

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of Rules and
Regulations Implementing the
Telephone Consumer Protection
Act of 1991

CG Docket No. 02-278

REPLY COMMENTS OF ROBERT BIGGERSTAFF ON THE PETITION OF YOUMAIL

Robert Biggerstaff hereby submits these reply comments on the Petition of YouMail, Inc., for a Expedited Declaratory Ruling regarding the Commission's rules under the Telephone Consumer Protection Act (TCPA) ("Petition").

As with other petitions on this docket, commenters have proven the wisdom and usefulness of the public comment mechanism by uncovering the rest of the story behind the pecuniary interests supporting the petitions. In the instant case, the comments of Megan Gold document¹ what can only be generously called "selective disclosures" of YouMail in this matter.²

However, I want to caution the Commission to not fixate on the details of that documentation (i.e. the explicit solicitation presented to recipients of YouMail messages when they follow the link in the message). Such a fixation will invariably lead to scofflaws trying to skirt the TCPA by evading such "specifics" in favor of more subtle solicitations.

¹ *Comment of Megan Gold in Response and Opposition to Youmail, Inc.'S Petition for Declaratory Ruling, July 25, 2013.*

² This raises a concern with respect to both other proceedings, as well as what other relevant information was not uncovered by commenters? I urge the Commission to consider a more active and investigative role with proceedings of this nature in the future.

Instead of the overt solicitation on the web page, a less direct “informational” link will lead to a more direct solicitation on a different page.

Part of an Overall Marketing Campaign

The concept of providing something for “free” as part of a system to market yourself (or others) is not new in practice or to the Commission. The Commission stated that such “[o]ffers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services constitute ‘advertising the commercial availability or quality of any property, goods, or services.’”³ Similarly, a message that invites someone to view a solicitation is itself a solicitation.⁴ This approach is particularly applicable in a situation like YouMail which purports to be merely a conduit for messages between individuals. To the contrary, it is now clear that YouMail is using the messaging channel between two individuals as its own advertising vehicle, by adding its advertising content to the message stream. The advertising was certainly not typed or entered by the YouMail subscriber for whom YouMail claims it is sending the message—it was created by YouMail itself, it benefits YouMail, and it advertises YouMail. YouMail is simply not a passive conduit.

Authorship of the Content

My original comments, based solely on the representations of the Petition, noted that it “appeared” that YouMail was not responsible for the “content” of the message. That was based on the representations of YouMail that it merely sent the precise text entered by their subscriber, *and nothing more*. Activities of passive conduits, like phone companies,

³ *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014 at ¶140 (2003) (Report & Order) (“2003 TCPA Order”).

⁴ “A call made by a telemarketer solely to determine whether a subscriber wishes to receive a telephone solicitation is, in effect, a solicitation from that telemarketer.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12391, ¶15 (1995).

that are doing *nothing more* than executing instructions of their users, militate against TCPA liability. It is now clear, however, that the prior “appearance” that YouMail was not responsible for the “content” of the message is false. Subsequent filing have show that YouMail is actually responsible for the advertising content of the message.

Automatically sending a text message to a number in Alex’s phone book, written entirely by the YouMail customer, that reads “Hi, this is Alex, I will respond to your voice mail ASAP” is one thing. Capturing CallerID and automatically sending a message that says “RE: Your voicemail for Alex (949]XXX]XXXX)] Click for more: <http://ymvm.it/sLZtdLYq>” and then putting advertising on the landing page “<http://ymvm.it/sLZtdLYq>” is something else. That is not the message entered by Alex. That web page is content authored by YouMail.

YouMail’s attempt to hijack and insert itself into an otherwise person-to-person communications channel is insidious. Imagine if I called and left a voice mail for you, and after I finished the message, my phone company jumped on the line and added a 10 second advertisement to the end of the voice mail message I just left. Who “sent” the advertisement? Like the wisdom of the aphorism to “following the money”, in the case of YouMail “follow the advertising” to reach the responsible party.

The Commission’s Existing ATDS Guidance Is Sound

None of the comments in this docket have provided a sound basis for the Commission to reverse course and limit the interpretation of ATDS. The broad interpretation is critically necessary to protect consumers from the unintended consequences of a more restrictive definition.

The Commission has interpreted the definition of the term “automated telephone dialing system” (“ATDS”) very broadly to any device that has a “the capacity to store or

produce numbers and dial those numbers at random, in sequential order, or from a database of numbers” including hardware where such a capacity is only realized “when paired with certain software.”⁵

Several filers fixate on the notion that YouMail only sends “a single text message.” This is simply false—every autodialer sends only a single message, then proceeds to the next “single” message, and then the next.... The *sin qua non* of the Commission’s guidance is the proceeding from one number to the next, from one message to the next, from one call to the next, without human intervention of the caller. There is no human intervention in the YouMail system—it is all automated, and improperly relying on captured CallerID or ANI..

Telephony technology has changed dramatically, and this was explicitly noted when the Commission reiterated the “human intervention” test in 2003:

It is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies. In the past, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily. As one commenter points out, the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective. The basic function of such equipment, however, has not changed—the capacity to dial numbers without human intervention. We fully expect automated dialing technology to continue to develop.⁶

YouMail’s platform is just such a development. If YouMail’s platform is not an ATDS, then no consent at all is required to use YouMail’s platform to send text messages. This

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 ¶ 131 (2003).

⁶ *Id.*, ¶ 132. See also 137 Cong. Rec. S18784 (1991) (statement of Sen. Hollings) (“The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies”).

“unintended consequence” alone is justification to reject the Petition as it would open up millions of cell phones to spam text messages of every type . . . as long as the spammer used YouMail’s “non-ATDS” platform.

The Commission’s bright-line “human intervention” test has been part of the Commission’s administration of the TCPA for over a decade. That test does not exempt any device from the ATDS definition, but establishes a safe harbor because, even though the device is an ATDS, sending a message with direct human intervention, like speed dialing, is not the target of the TCPA.

Consider the example of a simple wrong number. Someone misdials and accidentally reaches the voice mail for someone who is a YouMail user. Being polite, they leave a message saying “sorry, I reached a wrong number” or “sorry, I dialed your number by accident.” They are then, automatically, sent a useless text message by YouMail. This is a perfect illustration of the need for “human intervention” as opposed to automated systems, and why the Commission’s guidance requiring human intervention is sound.

CONCLUSION

Text messages cost me \$0.20 each. On a family member’s phone, they cost up to \$2.00. Other people pay for them out of their bucket of minutes/data/messages. If I call someone a leave a voice mail—even a voice mail saying to “call me back”—it is in no way consent to have a text message sent to me that I have to pay to receive. I encourage the Commission to deny the Petition of YouMail.

Respectfully submitted, this the 9th day of August, 2013.

/s/ Robert Biggerstaff