.S. Dept. of the Treasury* 1985). While the final formulation of section 307 promotes these humanitarian aims through governmental action, the concept of leveraging the economic prowess of the American consumer to effect change throughout the world was central. Governments are large and often slow in effectuating change. Consumers, who have time and specialized interests, can often determine where social problems exist and implement change if given the power and the requisite information. Section 307's regulations provided a process by which any person can notify the Customs Service about goods it believes to be a product of forced labor, presumably to be investigated at a later date (Findings of Commissioner of Customs 2011). The ineffectiveness of this provision stems not from the lack of awareness by the consumer, but rather "section 307 does not give consumers an enforceable interest in avoiding forced labor made goods" (*McKinney v. U.S. Dept. of the Treasury* 1985, p. 320).

While clearly having its origins in Section 307, the California Transparency in Supply Chains Act of 2010 attempts to ameliorate the ineffectiveness of Section 307. The California law, unlike section 307, does not provide for an absolute prohibition of a good falling within its strictures. Instead of promoting better business practices and foreign labor conditions through government action, the power to make change lies in the (invisible) hands of consumers and their free market approach to product demand.

4.2. California Transparency in Supply Chains Act of 2010

While trafficking has captured widespread legislative attention, efforts have been primarily focused on increasing successful prosecution and increasing incarceration terms. Most current legislative models "prioritize the needs of law enforcement over the rights of the trafficked persons" (Chuang 2006, p. 151). While these tactics can be an effective deterrent for wrongdoers within a criminal jurisdiction, the globalization of the marketplace and the opening of national borders to free trade agreements have had the ancillary effect of encouraging forced labor migration (Lansink 2004).

With the state's expansive border, major shipping ports, and powerful consumer demand, California is an enticing and fertile ground for traffickers to sell their slave made goods (California Alliance to Combat Trafficking and Slavery Taskforce 2007). Recognizing its role as a major market destination (Human Rights Center 2005), the State of California has aggressively updated their criminal and civil codes over the past seven years. California's Transparency in Supply Chains Act is the first statute of its kind in the United States. Its goal is to reduce the demand for forced labor made products which trafficked victims supplied (Office of the Texas Attorney General 2011). There are an estimated 3,200 companies with sufficient presence to fall within the scope of the new law (AP 2012). While a company falling under CATSCA's jurisdiction is not legally required to affirmatively engage in specific methods or procedures, they are, however, required to publicly state what, if any, methods they do employ to avoid trafficking. The implicit pressure disclosure of non-activity could generate, would provide the anti-trafficking community with material for a targeted "name and shame" public campaign (AP 2012). The CATSCA is a regulatory mechanism which will illuminate a product's manufacturing stream,

leveraging societal pressures and market incentives to encourage good corporate citizenship and best practices.

If consumer pressure fails to hold businesses accountable, the CATSCA also affords the California Attorney General the remedy of injunctive relief. The mere threat of a prohibitory (potentially in the form of a cease and desist of web page activity) or mandatory injunction (potentially in the form of a court order to post and comply with the reporting standards set-forth) may prompt compliance.

The CATSCA may also foster an indirect effect of retail supply chain competitiveness similar to that of the Rugmark, FIFA soccer ball logo or marketing strategies of *green* environmentally friendly products. There is a strong likelihood that companies will enhance clauses in supply chain contracts and those lagging may find themselves losing competitiveness, consumer favor and market share (Locke and Romis 2007).

4.3. What would disclosure and enforcement look like?

In order to forecast potential success of the CATSCA, one must look to see how statutory compliance is designed and how compliance will be judged. We will examine one key aspect of proper compliance, the aspect most likely to create legal challenges. We will also examine how the statutory injunctive powers provided the California Attorney General is likely to be legally understood and applied.

4.3.1. The California Transparency in Supply Chains Act, A Resource Guide, The California Attorney General's Office

In 2015, the California Attorney General's Office authored a resource guide seeking to address each of the Act's requirements and provides model disclosures based on actual company disclosures that fit with the language and spirit of the law. In each disclosure category, the Guide discusses how a company can provide disclosures that comply with the law, as well as enhance consumers' understanding of its anti-trafficking and anti-slavery efforts. Since the Act did not grant the Attorney General's office with regulatory authority – that is to clarify, interpret, or make clear the language - the resource guide has no precedential or legal effect. The guide itself goes to great lengths to make this point:

Importantly, the guide does not supplement, replace or supersede the law and does not create any enforceable rights. It is not a set of regulations, mandates, legal opinions, or legal advice. We hope it will be a useful tool for your company, but it is not a substitute for the Act. Anyone with questions regarding whether a company is subject to the law, or how a company should post disclosures without compromising confidential, proprietary and/or trade secret information, should refer to the California Transparency in Supply Chains Act or consult legal counsel. (Harris 2015, pp. 1-2)

While the Resource Guide helped to answer some of the Act's requirements, there are numerous mandates left for legal interpretation.

4.3.2. Proper disclosure requires the legal understanding of the website technology based term "homepage"

The CATSCA requires policy disclosures "be posted on the retail seller's or manufacturer's Internet website with a conspicuous and easily understood link to the required information placed on the business' homepage" and be readily understood that the link will take the viewer to their anti-trafficking policies. While the statute defines many terms, it fails to define *homepage*. Despite the prevalence of litigation in California pertaining to the Internet, courts routinely reference homepages without providing an explicit clarifying definition of the term. (*U.S. v. ASCAP* 2008, p. 450). While the courts have apparently not seen the need for legal clarification of the technical term *homepage*, proper disclosure will require a deeper understanding of what a homepage is. In the Attorney General's Resource Guide

(Harris 2015), the Attorney General defines *homepage* as “the generally understood page first encountered on a website that typically contains links to other pages of the site” (Harris 2015, p. 5).

California case law has given us five related but differing definitions (see California Health & Safety Code sections 1368.015(e)(1), 108046(a) and (a)(2), California Business & Professions Code section 22577(b)-(b)(3)). First potential qualifying definition could be the first page that loads when an individual opens their web browser; second, it could be the initial page of a website; third, the main page of the website, which acts as an index or table of contents for the other materials and documents contained on the site; fourth, the web page which loads when an individual clicks on the *home* button of a web browser or site; and fifth, an individual's personal web page. Thus, when a California statute includes the term *homepage*, it is necessary to understand which definition was contemplated.

Since the courts have failed to provide an unambiguous legal definition and the Legislature failed to provide specific guidance, we must look to other California statutory codes for analogous application and for guidance. We find the first two *homepage* definitions partially conflicting. Within the context of general business practices, the California Health and Safety Code Section 1368.015 defines *homepage*, for the express limited purpose of that section, as “the first page or welcome page of an internet website that serves as a starting point for navigation of the Internet Website”. Additionally, when a commercial dealer or manufacturer places a product into the stream of commerce, and a subsequent recall or warning is issued, if the business maintains an Internet website, the commercial dealer or manufacturer must prominently place a link to the recall or warning information on the homepage or first point of entry of its website. Thus, these sections seemingly define homepage as the first page encountered by the consumer when entering a given website.

However, the Online Privacy Protection Act of 2003 (hereinafter: OPPA) defines *homepage* differently. The OPPA requires businesses maintaining a website to “conspicuously post” their privacy policy or an icon or text hyperlink to the actual policy language on their homepage or first significant page after entering the website. Unlike the Health and Safety Code which correlates *homepage* with the first page encountered when entering a website, the Business and Professions Code correlates *homepage* with the first significant page after entering the website. The legislative intent of the OPPA was to “provide individual consumers (...) with notice of [a commercial website's] privacy policies, thus improving the knowledge of these individuals as to whether personally identifiable information obtained by the commercial web site through the Internet may be disclosed, sold, or shared” (Assem. B. 68, 2003 Leg., Reg. Sess. (Cal. 2003) [enacted]).

The CATSCA and OPPA do not address other issues that relate to the alleged or potential harm of consumers. These disclosure Acts were designed to provide information to consumers so they can make a more informed choice of which business entities to do business with based upon their business practices and policies. Based upon the similarities in the stated legislative intent for enacting the CATSCA and OPPA, coupled with the fact that the CATSCA does not concern issues of immediate harm directly impacting consumers, *homepage* as per the CATSCA would most likely indicate the first significant page of a website.

4.3.3. Proper enforcement requires understanding the Attorney General's injunctive powers

The CATSCA does not provide a civil right of action for non-compliance law states the exclusive remedy for non-compliance is “an action brought by the Attorney General for injunctive relief”. However, the vagueness of statutory injunctive relief raises more questions than answers.

A court can only provide injunctive relief if it can properly exercise *in personam* jurisdiction over a defendant (*Berger v. Superior Court* 1917). The CATSCA applies to every retail seller and manufacturer who does business in California having worldwide gross receipts in excess of \$100,000,000 (U.S.). Doing business in California is defined in Section 23101 of the California Revenue and Taxation Code. Jurisdiction of a company can be based upon the domicile, sales, property, or paid compensation by the company taxpayer in California. However, the specific criteria which must be sustained for each condition listed above leaves open the question of whether a California court will always be able to properly exercise *in personam* jurisdiction over a target business intend to be regulated by the Act. If the Attorney General were to bring an action for a preliminary injunction, that action would be governed by the holding in *IT Corp. v. County of Imperial* (1983):

Where a governmental entity seeking to enjoin the alleged violation of an ordinance which specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. If the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties. (*IT Corp. v. County of Imperial* 1983, p. 72)

The court held even though a statute provided the exclusive remedy of injunction, demonstrating the Legislature believes that the public harm outweighs the harm to a defendant in violation of the statute, the court is still required to balance the equities of potential harm to both parties. A fundamental argument often asserted by a defendant is an injunction should not be issued based on the disparity or disproportionality of the cost-benefit where the defendant did not act inequitably in connection with the infringement. When determining whether to issue a preliminary injunction, the goal is "to minimize the harm which an erroneous interim decision may cause".

Under the strictures of this test, the Attorney General would have to establish with reasonable probability that they would likely prevail on the merits (i.e. the company-defendant has not complied with the requirements of CATSCA and the injunction is not unduly burdensome). The likelihood of success of the merits could be a relatively easy task to demonstrate. If a company made absolutely no attempt to post the required information on their website, then non-compliance would be easily demonstrated. However, if a judge determined that CATSCA was ambiguous it would give a company-defendant the opportunity to illustrate a good faith attempt to comply with the CATSCA requirements. The defense of non-compliance would be based on the unsettled legal definition of a material term. Determining whether the Attorney General would prevail on the merits is much more challenging.

When injunctive relief is granted or required under a specific statutory section, like CATSCA, the courts tend to accept the legislative authorization as *prima facie* evidence for the necessary showing of the irreparable injury element and could still be granted despite the availability of an alternative remedy; however, statutory injunctions still need to be equitable in their effect. The second factor the court must balance is the potential harm inflicted upon the company-defendant of an injunction versus the harm the public would experience absent the injunction. This analysis potentially differs based on the type of injunction being sought.

There are two main classifications of injunction. Equitable relief can be achieved by two methods. First is the requirement to act (known as a mandatory injunction) and the second is when the defendant is ordered to refrain from acting (known as a prohibitory injunction) [*Davenport v. Blue Cross of California* 1997]. The goal of an injunction is to induce compliance by leveraging the sanctioning power of the court. Non-compliance with a court ordered injunction would subject the defendant to potentially strict monetary sanctions through the remedy of contempt. Courts

generally favor prohibitory injunctions preventing future harm (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty U.S.A, Inc.* 2005) over mandatory injunctions. Mandatory injunctions generally require a defendant to perform an affirmative act which requires greater oversight and resources of the court (*United R.Rs. of S.F. v. Superior Court* 1916). However, even if an order is entirely prohibitory, if the effect of the order is to compel the performance of a substantive act or necessarily contemplates a change in the position in the parties when the injunction is entered, the order will be classified as a mandatory injunction.

In theory, there are three potential forms of injunctive relief which could be imposed for a violation of CATSCA: first, a court order compelling a company to place the requisite information on its website and subsequently holding that company in contempt of court, issuing monetary fines for non-compliance; second, restricting or completely blocking a company's infringing website from being broadcast into California until their website comes into compliance with CATSCA; and third, completely prohibiting a company from conducting business in California until it complies with CATSCA. However, it seems highly unlikely a court would issue an injunction in forms two or three listed above. In balancing of the equities, the potential harm suffered by a company in restricting significant levels of business or blocking their website would substantially outweigh the harm the California citizenry suffer by not having access to a company's anti-trafficking policies.

Additionally, a private party can enjoin a governmental agency from regulating conduct outside the express statutory powers (*MacLeod v. Los Altos* 1960). The CATSCA's intent was to provide transparency of forced labor policies, providing information for concerned consumers. Not only would shuttering a company from doing business in California be extraordinarily severe, it would also frustrate the legislative intent of openness and disclosure of best practices. Completely blocking or shutting down a company's website would prevent access to any information provided concerning anti-human trafficking efforts. And prohibiting a company from doing business in California may also defeat the purpose of the CATSCA because it does little to advance the goal of educating consumers about forced labor. The practicable application of this type of injunction would simply be removal of Californians from that company's pool of potential customers.

It is possible that a court may determine all three forms of injunction listed above as mandatory in effect. Superficially, it is most apparent that compelling a business to place information on its website is mandatory in nature. The court would be ordering a company to affirmatively add or change information on its website. In *Ambrose v. Alioto* (1944), the petitioner sought a writ of supersedes after the trial court tried to commence contempt proceedings against the petitioner for violating an injunction by delivering canned tuna to a particular cannery. The court granted petitioner's writ stating, *inter alia*, because the petitioner was under a contractual obligation to deliver canned tuna to a specific cannery, an injunction preventing the petitioner from doing so would be mandatory in effect because it "compels the performance of a substantive act and also contemplates a change in the relative position or rights of the parties which existed at the time the decree was entered" (*Ambrose v. Alioto* 1944). If a company had a contractual obligation to person(s) in California, preventing it from fulfilling those obligations, as by enjoining the company from doing business in California or blocking its website could change the relative position or rights of the company when the decree is issued.

Determining whether a court will issue a preliminary injunction is largely speculative and rests in the sound discretion of the trial court. While a court must weigh both the degree of certainty in the outcome on the merits and the consequences of granting or denying the injunction, the balancing is subjective and is likely to vary court-by-court as there is little guidance dictating how much weight the trial court must give each factor and generally, the trial court's decision will

only be overturned if the granting of an injunction is shown to be an abuse of that discretion. A caveat to this rule exists concerning preliminary mandatory injunctions which are rarely granted and are subject to a stricter standard of review on appeal (*Teachers Ins. & Annuity Assn. v. Furlotti* 1999).

5. Additional proposed and existing legislation

Generally, corporations are not exposed to significant liability for the actions of their suppliers (Pierce 2011). Two states, Minnesota and Tennessee, have extended corporate liability provisions to include actions of human trafficking within their supply chain (Center for Women Policy Studies 2005, Pierce 2011). While Minnesota's "penalties include an order for the corporation's dissolution or reorganization, the revocation of licenses or permits of the corporation, and the surrender of a corporation's ability to conduct business in Minnesota" (Pierce 2011). Tennessee's law allows for prosecution of the corporation if an agent of the corporation performed an element of the crime while "acting within the scope of [employment or engaged in] a pattern of illegal activity that an agent of the company knew or should have known was occurring". While actual liability is still unclear, the legislative message is not: corporations that utilize slave labor or benefit from human trafficking will not be welcomed (Pierce 2011).

Corporate contribution to human trafficking often requires willful blindness. Supply chain disclosures are designed to eliminate this practice, decreasing the likelihood of its occurrence, and increasing its awareness with consumers. Formerly, federal bill H. Rep. No. 2759, 2011 attempted to address business supply chains. H. Rep. No. 2759, 2011 (Business Transparency on Trafficking and Slavery Act) is sponsored by Representative Maloney (D-New York). This bill differs from the CATSCA in that it would require any publicly traded or private company with gross worldwide receipts in excess of \$100,000,000 (U.S.) to file annually with the SEC disclosing/describing any measures the company has taken during the year to identify and address conditions of forced labor, slavery, human trafficking, and the worst forms of child labor within the company's supply chains. In the absence of federal disclosure legislation being adopted, especially in a climate where more and more states mandate affirmative actions to be taken or supply chain policies to be disclosed, an increased burden on interstate commerce exists.

6. Conclusion

Globalization of manufacturing encourages the movement of people across borders. While corporate evolution is not inherently predatory, trafficking syndicates often capitalize on the permeable nature of borders and the need of a large and available workforce (Panjabi 2009). Human trafficking is an egregious crime found in almost every country. As corporations spread globally, searching for cheaper labor, the risk to vulnerable populations rises. The farther the supply chain is removed from the end consumer, the higher the likelihood of illicit criminal activity and the less likely the consumer will be aware. Globalization has benefited from this dynamic. If a corporation believes their behavior will not be discovered potential sanctions become irrelevant.

Information disclosure is vital for consumer awareness and meaningful social controls. When corporations are held accountable to the consumer, corporate behavior necessarily changes. With proper supply chain disclosure, activists can target corporations which sell goods failing to meet the community's standards and voice their disapproval with a free market approach of shopping elsewhere. While it is unreasonable to expect every nation and sub-state to aggressively legislate against human trafficking, the pressure on corporations must come from those governments best positioned to exert pressure. Because corporate profit margins are too often elevated above human right concerns, policy makers are exploring new avenues to encourage good social policy (*Trafficking in Persons Report* 2012).

Traffickers prey upon the dreams and fears of the vulnerable. Victims come from all levels of society and from all rungs of the economic ladder. A comprehensive approach to fighting forced labor involves a strong criminal justice response, but also necessarily includes effective methods of public awareness. California's legislature and legal systems have begun to formulate and structure responses to protect those who are vulnerable. The State of California had the foresight to understand trafficking is an immensely complex transaction, infiltrating and entangling every economic sector and social strata. The Legislature has crafted numerous criminal and civil codes to investigate, prosecute and discourage human trafficking. Combating human trafficking demands a broader approach than just penal punishment; in doing so they have applied a nuanced understanding to the crime. A comprehensive "smart on crime approach" (Harris 2009) includes meaningful consumer awareness of a sellers business practices. The United States has the world's most influential economy. From that position of strength it can influence corporate behavior.

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