Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	GC Docket No. 02-278
	)	
Petition of YouMail, Inc. For Expedited	)	
Declaratory Ruling That YouMail's Service	)	
Does Not Violate the TCPA	)	

COMMENT OF MEGAN GOLD[1] IN RESPONSE AND OPPOSITION TO YOUMAIL, INC.'S PETITION FOR DECLARATORY RULING

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Dated: July 25, 2013

[1] Megan Gold is the plaintiff in *Gold v. YouMail, Inc.*, 1:12-cv-522-TWP-TAB (S.D.Ind.).

Summary

Since around 2009, internet startup company YouMail, Inc. has offered customers feature-rich voice mail services that replace the voice mail settings that typically come as part of cell phone service,.

Around January 2012, YouMail began adding a special feature (turned "on" by default): when a non-customer leaves a voice mail for a YouMail customer, YouMail automatically sends a return-receipt text message to the caller, which contains information about the voice mail and a hyperlink to YouMail's website. YouMail's system stores the phone number from the incoming call in its servers through ANI technology, and when the voice mail is finished sends an immediate "return receipt" or "auto-reply" text message to the caller. YouMail's petition frames these automated text messages as "consumer friendly" and explains that, although it decides what the text messages say, its customers may alter the messages to say what they like.

Absent from YouMail's petition, however, is any disclosure that the landing page for the hyperlink contained in each of these auto-reply messages contains a telemarketing message encouraging the non-customer recipient to sign up for YouMail products and services.

YouMail's petition thus asks the Commission to "clarify" that its automatically-sent telemarketing text messages are permissible. It espouses three ways that the Commission should do so. First, it asks that the Commission redefine ATDS to carve out the type of systematic text message telemarketing that its equipment has been engaged in for the past eighteen months. Second, it asks that the Commission clarify that the YouMail customer, rather than YouMail, "makes" these telemarketing text messages. Third, it asks the Commission to

decree that the mere act of leaving a voice mail for a YouMail customer, without any notice at all, constitutes "prior express consent" for non-customers to receive telemarketing text messages.

The Commission should reject YouMail's petition in its entirety. YouMail's use of incoming calls to trigger automatically sent telemarketing messages is precisely the type of innovation the current definition of ATDS was designed to prevent. As to the second question for review, it is absurd to argue that YouMail customers, who likely do not know about the telemarketing portion of the auto-reply messages, "made" such calls. Finally, it is beyond reason and all Commission precedent to suggest that a non-customer that calls a telephone and leaves a voice mail for a friend or colleague unknowingly provides "prior express consent" to receive telemarketing text messages from a third party. There exists no reason why YouMail cannot set its system to send auto-reply texts to callers that opt-in to receiving them during the subject telephone call.[2]

This petition is a prime example of why the Commission's current rules and regulations concerning what constitutes an ATDS should *not* change. Answering any of the three questions posed in YouMail's favor will open the floodgates to mass-scale copycat telemarketing.

For these reasons, and for the resons below, YouMail's petition should be denied in its entirety.

[2] YouMail could, for example, play an automated message at the beginning of customer voice mail greetings that asks the caller to press 2 if she wishes to receive a return receipt text message with a marketing message in it from YouMail.

Table of Contents

Page

I. YouMail's "Auto-Reply" Text Messages Constitute Telemarketing. 1

II. YouMail's Auto-Reply Feature Uses an ATDS. 6

III. YouMail's Receipt Messages are Unsolicited and Nonconsensual. 11

IV. YouMail "Makes" its Own Telemarketing Calls 13

Conclusion 16

COMMENT OF MEGAN GOLD IN OPPOSITION TO YOUMAIL, INC.'S
PETITION FOR DECLARATORY RULING

The TCPA was enacted in order to protect consumer privacy and public safety, through regulation of use of automated dialing equipment. Pub.L. No. 102–243, § 12. In furtherance of this goal, the TCPA contains a blanket prohibition against use of "automatic telephone dialing equipment" (ATDS) for calls to cell phones, with extremely limited exceptions. 47 U.S.C. § 227(B)(1)(A)(iii). Congress entrusted the FCC to issue regulations and orders implementing and interpreting this paragraph of the TCPA, as to calls where recipients are not charged, only. 47 U.S.C. § 227(b)(2)(C).

Although YouMail's petition omits reference to this fact, its "virtual receptionist" or "auto-reply"[3] text messages are designed to promote YouMail's goods and services, and therefore constitute telemarketing. Because they are sent automatically to persons with whom YouMail has no relationship, these auto reply text messages are precisely the type of automated calls the TCPA was designed to prohibit. If the Commission accepts YouMail's position as to any of the three questions in its petition, the Commission will be ratifying the automated and systematic sending of unsolicited telemarketing text messages, which will open the floodgates to an assault of unwanted and unsolicited automated telemarketing calls – precisely that which the TCPA was designed to prevent.

[3] The Commission refers to the sms text messages that are at issue herein as "virtual receptionist" in its June 25, 2013 Public Notice, and YouMail refers to the texts as "auto-replies" in its papers. This submission uses "auto-reply" to refer to the texts, because that term seems more descriptive of what is at issue. YouMail's virtual receptionist, the internet-based feature-rich voice mail service, existed successfully for several years before the company began advertising through auto-reply text messages.

The Commission should refuse to change its long-standing definition of an ATDS, reaffirm its prior rulings that "prior express consent" requires the consenting party to be informed as to that which she may be consenting and roundly reject YouMail's suggestion that its customers somehow "made" these telemarketing text messages that YouMail drafted and sent for its own benefit.

I. YouMail's "Auto-Reply" Text Messages Constitute Telemarketing.

The purpose and effect of YouMail's "auto-reply" text messages is to induce non-customers into signing up for YouMail products and services. As explained in YouMail's petition, its auto-reply sms text messages are automatically sent to non-customers when the non-customer leaves a voice mail for a YouMail customers.[4] The text messages generally look something like this:

> RE: Your voicemail for Alex (949-XXX-XXXX) - Click for more: http://ymvm.it/sLZtdLYq

When the recipient of an auto-reply text message clicks or enters the above hyperlink into a browser, substantially the following appears:[5]

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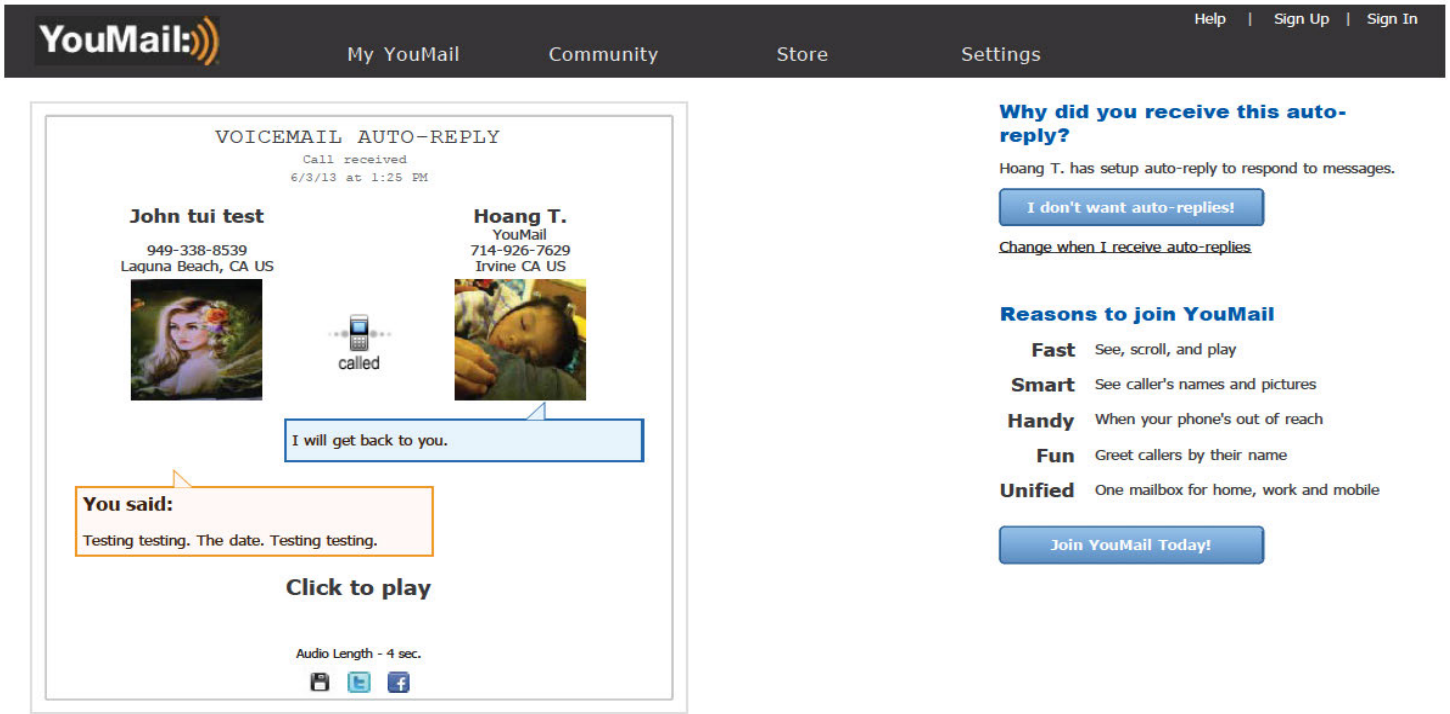
[4] Ms. Gold has no quarrel with YouMail's core premium voice mail services. She, and her counsel, believe that the service of providing YouMail customers with the opportunity to customize how incoming voice mails are kept and sorted is innovative and useful. There is no suggestion that YouMail's core services violate the TCPA, or that they are illegal in any way. At issue before the Commission is whether these nonessential telemarketing text messages violate the TCPA. They do.

[5] This image was taken from Exhibit A, which is a printout obtained by the undersigned attorney by entering the hyperlink found in the PowerPoint presentation submitted to the Commission by YouMail along with its June 13, 2013, Notice of Ex Parte Presentation page 10, http://ymvm.it/sLZtdLYq. As of the date of filing these comments, that link does not appear to work any longer.



As YouMail points out in its petition part of this message appears to be related to the voice mail that the non-customer left for the YouMail customer, including a transcription and a recording of the message.

Missing from YouMail's petition and supporting papers is any mention of the portion of this message on the right, which encourages the non-customer recipient of the text to sign up for YouMail products and services. In fact, the image that YouMail included in its *Ex Parte* meeting summary at page 10, Exhibit B, seems to have *excluded* the telemarketing portion of YouMail's auto-reply messages, which is enlarged as such:

Reasons to join YouMail

Fast	See, scroll, and play
Smart	See caller's names and pictures
Handy	When your phone's out of reach
Fun	Greet callers by their name
Unified	One mailbox for home, work and mobile

Join YouMail Today!

The Commission has defined telemarketing as "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." 47 C.F.R. §64.1200(f)(12). The above message is clearly designed to encourage recipients to sign up for YouMail products and services. It explains why the non-customer recipient should sign up, and the benefits of becoming a YouMail customer -- typical marketing sales pitch language.

And although the auto-reply text messages sent by YouMail may have one "innocent" purpose, the fact that they also have a telemarketing purpose illustrates why they cannot be permitted. The Commission has been steadfast in its position that "dual-purpose" calls are impermissible, if one of those purposes is telemarketing. "If the call is intended to offer property, goods, or services for sale either during the call, or in the future (such as in response to a message that provides a toll-free number), that call is an advertisement. Similarly, a message that seeks people to help sell or market a business' products, constitutes an advertisement if the individuals called are encouraged to purchase, rent, or invest in property,

goods, or services, during or after the call." *2003 TCPA Order*, 18 FCC Rcd. 14,014, 14,099 at ¶ 142 (July 5, 2003).

YouMail has continued to send auto-reply text messages with advertisements in them for the past fourteen months in spite of Ms. Gold's lawsuit, and in spite of the fact that it *agrees* that its equipment constitute an ATDS pursuant to the Commission's current ATDS definition.[6] Apparently, YouMail feels it more appropriate to ask for a change in the law, rather than obtain opt-ins from potential text message recipients.

The undersigned understands that YouMail has sent in excess of ten million[7] such text messages since the *Gold* TCPA lawsuit was filed in April 2012, and that, although technologically feasible to insert prerecorded opt-in consent opportunities during customer voice mail greetings, YouMail has decided not to do so because few rational persons would actually press a button on their phones in order to agree to receive telemarketing texts from it.

Any doubt as to the telemarketing purpose of YouMail's messages is laid to rest by an email chain produced by YouMail in the *Gold* litigation, between YouMail executives and members of its board of directors. Exhibit C. In this January 2012 email chain, sent shortly after YouMail began its auto-reply text message campaign, YouMail CEO Alex Quilici writes to board members about the company's success in generating new YouMail accounts and users through the auto-reply, which he refers to as "receipts." After Mr. Quilici explains how fantastic it was that the text message receipts were resulting in between 2% and 4% of recipients signing up for

[6] See Declaration of Alex Quilici, attached to YouMail's Notice of Ex Parte Presentation, at pp. 12-13. Plaintiff intends to contest the statements in paragraph 6 of the declaration through expert and deposition testimony, in the underlying litigation.

[7] YouMail's website boasts that it has handled over two billion calls, total, and that it handles more than two million calls per day. http://www.youmail.com/home/corp/about.

YouMail services, Board member Eric Ver Ploeg calls the first couple of days in sending receipts "amazing," suggests that it was "smart" to buy extra computer servers in order to better handle sending more receipts in the future. Mr. Ver Ploeg then suggests that YouMail "drop (almost) everything else and put all your efforts into that thing that seems to be working." The top email message ends with Mr. Quilici indicating that YouMail had, indeed, dropped almost all other forms of marketing, and that the company sees "everything" through the lens of gaining more customers through telemarketing with "auto-receipt" text messages.

Ms. Gold sees no problem with YouMail's core "virtual receptionist" products and services, except for its relatively new practice of sending text messages to persons who call its customers' text messages that include marketing material. There is nothing stopping YouMail from eliminating its automated text message regime. Indeed, YouMail's core voice mail services existed successfully for years, from approximately 2009 to 2012, before it sent any auto-reply text messages at all. Thus, denial of YouMail's petition will not mean the end of innovation, or the demise of startup companies as its petition suggests. Instead, denying YouMail's petition in its entirety will maintain the *status quo*, which prevents the sending of automated text messages to cell phones, without the prior express consent of the called party.[8]

II. YouMail's Auto-Reply Feature Uses an ATDS.

When Congress enacted the TCPA over twenty years ago, it did so to address consumer privacy concerns over a massive increase in unsolicited telemarketing caused by "changes in the

[8] As the Commission has repeatedly stated, there exists no prohibition against using an autodialer in order to call cell phones where the called party has consented to receive the calls. E.g. *2008 TCPA Order,* 23 FCC Rcd. at 567, ¶14 ("[T]he Commission noted that the TCPA does not ban the use of automated dialing technology. It merely prohibits such technologies from dialing" certain types of numbers, where it does not have consent.).

telemarketing industry [that] made making unsolicited phone calls a more cost-effective method of reaching potential customers[,]" including as is specifically relevant here, "the advent of automatic dialer recorded message players (ADRMPs) or automatic dialing and announcing devices (ADADs)[, which] … automatically dial a telephone number and deliver to the called party an artificial or prerecorded voice message."[9]

Congress expressed particular concern regarding autodialed calls to cell phones.[10] Thus, the resulting TCPA expressly prohibits "mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice … to any telephone number assigned to a … cellular telephone service," defining an "automatic telephone dialing system" as "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."[11]

YouMail's *ex parte* presentation to the Commission indicates that, instead of the subscriber personally responding to each voicemail message he or she receives, "With YouMail,

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[9] S. Rep. No. 102-178 (Oct. 8, 1991); *see also Abbas v. Selling Source, LLC*, No. 09-3413, 2009 WL 4884471, at *7 (N.D. Ill. Dec. 14, 2009) ("Congress, for its part, found that cheap, pervasive telemarketing practices needed to be controlled, … and intended to restrict unsolicited, automated advertisements and solicitations by telephonic means.") (citations omitted).

[10] *See* S. Rep. No. 102-178 (Oct. 8, 1991) (noting that the bill was intended, in part, to outright "ban all autodialed calls … to … cellular phones"); *see also ACA International Ruling*, 23 FCC Rcd at 562, para. 7 ("[W]ireless customers are charged for incoming calls whether they pay in advance or after the minutes are used."); *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638 (7th Cir. 2012), *reh'g denied*, (May 25, 2012) ("An automated call to a landline phone can be an annoyance; an automated call to a cell phone adds expense to annoyance.").

[11] 47 U.S.C. §§ 227(b)(1)(A)(iii) and 227(a)(1).

Set 'Response' Once … And YouMail Auto-Replies To Each Voicemail[.]"[12] It is entirely contradictory for YouMail to argue on one hand that its service does not constitute or use an ATDS, and on the other hand directly admit that its auto-replies are sent automatically and systematically.

In interpreting what constitutes an ATDS the Commission has consistently "emphasized" that that the definition of an ATDS covers any equipment that has the capacity to dial numbers without human intervention. *Soundbite TCPA Ruling*, 15 FCC Rcd. 15,391, fn. 5 (Nov. 26, 2012); *ACA International TCPA Ruling*, 23 FCC Rcd 559, 566 ¶13 (Jan. 4, 2008); *2003 TCPA Order,* 18 FCC Rcd. 14014, 14092; ¶132-33 (July 5, 2003).

In each of the above-cited rulings, the Commission indicated that this definition was necessary to prevent telemarketers or other persons from attempting to circumvent the TCPA. In 2003, the Commission stated:

> We believe the purpose of the requirement that equipment have the "capacity to store or produce telephone numbers to be called" is to ensure that the prohibition on autodialed calls not be circumvented. Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of " automatic telephone dialing equipment" and the intent of Congress.

2003 TCPA Order, 18 F.C.C.R. at 14092-93, ¶ 134. In its 2008 ruling, the Commission rejected arguments similar to those of YouMail, urging a narrowed definition of ATDS:

> [T]o find that calls to emergency numbers, health care facilities, and wireless numbers are permissible when the dialing equipment is paired with predictive dialing software and a database of numbers, but prohibited when the equipment operates independently of such lists, would be inconsistent with the avowed purpose of the TCPA and the intent of Congress in protecting consumers from such calls.

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[12] *See* Ex. 6, YouMail Presentation.

2008 TCPA Order, 23 FCC Rcd. at 566, ¶14. More recently, in the *Soundbite* ruling, the Commission found the following:

> Under the TCPA, the term "automatic telephone dialing system" or "autodialer" is defined as "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." Id. § 227(a)(1). The Commission has emphasized that this definition covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14092, para. 133 (2003) (2003 TCPA Order).
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> The Commission has, for example, concluded that the scope of that definition encompasses "hardware [that], when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers," in light of, among other things, its conclusion that "the purpose of the requirement that equipment have the 'capacity to store or produce telephone numbers to be called' is to ensure that the prohibition on autodialed calls not be circumvented." *Id*. at 14091-93, paras. 131, 133.

Soundbite TCPA Ruling, 15 FCC Rcd. 15391 at ¶2, n.5. These rules have not changed in more than ten years, and there is no good reason to change them now; particularly where the party seeking a change wishes to use the proffered equipment for telemarketing purposes.[13]

YouMail does not provide any compelling reason to change this precedent, and none exists, particularly in light of the marketing purpose of its text messages. YouMail sent millions upon millions of auto-reply text messages *after Ms. Gold filed suit against it* for violation of the

[13] It is worth noting that YouMail has requested that the Commission "clarify" that the equipment it has used to knowingly send millions of telemarketing messages does not constitute an ATDS. The purpose of the petition seems to be to obtain retroactive immunity from its admitted use of what, under current law, constitutes an ATDS. That these are YouMail's motives is buttressed by the fact that it did not separately notify Gold's counsel of these proceedings (Gold learned about the petition through the Commission's public notice around June 27, 2013), and YouMail's omission of the fact that the texts that are the subject of its petition contain marketing material.

TCPA, acknowledges that its dialer constitutes an ATDS under these standards. The amended complaint in the Gold lawsuit is limited to challenging text messages that it sent *after* YouMail it was put on notice that its auto-reply messages were TCPA violations. YouMail continues to send the telemarketing text messages that are the subject of this petition to this day.

The fact that petitioner failed to disclose that its auto-reply text messages contain a marketing element is telling as to its motives before the Commission. The TCPA was intended to apply to telemarketing text messages that are automatically sent. The petition to change the standards for what constitutes an ATDS would open the floodgates for millions, indeed billions, more unsolicited telemarketing calls.

These text messages also pose a substantial threat to public safety, too. The Commission is aware that texting while driving is extremely dangerous.[14] On the other hand, driving while using an approved hands-free cellular telephone is legal in many states. YouMail's auto-reply function systematically ensures that each and every voice mail left by persons on cell phones who are driving cars will be followed immediately by an unexpected and distracting text message sent for telemarketing purposes.

Applying the YouMail ATDS model to analogous circumstances illustrates the problem that would arise if the Commission were to find that YouMail's equipment is not an ATDS. Creditors, for example, could permissibly began sending automated text message advertisements to persons who called them to inquire about the terms of a credit card (but did not give out their phone number) immediately after such inquiry calls were finished. In this creditor example, the relationship between the telemarketer and the consumer is much closer

[14] See, http://www.fcc.gov/guides/texting-while-driving

than with YouMail because the consumer knowingly dialed the creditor's phone number. YouMail text message recipients leave voice mails for one party, and receive auto-reply telemarketing from another, unrelated party.

Aside from permitting automated telemarketing to cell phones, YouMail's proposed "solution" of clarifying that only equipment with the *current* capacity to store and produce telephone numbers does not make sense. The statutory and regulatory standard for what constitutes an ATDS focuses on the telephone "equipment" (i.e. hardware) and not software. If *equipment* has the capacity to store or produce telephone numbers to be called using a random or sequential number generator today, then it has that same capacity tomorrow, and on any other day. Software that is paired with equipment does not affect whether the equipment has the "current" capacity to do one thing or another.

Ms. Gold suggests that the most appropriate solution is for YouMail not to send any auto-reply text messages at all, unless it receives an opt-in from the call recipient before it sends its first text message.[15] The Commission need not make any rule changes for *those* texts to be legal.

Absent informed opt-in, these messages are <u>exactly</u> the kind of unsolicited, automated calls Congress was trying to prevent in enacting the TCPA. A determination by the FCC that a text message call that is automatically generated and sent to cell phone numbers without any human intervention would not be in keeping with the intent of Congress to "ban all autodialed

[15] YouMail's petition suggests on page 4 that a consumer must become a "limited account holder" in order to opt out of receiving auto-reply messages.

calls … to cellular phones."[16] The FCC should determine that YouMail's "voicemail receipt" technology is or uses an "automatic telephone dialing system" under the TCPA.

III. YouMail's Receipt Messages are Unsolicited and Nonconsensual.

The auto-reply messages that YouMail sends are completely unsolicited. Commission precedent, and common sense, preclude a finding that a person gives "prior express consent" merely by calling and leaving a message for another party, as YouMail urges.

The Commission has nearly uniformly held that meaningful and knowing consent is necessary for a call recipient to have provided "prior express consent." Despite this, YouMail asks the Commission to find that a mere call to a YouMail customer constitutes "prior express consent" to receive text messages, including those which have marketing messages. YouMail's position should be rejected.

The Commission's position regarding "prior express consent" through ANI caller ID capture requires rejection of YouMail's position. The Commission has consistently held that a party that calls a telephone number and presents her caller ID to the called party "cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls." *ACA International Declaratory Ruling*, 23 FCC Rcd. 559, fn. 34 (Jan. 4, 2008), citing *1992 TCPA Order*, 7 FCC Rcd. at 8769, ¶31.[17] YouMail's suggestion that Ms. Gold, a person

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[16] S. Rep. No. 102-178 (Oct. 8, 1991).

[17] YouMail miscomprehends the passage in paragraph 31 of the 1992 TCPA Order, regarding knowing release of phone numbers constituting invitation or permission to be called. 7 FCC Rcd. at 8769. That passage must be read in context of the regulations and law that existed in 1992. The National Do Not Call Registry did not exist until 2003, so in 1992 telemarketers were free to call any telephone number they wanted to sell goods and services. The Commission was making the point that, as long as telemarketers did not otherwise violate the then-existing rules, most

who had no relationship with YouMail and no initial knowledge that the person she was calling was a YouMail customer, somehow consented to receive telemarketing calls from YouMail through the mere act of making a phone call is contrary to this precedent.

YouMail also argues that its "auto-reply" feature is akin to the confirmatory message in Soundbite. Gold agrees, to the extent that both YouMail and Soundbite's text messages appear to work in a similar manner as an ATDS: text messages are automatically sent once there is a trigger from an outside source. However, the *Soundbite* decision held that this type of message did not constitute a violation of the TCPA, so long as the texts do not contain marketing messages, concluding that, "texts that encourage consumers to call or otherwise contact the sender in an attempt to market, including such texts that, while neutral on their face, lead to a marketing message if the consumer contacts the sender, are likely beyond the scope of the consumer's prior consent." *Soundbite Ruling*, 15 FCC Rcd. 15,391, ¶12 (Nov. 29, 2012).

YouMail's text messages are clearly designed to market its products and services, and, just as condemned by *Soundbite*, these messages refer the recipient to a marketing message and have a telemarketing purpose. Recipients of these text messages generally have no idea that they are coming, and certainly never told YouMail it was okay for it to send them text messages – much less telemarketing messages. The Commission should reject YouMail's petition to the extent that it suggests that callers provide prior express consent when they leave a voice mail for a YouMail customer.

IV. YouMail "Makes" its Own Auto-Reply Calls.

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notably the prohibitions against use of an ATDS and then-current company-specific DNC rule, telemarketing calls to the general public were allowed.

YouMail's Petition understates its involvement and interest in its "auto-reply" text message calls to third party cell phones. As explained above, its petition fails to disclose that its auto-reply text messages include marketing material. Relying upon this material omission, YouMail attempts to "blame" its customers for sending text messages that it drafted, and marketing material that advertises YouMail goods and services, because in YouMail's eyes, "the subscriber causes the call to exist by setting its YouMail preferences to request auto-replies."[18] Apart from failing to inform the Commission that YouMail automatically sets its subscribers' preferences with the auto-reply function as the default setting—and that, therefore, the subscriber is not necessarily "setting its YouMail preferences to request auto-replies"—YouMail's position ignores the fact that the auto-reply texts are an intentional and highly successful marketing strategy specifically designed and implemented by YouMail for its own benefit, a far cry from YouMail's suggestion that its customers are the persons that "made" the calls.[19] that each text message is merely "part of the private conversation" between the caller and YouMail subscriber.[20] With over 4 million current subscribers,[21] the "voicemail receipt"

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[18] YouMail Petition at 12.

[19] The result of the Commission finding, as YouMail urges, that YouMail customers made the auto-reply text message calls, would be that YouMail customers could be held liable for violations of the TCPA arising out of telemarketing that was drafted and scripted, and then sent on YouMail equipment – an absurd result, indeed.

[20] YouMail Petition at ii.

[21] *See* http://www.youmail.com/home/corp/about.

text messages serve as YouMail's primary source of new customers, and YouMail intentionally uses these "receipts" for that purpose.[22]

YouMail's assertion that it "does not 'make' calls because it does not cause the call to occur" is entirely disingenuous.[23] The "voicemail receipt" text messages are generated and sent by YouMail.[24] The text messages are not generated by the subscriber him or herself; as YouMail's own *ex parte* presentation materials confirm, the auto-reply feature "[w]orks even when [the subscriber's] phone is off."[25] The subscriber does not draft the preset message text and hyperlink, and can only control what basic groups of callers are able to receive it and, at best, add custom text within the confines of YouMail's own preset message. For example, YouMail's *ex parte* presentation shows the subscriber's ability to add, in that example, "Busy right now. Will call you at 5pm." to the auto-reply, but this language is then merely inserted within the confines of YouMail's preset message, as follows:

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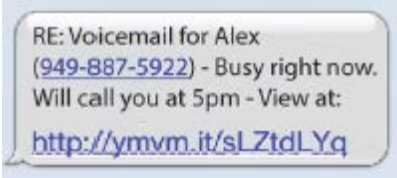
[22] *See, e.g.,* Receipt Stats E-mail Chain, Exhibit C ("Despite our efforts [click-through-rate] is fading a bit. HOWEVER, a decent amount of receipts are going to existing YouMailers (… so we really need to get an adjusted [click-through-rate/reversal rate] focused on new people experiencing [the voicemail receipts] - since YouMailers can't convert).").

[23] YouMail Petition at 12.

[24] YouMail Petition at 7 (noting that if a wireless provider has enabled YouMail for its customers, "*YouMail's system* delivers the text message to the wireless carrier, which generally delivers the message as if it came from the telephone company[,]" that if the text message recipient is the customer of a large national carrier, "*YouMail* must generally deliver the message to that company's 'email gateway[,]'" and that other wireless carriers require "*YouMail* to deliver the auto-reply to an SMS gateway provider") (emphasis added).

[25] YouMail Notice of *Ex Parte* Presentation at 11.



[26]

YouMail argues that "[i]t no more 'makes' a call under the TCPA than does the provider of telephone lines or cellular networks."[27] This is false. Carriers like AT&T or T-Mobile do not create the content of text messages sent by their customers, and they certainly know better than to use their customers' text messages as a marketing mechanism by including text in or hyperlinks to materials urging the third party to sign up for their services, and providing a mechanism to do so.[28] YouMail is not, as it would have the Commission believe, "merely the service by which execution of the subscriber's call is arranged."[29] Rather, it functions as both conduit and communicator. Even where a particular subscriber genuinely intends for a "voicemail receipt" text message to be sent by YouMail to those who leave voicemail messages on his or her phone, this does not make the text message any less of an unsolicited advertisement by YouMail for its services, or absolve YouMail for directly placing such text message calls after drafting all or part of the text message and associated web link. The communication stops being "part of the private conversation" between the caller and YouMail subscriber[30] once YouMail interjects itself into the conversation.

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[26] YouMail Notice of *Ex Parte* Presentation at 10.

[27] YouMail Petition at 12.

[28] See web page attached as Exhibit B.

[29] YouMail Petition at 12.

[30] Ex. 2, Petition, p. ii.

YouMail customers do not draft and send the auto-reply text messages — YouMail does. YouMail created the text of the auto-reply hyperlink and associated web page urging recipients to join YouMail. And while YouMail touts the supposed "benefits" to consumers who receive these unrequested "voicemail receipt" text messages,[31] it conveniently neglects to inform the Commission that the primary purpose for their use is as a marketing device for YouMail, itself. The Commission should reject YouMail's proposal, and find that YouMail "makes" these auto-reply text messages.

CONCLUSION

YouMail's automated, systematic and unsolicited telemarketing text messages are exactly that which the TCPA is designed to prohibit. The Commission should uphold the intent of Congress and reject each of YouMail's three positions in their entirety.

Dated: July 25, 2013

Respectfully submitted,

Alexander H. Burke
Counsel for Megan Gold

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[31] YouMail Petition, pp. 6-7.

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Certificate of Service

Alexander H. Burke certifies that this document was served upon YouMail, Inc. through filing with the FCC, and by email and United States Mail to its counsel at the addresses below, on July 25, 2013.

Alexander H. Burke
Counsel for Megan Gold

Exhibit A

VOICEMAIL AUTO-REPLY

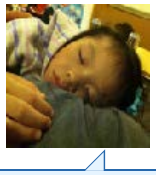
Call received
6/3/13 at 1:25 PM

John tui test

949-338-8539
Laguna Beach, CA US

called

Hoang T.
YouMail
714-926-7629
Irvine CA US



I will get back to you.

You said:

Testing testing. The date. Testing testing.

Click to play

Audio Length - 4 sec.

Why did you receive this auto-reply?

Hoang T. has setup auto-reply to respond to messages.

I don't want auto-replies!

Change when I receive auto-replies

Reasons to join YouMail

Fast See, scroll, and play

Smart See caller's names and pictures

Handy When your phone's out of reach

Fun Greet callers by their name

Unified One mailbox for home, work and mobile

Join YouMail Today!

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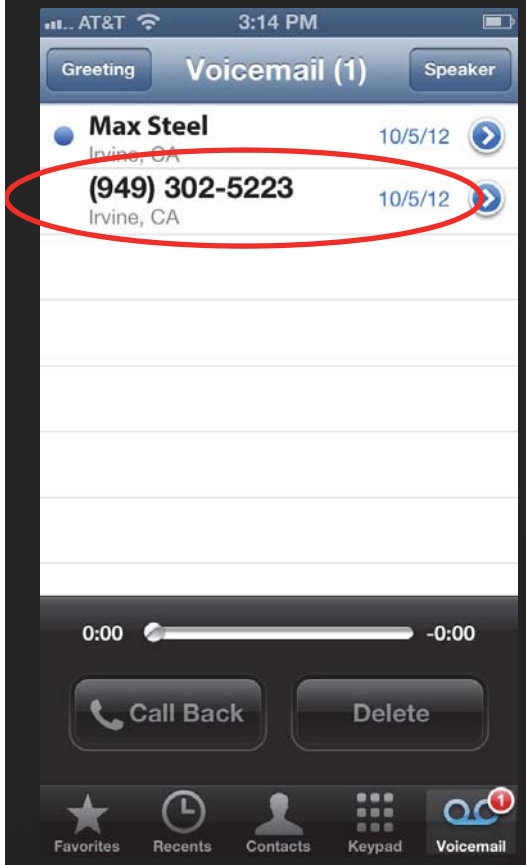
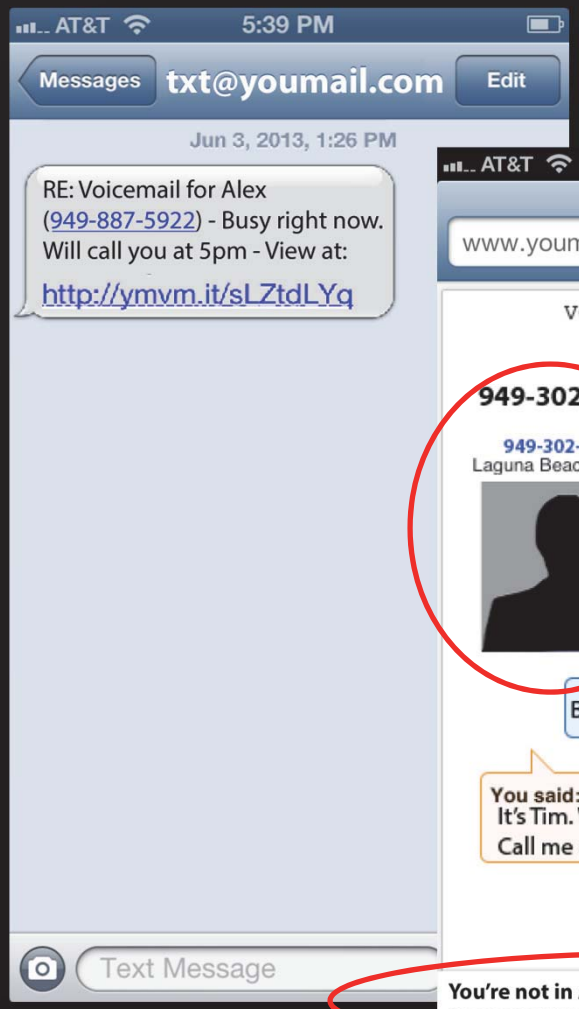
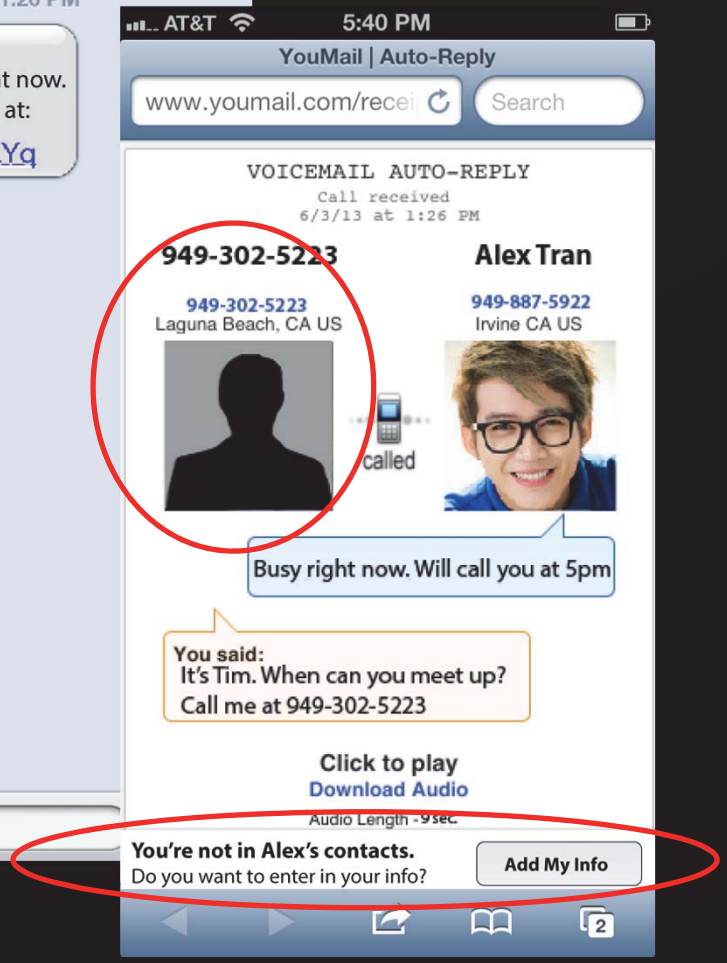
Exhibit B

...And Provides Many Caller Benefits







YouMail

Exhibit C

Subject: RE: Receipt Stats
From: alex@youmail.com
To: 'Eric Ver Ploeg'
CC: 'Rick Prostko'
BCC:
Sent: 1/25/2012 9:43:15 AM
Importance: Normal
Attachments:

I'd like to credit Rick....

But I definitely will credit VPCP's $1m investment in July. That's what enabled us to ramp just enough on the dev team beyond "survival" mode to get things fixed in terms of scale, build visual caller id, improve the apps quite a bit, and then get the receipts built on top of that ☺.

It's interesting that a simple idea can require so much effort to get it out there - more than I think we guessed when we first spec'd it out.

(What's great about this is that - assuming that it continues to work - if we move reasonably quickly to ramp, I don't think anyone else can catch up with the secret sauce for awhile, given what's involved to get it out there, giving us first mover with this as a growth tactic.)

And we have dropped almost everything else - we are now looking at everything from the perspective of receipts, fixing anything that touches that experience (including fixing up the apps and registration process throughout), and only with left over cycles putting some effort into WhoAreYou (to get the second app growing), and a few items around monetization (like supporting data sales, getting the auto-updater working, etc...)

--Alex

From: Eric Ver Ploeg [mailto:eric@recursivecap.com]
Sent: Wednesday, January 25, 2012 9:31 AM
To: alex@youmail.com
Cc: Rick Prostko
Subject: Re: Receipt Stats

Amazing first handful of days.

I think it is wise to work out the kinks, generate key learnings, and generally improve the UX/user acquisition funnel, before making this more generally available. This is a classic case of "when you find something that seems to be working, drop (almost) everything else, and put all your efforts into that thing that seems to be working".

Smart to buy the required hardware. It does not seem like an optimistic stretch to extrapolate these early results onto the rest of the YouMail user population.

Good to see something we can control and that seems to be working well. It must be due to Rick Prostko joining the board. :-)

Take care,
Eric

On Wed, Jan 25, 2012 at 8:53 AM, <alex@youmail.com> wrote:

So this is getting more and more interesting. Here are the daily receipt results six days into it (we launched 1-19).

	Receipts	Views	CTR	Accounts	Conv	RR
Daily Total for 1-24:	22,485	2,534	11%	621	25%	2.8%
Daily Total for 1-23:	23,408	2,743	12%	577	21%	2.5%
Daily Total for 1-22:	11,468	1,591	14%	512	32%	4.5%
Daily Total for 1-21:	16,914	2,284	14%	560	25%	3.3%
Daily Total for 1-20:	30,470	4,340	14%	761	18%	2.5%
Daily Total for 1-19:	27,190	4,536	17%	589	13%	2.2%

So new accounts/day is roughly 600/day with 20k-ish users and is still hanging around there. Call it 4,000 users over 7 days, which is huge (20%). And it's really interesting that new accounts/day is steady - we have to break it down, but it might be that enough new people are coming on fast enough to sustain things as older users have fewer new people calling them and as older users potentially turn off sending receipts (the 10% who have opted-out).

(Remember, we have nearly 600k active users, so doing the math - say 25 times as many cohorts x4k = 100k accounts/week, which is huge, and would blow us out of our existing hardware capacity within a very short period.)

Despite our efforts CTR is fading a bit. HOWEVER, a decent amount of receipts are going to existing YouMailers (like mine have gone to Melissa and Lee more than anyone else, so we really need to get an adjusted CTR/RR focused on new people experiencing them - since YouMailers can't convert). And while our original plan was to send just one, we're seeing users turn on "all receipts" more and more (so you'd expect it to go down as people see it more and more, though that should bring in new people over time).

The RR rate has gone up a bit - but it is especially high on weekends, which may mean that's when people have the most time to play around. This makes me wonder if we shouldn't explore making sure we first turn this on for people on a Friday so that the people who call a lot will call on the weekend and get the receipt when they can act on it right away. Also, we see the RR go up over time for a given day - as people save the text messages and act later.

While we're all desperate to scale this up and see us double the base in less than 60 days, we still have some work to do.

Top on the list: the iphone sign up experience in-app sucks (no other word for it), so we're focused on redoing that yesterday and today - and getting it to the store (and then have the Apple 4-5 day delay). That should boost RR since we're getting 650-800 downloads/day on iPhone now and only 200-250 accounts.

Next: we also made the Android app much better looking and are trying to push that over the next week, which will have better screen shots on the market page, and will have the key missing features (ditchmail and personal greetings) which should help the RR there too.

Finally: we really need to buy another NFS, so we're going to spend the $15k to get one ordered and installed quickly before we ramp much more. We can try to squeeze by without it, but it's a big risk.

So we'll let it run like this for another week to get two solid weeks of data - unless we think of a particular test we want to do on another 5-10k users. I think it's more important to do this right than to reach for some arbitrary growth in actives for January just to have the growth for that month look better. Plus we're growing 1k-ish/day now anyways, so we'll clear 600k for sure in the next few days.

--Alex

Categories: