

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991
and Interpretations in Light of the D.C.
Circuit's ACA International Decision

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: CG Docket No. 02-278
: CG Docket No. 18-152
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REPLY COMMENTS OF VINCENT LUCAS

I agree with the comments of National Consumer Law Center, which are quite excellent.

I. Statement of my interest in this matter

Every day I receive numerous unwanted telemarketing calls. These days, the telemarketer usually hangs up when he/she/it gets my answering machine, and does not leave a message, and the telemarketer blocks its name from being displayed on my caller ID device. I find it extremely irritating getting these anonymous calls from entities who can't leave a message on my answering machine telling me who they are and why they are calling. When I do pick up the phone for one of these callers, the caller is usually a telemarketer or scammer¹, and is always somebody who I would not actually want to talk to. The robocall telemarketing industry constantly adapts to make as many calls as it can while avoiding being held accountable under the law. (That adaption does *not* include actual compliance with the TCPA.) Nowadays, to avoid litigation, most telemarketers avoid identifying who they are until they feel certain that the called party will agree to purchase what they are selling.

¹ E.g. the IRS and computer support telephone scams. During election time, many of the calls are political.

Consumers are getting more unwanted telemarketing calls than ever.² However, in telemarketing lobby's warped view of the world, they are getting sued not because they are calling more than ever, but because of "evil" "professional plaintiffs." I have on a few occasions stood up for my rights to privacy by filing TCPA litigation, and I have filed a petition with this Commission (which is still pending) asking for a declaratory ruling finding that persons who willfully or knowingly assist unlawful telemarketing are vicariously liable under the TCPA. (Lucas TCPA Petition of 2014).³ However, I am not a professional plaintiff.⁴

II. "Make any call using any ATDS" should be interpreted to include all forms of commercial calls that are dialed in an automated manner.

ATDS is a system that either dials from a stored list of numbers or dials numbers generated from a number generator. To be an ATDS, a number generator is not necessary if a stored list of numbers is used. If the dialing system dials from a stored list of numbers, the dialing system is an ATDS. 47 U.S.C. § 227(a)(1)(A) uses the phrase "to store or produce telephone numbers to be called, using a random or sequential number generator". "Or" is used – "store or produce". It does not make sense to believe that "using a random or sequential number generator" modifies "store". If the "number generator" clause were intended to modify "store", then the sentence would make sense if "or produce" were deleted. I.e. an ATDS is equipment that has capacity to "to store ... telephone numbers to be called, using a random or sequential number generator." That

² <https://www.consumer.ftc.gov/articles/0259-robocalls>

³ Nowadays, many telemarketing calls come from foreign telemarketers, who as a practical matter are "judgment proof", but who are assisted by U.S. companies who know or should know that telemarketers are violating the law. Without liability for these U.S. companies who willfully assist unlawful telemarketing, consumers have no recourse under the TCPA against these calls.

⁴ I have a well-paying full time job that has nothing to do with being a plaintiff.

does not make sense. If the equipment has been supplied with a list of numbers, there is no need for it to use a number generator.

Reading the ATDS definition to always require a number generator, as advocated by PACE and other lobbyists, would mean that the automated dialing equipment could simply store the entire telephone book and could simply dial every number in the telephone book, and the equipment would not meet PACE's idea of an ATDS. Is a dialing system that just automatically dials numbers from the telephone book less of a nuisance to the public than a dialing system that generates numbers? No.

The statute's definition of ATDS is ambiguous. The foremost goal of statutory interpretation is to determine Congress's intent. Congress stated its intent in the Findings section of the 1991 TCPA Act. Exhibit A. "Evidence compiled by Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." TCPA Act of 1991, Findings ¶ 10. "Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such call are necessary in an emergency ..., is the only effect means of protecting telephone consumers from this nuisance and privacy invasion." *Id.* ¶ 12. Congress intended to broadly prohibit non-consensual commercial automated telephone calls, regardless of the means of how the calls are automated, to consumers.

As a bright line rule, unless a commercial caller types in my full 10 digit telephone number on a keypad each and every time that the caller makes a call to me⁵, the caller is using some form of an automated telephone dialing system. Moreover, under the statute, the operative question is

⁵ Seven digits if the caller happens to be in my area code

whether the dialing system has the capacity to make automated calls, regardless of whether that capacity is actually used in any particular call.⁶

III. “Called party” means the person called

Under rules of statutory construction, words are given their ordinary meaning unless a different meaning is evident from the statute. The ordinary meaning of “called party” is the party that was called. In other words, the party that received the call. There is no evidence in the statute that Congress intended a different meaning. In fact, the purpose of the TCPA is to protect the rights of persons that are actually called. An “intended recipient” who is not actually called does not get annoyed or harassed by the call, and therefore is not the person whose rights the TCPA was designed to protect. Only someone paid off by the telemarketing lobby would think that “called party” does not mean the party that was called, but rather some other party that was the intended recipient.

This Commission should work in earnest on creating a reassigned number database. In the absence of such database, this Commission may have authority to create a reasonable safe harbor period when a telephone number is reassigned, but can not do so by redefining “called party” to mean something that Congress plainly did not intend it to mean. There is no technological reason why it should not be possible to create a database. In order for a call to a reassigned number to be routed to the right person, the routing information needs to be updated in one or more telecom

⁶ As a practical matter, if a telemarketer is willing to lie under oath, it is difficult to prove that the telemarketer did not manually type in the telephone number for any particular call. Perhaps this is the reason that Congress focused on whether the equipment has the capacity to make automated calls, regardless of whether that capacity was actually used in a particular telephone call. Is it unreasonable to require telemarketers to use old-fashion type phones that do not have any automatic dialing features? Do such old-fashion phones cost too much for the multibillion dollar telemarketing industry? I don’t think so.

carrier databases. The telecom carriers could be required to post an entry in the reassigned number database when a number is reassigned.

One of the first occasions that got me interested in the TCPA is when a debt collector repeated called me regarding somebody who was the previous owner of my telephone number. The number was reassigned to me more than ten years prior to the calls. Under the “intended recipient” interpretation, I could receive telemarketing calls intended for somebody who owned by telephone number before I was born. How exciting!

IV. Persons should be able to revoke consent using any reasonable means

Of course, persons should be permitted to revoke consent. To hold otherwise would be mean that a consumer that gives consent would be powerless to stop the calls for the rest of his or her life. In many cases, consumers are forced into giving their “consent”. For example, consumers are often faced with contracts of adhesion that demand their consent to calls. Also, in ecommerce, often a website will not permit a customer to go through with a transaction unless the customer provides a telephone number. In other cases, consumers are tricked into giving consent when the “consent” is buried in the fine print of a voluminous terms of use agreement. Consumers should be permitted to use any reasonable means for revoking consent. In all circumstances, the consumer should be able to revoke consent during any call that would not be permitted except for the consumer’s prior consent. For automated calls, the consumer should always be given some conspicuous option (e.g. pressing a number on the keypad) for revoking consent. In calls where involving a live sales representative, the consumer should be permitted to revoke consent orally. Consumers should also be permitted to revoke their consent in writing sent to any postal or email address that the caller (or entity that the call is made on behalf of) has held out to the consumer or

to the general public as an address for customer service or for legal affairs. The consumer should not be required to go through some difficult-to-follow procedure dictated by the caller's company. A simple email sent to company's customer service email address saying "Stop calling me at (___) ___-____" or words to that effect should be sufficient.

Respectfully submitted,

Vincent Lucas, Ph.D.

Public Law 102-243
102d Congress

An Act

Dec. 20, 1991
 [S. 1462]

To amend the Communications Act of 1934 to prohibit certain practices involving the use of telephone equipment.

Telephone
 Consumer
 Protection Act of
 1991.
 47 USC 609 note.
 47 USC 227 note.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Telephone Consumer Protection Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that:

(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

(4) Total United States sales generated through telemarketing amounted to \$435,000,000,000 in 1990, a more than four-fold increase since 1984.

(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency

situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.

SEC. 3. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT.

(a) **AMENDMENT.**—Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

“SEC. 227. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT.

47 USC 227.

“(a) **DEFINITIONS.**—As used in this section—

“(1) The term ‘automatic telephone dialing system’ means equipment which has the capacity—

“(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

“(B) to dial such numbers.

“(2) The term ‘telephone facsimile machine’ means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

“(3) The term ‘telephone solicitation’ means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person’s prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

“(4) The term ‘unsolicited advertisement’ means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.

“(b) **RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT.**—

“(1) **PROHIBITIONS.**—It shall be unlawful for any person within the United States—

“(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of