**CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU SEEKS FURTHER COMMENT ON INTERPRETATION OF THE TELEPHONE CONSUMER PROTECTION ACT IN LIGHT OF THE NINTH CIRCUIT’S MARKS V. CRUNCH SAN DIEGO, LLC DECISION**

**CG Docket No. 18-152**

**CG Docket No. 02-278**

**Comments of The International Health Racquet & Sportsclub Association (IHRSA)**

The International Health, Racquet, and Sportsclub Association (IHRSA) is a not-for-profit trade association representing more than 10,000 health and fitness facilities, gyms, spas, sports clubs, and industry suppliers in over 80 countries. Since its founding in 1981, IHRSA has worked to grow, protect, and promote the fitness industry and make the world healthier through regular exercise.

[**FCC Questions**](https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2018/10/DA-18-1014A1.pdf)**:**

1. To the extent the ATDS definition is ambiguous, how should the FCC exercise its discretion to interpret such ambiguities?

2. Does the Marks interpretation mean that any device with the capacity to dial stored numbers automatically is an ATDS?

3. What devices have the capacity to dial stored numbers and do smartphones have such capacity?

4. What devices that have the capacity to dial stored numbers also have the capacity to automatically dial such numbers and do smartphones have such capacity?

In short, how should the Commission address these two court holdings? We also seek comment on any other issues addressed in the Marks decision that the Commission should consider in interpreting the definition of an “automatic telephone dialing system.”

Comments

**1. To the extent the ATDS definition is ambiguous, how should the FCC exercise its discretion to interpret such ambiguities?**

The definition of an ATDS is not ambiguous under the TCPA and under a plain language reading of the statute for equipment to be an ATDS it must have the capacity to either “store” phone numbers “using a random or sequential number generator,” or “produce” phone numbers “using a random or sequential number generator.” The statute is best interpreted by looking to the plain language. The Ninth Circuit previously found as such, stating “that the statutory text is clear and unambiguous.” *Satterfield v. Simon & Schuster, Inc.*, 596 F.3d 946 (9th Cir. 2009). Further stating “[w]hen evaluating the issue of whether equipment is an ATDS, the statue’s clear language mandates that the focus must be on whether the equipment has the capacity ‘to store or produce telephone numbers to be called, using a random or sequential number generator[;...]” *Id.* at 951. This interpretation has been adopted by the Third Circuit, which concluded that the key determinant is whether the equipment “had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers.” *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018).

**2. Does the Marks interpretation mean that any device with the capacity to dial stored numbers automatically is an ATDS?**

Yes. The *Marks* decision adopted a broad interpretation that equipment constitutes an ATDS even if it does not have the capacity to generate telephone numbers randomly or sequentially. *See* *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553, at \*9 (9th Cir. Sept. 20, 2018) (“[W]e conclude that the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a “random or sequential number generator,” but also includes devices with the capacity to dial stored numbers automatically.”).The D.C. Circuit vacated a similarly broadened interpretation, stating that the FCC’s expansive interpretation was “untenable” based on the statutory text and “impermissible” in its scope because it would “render every smartphone an ATDS.” *ACA Int’l v. FCC*, 885 F.3d 687, at 697-703, (D.C. Cir. 2018).

We share the D.C. Circuit’s concern of the absurd results of interpreting the ATDS requirements as *Marks* does. The Court notes by 2016, “nearly 80% of American adults had become smartphone owners.” *Id.* at 697. The definition of an ATDS cannot reasonably be interpreted “in a manner that brings within the definition’s fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country.” *Id.* at 698. As the Court aptly noted, “[i]t cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact.” *Id.*

*Marks* rejects the tendency to decide cases in the most narrow possible context, and instead effectively converts all citizens from smartphone users to potential violators of the TCPA. As noted by *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014), adopting such an overbroad interpretation would capture many of contemporary society's most common technological devices within the statutory definition. This would then likely subject most smartphone users to liability under 47 U.S.C. § 227 given the possibilities of software creation.

**3. What devices have the capacity to dial stored numbers and do smartphones have such capacity?**

No Comment.

**4. What devices that have the capacity to dial stored numbers also have the capacity to automatically dial such numbers and do smartphones have such capacity?**

No Comment.

**In short, how should the Commission address these two court holdings? We also seek comment on any other issues addressed in the Marks decision that the Commission should consider in interpreting the definition of an “automatic telephone dialing system.”**

To avoid the overbreadth problem and absurd results, the commission should adopt the interpretation consistent with the plain language of the statute. That is, a device qualifies as an ATDS regulated by the TCPA only if the device, as currently programmed, has the ability to generate and dial random or sequential telephone numbers. *See Dominguez*, 894 F.3d at 121 (concluding that the “key” question under the TCPA is whether the equipment “had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers”); *Dominguez v. Yahoo, Inc.*, 629 F. App’x. 368, 372, 373 n.2 (3d Cir. 2015) (holding that “an autodialer must be able to store or produce numbers that themselves are randomly or sequentially generated”).