# TEXT MESSAGING AND THE REQUIREMENTS OF THE TELEPHONE CONSUMER PROTECTION ACT

Excerpted from Chapter 29 (Law of Unsolicited Commercial Email) of
*E-Commerce and Internet Law: A Legal Treatise With Forms, Second Edition*,
a 4-volume legal treatise by Ian C. Ballon (Thomson/West Publishing 2015)

SANTA CLARA UNIVERSITY LAW PRESENTS

## "HOT TOPICS IN INTERNET, CLOUD, AND PRIVACY LAW"

SANTA CLARA UNIVERSITY LAW SCHOOL
APRIL 23, 2015


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This paper has been excerpted from the page proofs for the 2015 update to *E-Commerce and Internet Law: Treatise with Forms 2d Edition* (Thomson West 2015 Annual Update), a 4-volume legal treatise by Ian C. Ballon, published by Thomson Reuters West Publishing, 395 Hudson Street, New York, NY 10014, (212) 337-8443, www.ianballon.net.

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## 29.16 Text Messaging and the Requirements of the Telephone Consumer Protection Act (TCPA)

The Telephone Consumer Protection Act ("TCPA")[1] was enacted to place "restrictions on unsolicited, automated

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**[Section 29.16]**

[1]47 U.S.C.A. § 227.

telephone calls to the home," and to limit "certain uses of facsimile (fax) machines and automatic dialers."[2] Congress, in enacting the TCPA, was concerned about "the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which makes automated phone calls more cost-effective."[3] The statute and legislative history focus largely on *unsolicited telemarketing* and *bulk communications*. The TCPA seeks to address "intrusive nuisance calls" and "certain practices invasive of privacy."[4] Among other things, it includes express provisions governing commercial fax advertisements.[5] It also subsequently has been construed by the FCC to apply to text messages, which did not exist at the time of the TCPA's enactment in 1991. For purposes of the TCPA, some circuits have held that a text message is considered a "call."[6]

Like the CAN-SPAM Act,[7] which regulates commercial email, the TCPA does not *prohibit* commercial text messages. Calls and text messages are permissible so long as they are directed to numbers not on the national Do-Not-Call list.[8] However, when an *automatic telephone dialing system* or *ATDS* is used to call or send text messages, calls or texts may only be directed to recipients who have consented to receive them. For text messages where an ATDS is used,

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[2]S. Rep. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968.

[3]S. Rep. 102-178, at 2 (1991); *see also* 47 U.S.C. § 227(b)(1)(B) (prohibiting the initiation of a telephone call to residences using an artificial or prerecorded voice without prior consent); 47 U.S.C. § 227(b)(1)(C) (prohibiting unsolicited fax advertisements subject to certain exceptions); Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, 2395 (1991) (incorporating Congressional findings expressing concerns about telemarketing such as "the increased use of cost-effective telemarketing techniques," and that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety").

[4]*Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 744 (2012); *see also ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 514 (3d Cir. 1998) ("Enacted in 1991 as part of the Federal Communications Act, the TCPA seeks to deal with an increasingly common nuisance—telemarketing.").

[5]*See* 47 U.S.C. § 227(b)(1)(C).

[6]*See, e.g.*, *Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 269 n.2 (3d Cir. 2013); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009).

[7]15 U.S.C.A. §§ 7701 to 7713; *supra* § 29.03.

[8]*See* 15 U.S.C.A. § 6101 (the Do-Not-Call Implementation Act).

prior opt-in consent is required in most cases. Pursuant to FCC regulations that took effect in October 2013, *prior express written consent* must be obtained for telemarketing calls sent from an ATDS to a mobile device, including text messages, although the form of consent required is relaxed for purely informational calls and text messages.[9] Even where consent has been provided, the Third Circuit has held that consent to receive text messages from an ATDS may be withdrawn at any time.[10]

For any text message that "includes or introduces an advertisement[11] or constitutes telemarketing," the FCC requires *prior express written consent*[12] of the "called party" (*i.e.,* the recipient), which must be signed by the consumer (including an electronic signature "using any medium or format permitted by the E-SIGN Act[13] . . ."[14]) and be suf-

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[9]*See Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830 (2012). The TCPA is silent on the type of consent required, which allowed the FCC discretion, consistent with legislative intent, to prescribe the form of express consent required. *See id.* at 1838.

[10]*See Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 270–72 (3d Cir. 2013).

[11]An *advertisement* is defined as "any material advertising the commercial availability or quality of any property, goods, or services." 47 C.F.R. § 64.1200(f)(1).

[12]*Prior express written consent* means

> an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.
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> (i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:
>
> (A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and
>
> (B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.
>
> (ii) The term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

47 C.F.R. § 64.1200(f)(8).

[13]15 U.S.C.A. §§ 7001 *et seq.*

[14]*Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830, 1884 (2012). The

ficient to show that he or she:

- received "clear and conspicuous disclosure"[15] of the consequences of providing the requested consent (*i.e.,* that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller); and
- having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.[16]

The written agreement contemplated by the regulations must be obtained "without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service."[17]

In short, in most cases where an ATDS is used, agreement to receive text messages is required when the message includes or introduces an advertisement or constitutes telemarketing. The communication memorializing the agreement should include an acknowledgement that the person providing consent was not required to do so as a condition of purchasing any good or service and, where prior express written consent is sought electronically, it should contain confirmation that the action taken to manifest assent is intended to serve as an electronic signature (consistent with the requirements of e-SIGN[18]).

*Prior express consent*, rather than prior express *written* consent, is all that is required for text messages that include or introduce an advertisement or which constitute telemarketing in two narrow circumstances: (1) when the call or text is made or sent by or on behalf of a tax-exempt nonprofit organization; or (2) if the call or text delivers a "health care"

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FCC has expressly found that "consent obtained via an email, website form, text message, telephone keypress, or voice recording are in compliance with the E-SIGN Act and would satisfy the written consent requirement . . . ." *Id.*; *see generally supra* § 15.02 (analyzing the federal e-SIGN law and its interaction with state electronic signature laws).

[15]The term *clear and conspicuous* means "a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures." 47 C.F.R. § 64.1200(f)(3).

[16]47 C.F.R. § 64.1200(a)(2); *Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830, 1884 (2012).

[17]*Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830, 1884 (2012).

[18]*See supra* § 15.02.

message made by, or on behalf of, a "covered entity" or its "business associate" (as those terms are defined in the HIPAA Privacy Rule[19]).[20]

The regulations provide that "should any question about the consent arise, the seller will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained."[21]

For "non-telemarketing, informational" calls and text messages, such as those sent by or on behalf of tax-exempt nonprofit organizations, calls for political purposes and calls for other noncommercial purposes, including those that deliver purely informational messages such as school closings (or which update consumers on airline flight schedules or warn them about fraudulent activity on their bank accounts[22]), oral consent is sufficient for calls or text messages sent to wireless phones (and no prior consent is required at all for calls to residential wireline consumers).[23] Prior written consent also is not required for calls made to a wireless customer by his or her wireless carrier if the customer is not charged.[24] As a practical matter, however, businesses that send these types of text messages should keep adequate records to prove that consent was obtained, in the event of litigation.

The TCPA does not prohibit a one-time text message confirming a consumer's request that no further text messages be sent when the sender of the text message previously had obtained prior express consent to send text mes-

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[19]45 C.F.R. § 160.103.

[20]47 C.F.R. § 64.1200(a)(2).

[21]*Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830, 1884 (2012).

[22]*Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830, 1875 (2012) (Statement of FCC Chairman Julius Genachowski) (providing examples of "informational" calls).

[23]*Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830, 1841 (2012). As a practical matter, companies should retain evidence that consent has been obtained, in the event of litigation.

[24]*Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830, 1840 (2012).

sages using an ATDS.[25] In *Ibey v. Taco Bell Corp.*,[26] Judge Marilyn Huff of the Southern District of California ruled more broadly that the "TCPA does not impose liability for a single, confirmatory text message . . . ."[27] She explained that "[t]o impose liability under the TCPA for a single, confirmatory text message would contravene public policy and the spirit of the statute—prevention of unsolicited telemarketing in a bulk format."[28]

Where a message contains both information and an advertisement, the FCC considers the communication to be a telemarketing communication.[29]

The specific regulations that apply thus depend on the circumstances surrounding how a message is sent (either with or without use of an *automatic telephone dialing system*), to whom (someone who has or has not provided either prior

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[25]*Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc.*, 27 FCC Rcd. 15391 (2012).

[26]*Ibey v. Taco Bell Corp.*, No. 12-CV-0583-H (WVG), 2012 WL 2401972 (S.D. Cal. June 18, 2012), *appeal dismissed*, Docket No. 12-56482 (9th Cir. Nov. 28, 2012).

[27]*Ibey v. Taco Bell Corp.*, 12-CV-0583-H WVG, 2012 WL 2401972, at *3 (S.D. Cal. June 18, 2012), *appeal dismissed*, Docket No. 12-56482 (9th Cir. Nov. 28, 2012). *Taco Bell* was decided before the FCC addressed more narrowly the issue of confirmatory text messages. In *Taco Bell,* the plaintiff, an employee of the plaintiff's law firm, had opted-in to receive commercial text messages from Taco Bell, then opted-out, and then sued when he received a final text message confirming receipt of his opt out request.

[28]*Ibey v. Taco Bell Corp.*, 12-CV-0583-H WVG, 2012 WL 2401972, at *3 (S.D. Cal. June 18, 2012), *appeal dismissed*, Docket No. 12-56482 (9th Cir. Nov. 28, 2012). The Ninth Circuit explained that "the purpose and history of the TCPA indicate that Congress was trying to prohibit the use of ATDSs in a manner that would be an invasion of privacy." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). With respect to ATDSs, the House Report accompanying the statute underscores that

> these systems are used to make millions of calls every day. Each system has the capacity to automatically dial as many as 1,000 phones per day. Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers.

H.R. Rep. 102-317, at 10 (1991).

[29]*Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830, 1842 (2012); *see also Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14098 (2003) (addressing " 'dual-purpose' robocalls").

express or prior express written consent), by whom (a tax exempt non-profit; a covered entity or business associate within the meaning of HIPAA; or some other person or entity) and based on its contents (general telemarketing or advertising; telemarketing or advertising involving health care matters; "non-telemarketing, informational" messages; a single confirmatory message; or messages sent "for emergency purposes . . ."[30]).

Like the CAN-SPAM Act, the TCPA does not comprehensively regulate all text messages or even all unsolicited text messages. Text messages sent manually from one phone to another or through technologies other than an ATDS are not subject to the TCPA's consent requirements (although they are still subject to compliance with the national Do-Not-Call list). Businesses that do not use an ATDS nonetheless may find it a "best practice" to comply with FCC consent guidelines to avoid litigation (and the cost of proving in litigation that an ATDS was not used, which may be significant).

Unlike the CAN-SPAM Act, the TCPA requires opt-in consent ("prior express consent"[31]) to receive text messages that are subject to the Act, rather than simply requiring that recipients be given the opportunity to opt out as in the case of email messages subject to the CAN-SPAM Act.[32] For text messages, the TCPA does not include an exception for messages sent where there is an "established business relationship," even though such an exception exists under the TCPA for fax transmissions.[33]

Also unlike the CAN-SPAM Act, the TCPA provides for a private cause of action. Marketing by text message therefore can be riskier and potentially more expensive than email marketing because of the number of putative class action suits filed by plaintiffs' lawyers against both advertisers and text message marketing firms or platform providers seeking to recoup statutory damages of up to $500 per message (potentially increased as high as $1,500 per message, in the discretion of the court, if a defendant "willfully or know-

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[30]*See* 47 U.S.C.A. § 227(b)(1)(A). Regulation of the contents of a text message may raise First Amendment issues.

[31]*See* 47 U.S.C.A. § 227(b)(1)(A).

[32]*See supra* § 29.03.

[33]*See* 47 U.S.C.A. § 227(b)(1)(C)(i).

ingly" violated the statute),[34] whenever an unwanted message is received (and in many of these lawsuits, even when the messages sent complied with the TCPA or are not subject to its regulations). The lure of large statutory damages has made TCPA litigation a cottage industry for plaintiffs' counsel.

The TCPA prohibits any person from making

> 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 . . .
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call . . . .[35]

An *automatic telephone dialing system* or *ATDS* 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."[36] Unless a text message is sent by a machine or technology that has the capacity to send messages to random or sequential numbers, the message will not be actionable because it cannot have been sent by an ATDS.[37] Indeed, "courts broadly recognize that not every text message or call

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[34]*See* 47 U.S.C.A. § 227(b)(3). The statute authorizes up to $500 *per violation.* Plaintiffs' lawyers typically argue that each message is a separate violation.

[35]47 U.S.C.A. § 227 (b)(1)(A).

[36]47 U.S.C.A. § 227(a)(1).

[37]*See, e.g.*, *Marks v. Crunch San Diego, LLC*, ___ F. Supp. 3d ___, 2014 WL 5422976 (S.D. Cal. 2014) ("If Defendant's system is not an ATDS, the TCPA does not apply. . . ."); *Emanuel v. Los Angeles Lakers, Inc.,* CV 12-9936-GW SHX, 2013 WL 1719035, at *4 n.3 (C.D. Cal. Apr. 18, 2013) (granting the defendant's motion to dismiss and holding that the plaintiff failed to adequately plead that the defendant used an ATDS because "[p]laintiff's FAC suggests that Defendant does not use a system that has the capacity to generate, or to sequentially or randomly dial numbers. As Defendant points out, Plaintiff does not allege that he received the Lakers' text "randomly" but rather in direct response to Plaintiff's initiating text."); *Ibey v. Taco Bell Corp.*, No. 12-CV-0583-H (WVG), 2012 WL 2401972 (S.D. Cal. June 18, 2012) (granting defendant's motion to dismiss with leave to amend to allege facts supporting use of an ATDS but expressing skepticism that an ATDS was used based on the facts alleged and holding that the TCPA cannot be read to impose liability for a single, confirmatory opt-out message), *appeal dismissed*, Docket No. 12-56482 (9th Cir. Nov. 28, 2012).

constitutes an actionable offense."[38]

The Ninth Circuit has held that the definition of ATDS is "clear and unambiguous," and therefore the court's "inquiry begins with the statutory text, and ends there as well. . . ."[39] Some plaintiffs' lawyers nevertheless have argued that notwithstanding the statutory definition, an ATDS also includes any equipment that could dial a number from a list without human intervention, based on 3 paragraphs about predictive dialers out of 225 paragraphs in an FCC Report and Order from 2003[40]—and some district courts have agreed.[41] This purported expansion of the term ATDS beyond the statutory definition of "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," however, is improper for several reasons and has been rejected by courts in better-reasoned opinions.[42]

First, the FCC does not have the statutory authority to

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[38]*Ryabyshchuck v. Citibank (S. Dakota) N.A.*, 11-CV-1236-IEG WVG, 2012 WL 5379143 at *2 (S.D. Cal. Oct. 30, 2012), *appeal dismissed*, Docket No. 12-57090 (9th Cir. Feb. 4, 2013).

[39]*Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951, 953 (9th Cir. 2009).

[40]*See Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091- 14093 (2003) (paragraphs 131-33).

[41]*See, e.g.*, *Sterk v. Path, Inc.*, __ F. Supp. 2d __, 2014 WL 2443785, at *3 (N.D. Ill. 2014) (granting summary judgment to the plaintiff based on an expansive application of the FCC's 2003 Report and Order to a system that was not a predictive dialer because it could send text messages to a list without human intervention); *Legg v. Voice Media Grp., Inc.*, ____ F. Supp. 2d __, 2014 WL 2004383, at *3 (S.D. Fla. May 16, 2014) (denying plaintiff summary judgment for failing to establish use of an ATDS; relying on a policy argument to expand the FCC's 2003 Report and Order beyond predictive dialers because the statutory requirement that a system must have the capacity to generate numbers randomly or sequentially "had become an anachronism" in view of new technology); *Fields v. Mobile Messengers Am. Inc.*, No. C 12—05160 WHA, 2013 WL 6774076 (N.D. Cal. Dec. 23, 2013) (denying summary judgment in a TCPA case by applying FCC commentary on predictive dialers expansively to a text message system that was not a predictive dialer, despite the fact that under Ninth Circuit precedent, *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009), this commentary was not entitled to *Chevron* deference because the definition of ATDS was held to be clear and unambiguous). As discussed later in this section, these cases were wrongly decided.

[42]*See, e.g.*, *Marks v. Crunch San Diego, LLC*, __ F. Supp. 3d __, 2014 WL 5422976 (S.D. Cal. 2014); *Dominguez v. Yahoo! Inc.*, 8 F. Supp. 3d 637 (E.D. Pa. 2014).

modify the definition of an ATDS. In delegating rulemaking authority under the TCPA to the FCC, Congress limited the FCC's role to prescribing regulations to implement (1) section 227(b)'s restrictions on the use of automated telephone equipment in seven specific circumstances involving use of artificial or prerecorded voice, unsolicited ads sent to fax machines, and simultaneous calls to multiple phone lines of a multi-line business; and (2) methods and procedures for protecting residential telephone subscribers' privacy rights as set forth in section 227(c). The FCC does not have any other statutory authority to modify the definition of an ATDS set forth in section 227(a).[43]

Second, the FCC has not purported to expand the statutory definition of ATDS. The FCC's own definition of ATDS, which is set forth in 47 C.F.R. § 64.1200(f)(2), is consistent with the statute. The FCC rule provides that "[t]he terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers."[44] To amend section 64.1200(f)(2), the FCC would have to undertake formal rulemaking authority, including inviting comments on proposed amendments, which the FCC has not done.

Third, the FCC has never ruled that any equipment that stores telephone numbers in a database and dials them without human intervention, but is not a predictive dialer and otherwise lacks the capacity to store or produce numbers using a random or sequential number generator, is nonetheless an ATDS. In determining that a predictive dialer may constitute an ATDS in its 2003 Report and Order, the FCC sought to address a technology that met the statutory definition, not to expand the statutory definition.[45] The 2003 Report and Order addressed predictive dialers that dial multiple numbers simultaneously based on calculations

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[43]*Compare* 47 U.S.C.A. § 227(a) *with* 47 U.S.C.A. §§ 227(b), 227(c); *see also Marks v. Crunch San Diego, LLC*, ___ F. Supp. 3d ___, 2014 WL 5422976 (S.D. Cal. 2014) (holding that the TCPA did not delegate rulemaking authority to the FCC to change the statutory definition of ATDS).

[44]47 C.F.R. § 64.1200(f)(2).

[45]*See Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14093 (2003) (concluding that "a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress.").

about how quickly people will answer their phones and how many numbers may be called to reach a single live person by telephone.[46] While the 2003 Report and Order stated that a party could not circumvent TCPA liability by using a predictive dialer, and within that context added that "[t]he basic function of such equipment. . . [is] the capacity to dial numbers without human intervention," the FCC never ruled that such equipment need not meet the statutory definition of an ATDS or that any equipment that merely has the capacity to make a call without human intervention is an ATDS.[47]

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[46]According to the FCC, "a predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, 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." *Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14091 (2003). As one court explained:

> Predictive dialers use an algorithm to "predict" *when* a telemarketer will become available to take a call, effectively queueing callers for the telemarketer. They are neither the database storing the numbers nor a number generator creating an ephemeral queue of numbers. However, database or number generator software is frequently attached to automatic dialers, thereby creating the "potential capacity" to become an ATDS.

*Marks v. Crunch San Diego, LLC*, ___ F. Supp. 3d ___, 2014 WL 5422976, at *4 (S.D. Cal. 2014) (emphasis in the original).

[47]*See Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091- 14093 (2003) (explaining that "to exclude from these restrictions equipment that use predictive dialing software from the definition of 'automated telephone dialing equipment' simply because it relies on a given set of numbers would lead to an unintended result."). Plaintiffs sometimes cite to a footnote in an unrelated order addressing prior express consent or a 2008 report and order on prerecorded debt collection phone calls as evidence that the FCC has expanded the definition of an ATDS. *See Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, SoundBite Communications, Inc.*, 27 F.C.C. Rcd. 15391, 15392 n.5 (2012) (referring to an ATDS, in a footnote in a ruling clarifying the requirements for prior express consent, as "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."; emphasis in original); *Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Request of ACA Int'l for Clarification and Declaratory Ruling*, 23 F.C.C. Rcd. 559, 566 (2008) (clarifying that prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the "prior express consent" of the called party). Both of these references, however, refer back to the 2003 FCC Report and Order addressing predictive dialers. More-

As evidence of this fact, the Final Rules attached as Appendix A to the 2003 Report and Order show no changes to 47 C.F.R. § 64.1200(f)(2). The FCC Rule defining ATDS included in the 2003 Report and Order tracks the statutory definition and does not include dialing from a list without human intervention as an alternative definition of ATDS. Rather, it was only in the context of considering whether predictive dialers could come within that statutory definition of an ATDS that the Commission 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."[48] Citing to the statutory definition of an ATDS, the FCC explained that "to exclude from [the TCPA's] restrictions equipment that use predictive dialing software from the definition of 'automated telephone dialing equipment' simply because it relies on a given set of numbers would lead to an unintended result," and stated that it sought to "ensure that the prohibition on autodialed calls not be circumvented."[49] Accordingly, a predictive dialer that has the "random" and "sequential" features turned off (but nonetheless has the requisite capacity under the statute) cannot circumvent the TCPA just

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over, neither purported to apply a new definition to ATDS. The 2003 Report and Order includes the C.F.R. definition of ATDS, which tracks the statute. The 2008 document stated that the 2003 Report and Order "found that. . . a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress." — making clear that it applied only to predictive dialers that met the statutory definition of an ATDS. *Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, *Request of ACA International for Clarification and Declaratory Ruling*, 23 F.C.C. Rcd. 559, 556 ¶ 13 (2008); *see also Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14093 (2003) (concluding that "a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress."). Imprecise language in a footnote in the 2012 report (which itself addressed consent, a different issue) is not the same as rulemaking (as evidenced by the fact that the C.F.R. definition was not changed) and cannot trump the plain terms of a statute.

[48]*Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091-93 (2003).

[49]*Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091-14092 ¶ 132 (2003) (citing to the statutory definition of an ATDS).

because it dials numbers from a database.[50] It does not, however, follow that a device that dials numbers from a list constitutes an ATDS even if it does not have the capacity to generate numbers randomly or sequentially.

Fourth, the FCC itself has never extended its predictive dialer analysis to text messaging platforms. A service that sends SMS messages by definition could *not* be a predictive dialer because there is no such thing as predictive dialing for text (unlike voice calls, there is no need to reach a live person for a text message to be received and no way to measure how quickly a recipient will review a text message).

Fifth, even in the context of predictive dialers, the FCC's 2003 Report and Order would not be entitled to judicial deference if it could be read as expanding the express statutory definition of an ATDS. The U.S. Supreme Court has made clear that an agency may not modify the terms of a statute where the intent of Congress is clear.[51] A broad reading of ATDS from the FCC's 2003 Report and Order to include any equipment that has the capacity to dial numbers without human intervention would not be entitled to *Chevron* deference because the definition of *automatic telephone dialing system* set forth in the statute has been held to be "clear and unambiguous."[52] While the FCC's determination that a predictive dialer may constitute an ATDS may be entitled to *Chevron* deference in a case involving a predictive voice dialer, an expansive reading of that determination to hold that the FCC enlarged the statutory definition of ATDS beyond the terms of the statute would not be entitled to *Chevron* deference because Congress defined the term in the

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[50] *Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14092-14093 ¶ 133 (2003) (citing to the statutory definition of an ATDS).

[51] *See Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

[52] *See Satterfield v. Simon and Schuster, Inc.*, 569 F.3d 946, 951, 953 (9th Cir. 2009) (holding that the definition of an ATDS is unambiguously set forth in the statute, and that therefore, under *Chevron*, because "Congress spoke clearly, we need not look to the FCC's interpretations. . . ."); *see also Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014) (applying *Chevron* deference to an FCC ruling on vicarious liability "[b]ecause Congress has not spoken directly to this issue and because the FCC's interpretation was included in a fully adjudicated declaratory ruling. . . .").

TCPA[53] (putting aside the fact that such an interpretation would amount to a misreading of the 2003 Report and Order, in which the FCC does not purport to change the definition, and indeed ratifies the statutory definition of ATDS that it adopted in 47 C.F.R. § 64.1200(f)(2)).

The proper analysis under the TCPA therefore is whether equipment "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"[54]—which is the standard that the FCC itself applies—and not whether a service may dial numbers from a list and send them without human intervention.

Courts have interpreted *random number generation* to mean production of telephone numbers based on a random

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[53]*See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951, 953 (9th Cir. 2009); *Dominguez v. Yahoo! Inc.*, 8 F. Supp. 3d 637, 643 n.6 (E.D. Pa. 2014) (applying *Satterfield* in holding that the definition of ATDS is unambiguous and therefore any contrary interpretation given to the FCC's 2003 Report and Order would not be entitled to *Chevron* deference), *citing Swallows Holding, Ltd. v. C.I.R.*, 515 F.3d 162, 170 (3d Cir. 2008) ( "Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), if the statutory language is clear and unambiguous, our inquiry ends and the plain meaning of the statute governs the action."). Likewise, applying the 2003 Report and Order to a text system that is not a predictive dialer would be erroneous if that system did not also meet the statutory requirement that it have the capacity to generate numbers randomly or sequentially. For this reason, *Sterk v. Path, Inc.*, __ F. Supp. 2d __, 2014 WL 2443785, at *3 (N.D. Ill. 2014) (granting summary judgment to the plaintiff based on an expansive application of the FCC's 2003 Report and Order to a system that was not a predictive dialer because it could send text messages to a list without human intervention), *Legg v. Voice Media Grp., Inc.*, ____F. Supp. 2d____, 2014 WL 2004383, at *3 (S.D. Fla. May 16, 2014) (relying on a policy argument to expand the FCC's 2003 Report and Order beyond predictive dialers because the statutory requirement that a system must have the capacity to generate numbers randomly or sequentially "had become an anachronism" in view of new technology), and *Fields v. Mobile Messengers Am. Inc.*, No. C 12—05160 WHA, 2013 WL 6774076 (N.D. Cal. Dec. 23, 2013) (denying summary judgment in a TCPA case by applying FCC commentary on predictive dialers expansively to a text message system that was not a predictive dialer and did not have the capacity to generate number randomly or sequentially), are wrongly decided. An FCC ruling interpreting a statute is not the same as a court decision applying common law principles, such as negligence, where a court may in its discretion expand upon a prior ruling based on the facts presented in a given case. A court may not expansively read (or misread) an agency interpretation or ruling to apply a statute beyond its plain terms.

[54]47 U.S.C.A. § 227(a)(1).

selection of ten digits and *sequential number generation* to mean production of telephone numbers that follow a sequential pattern "such as (111) 111-1111, (111) 111-1112, and so on."[55] For example, in the context of phone calls, a predictive dialer that randomly calls numbers from a database based on an algorithm that predicts when a consumer will answer (calling, for example, six numbers simultaneously on the assumption that only one will be answered), potentially may constitute an ATDS.[56]

*Capacity* has been construed to mean "the system's *present*, not *potential*, capacity to store, produce, or call randomly or sequentially generated telephone numbers."[57]

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[55]*Griffith v. Consumer Portfolio Services, Inc.*, 838 F. Supp. 2d 723, 725 (N.D. Ill. 2011); *see also Marks v. Crunch San Diego, LLC*, __ F. Supp. 3d __, 2014 WL 5422976, at *3 (S.D. Cal. 2014) (citing this standard approvingly); *Dominguez v. Yahoo! Inc.*, 8 F. Supp. 3d 637, 643 (E.D. Pa. 2014) (adopting the same analysis); *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014) (adopting the same analysis).

[56]*See, e.g.*, *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012) (affirming entry of a preliminary injunction based on allegations that defendants used an ATDS because their security filings showed that they used predictive dialers and defendants did not dispute that the predictive dialers could be used to "produce or store telephone numbers using a random or sequential number generator, or to dial those numbers"); *Hernandez v. Collection Bureau of Am., Ltd.*, No. SACV 13-01626-CJC (DFMx) (C.D. Cal. Apr. 16, 2014) (finding that a predictive dialer was an ATDS); *Nelson v. Santander Consumer USA, Inc.*, 931 F. Supp. 2d 919 (W.D. Wis. Mar. 8, 2013) (finding that a predictive dialer which has the capacity to randomly or sequentially dial telephone numbers is an ATDS), *vacated pursuant to joint motion*, 2013 WL 5377280 (W.D. Wis. June 7, 2013); *Lee v. Credit Management LP*, 846 F. Supp. 2d 716, 729 (S.D. Tex. 2012); *Griffith v. Consumer Portfolio Services, Inc.*, 838 F. Supp. 2d 723, 725–27 (N.D. Ill. 2011); *Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 18 FCC Rcd. 14014 (2003).

[57]*Gragg v. Orange Cab Co.*, 995 F.Supp.2d 1189, 1193 (W.D. Wash. 2014) (emphasis in original); *see also Marks v. Crunch San Diego, LLC*, __ F. Supp. 3d __, 2014 WL 5422976, at *3 (S.D. Cal. 2014) (quoting and applying the *Orange Cab* standard); *Hunt v. 21st Century Mortgage Corp.*, No. 2:12-CV-2697-WMA, 2013 WL 5230061, at *4 (N.D. Ala. Sept. 17, 2013) (holding that *capacity* must mean present, not future capacity). In *Sherman v. Yahoo!, Inc.*, 997 F. Supp. 2d 1129, 1141-42 (S.D. Cal. 2014), the court held that there was a factual issue precluding summary judgment on the issue of capacity where the plaintiff argued that software could be written that would convert the defendant's system to become an ATDS, but this opinion should be viewed as an outlier. The better view is that *capacity* must mean present capacity, not hypothetical future capacity, or else any system that does not currently have the capacity to gener-

Congress delegated specific authority to the Federal Communications Commission to adopt rules and regulations implementing certain aspects of the TCPA.[58] The Agency may not vary the plain terms of the statute, however. In evaluating whether a court is bound by FCC interpretations of the TCPA, a court must engage in a two-step process laid out in the U.S. Supreme Court's decision in *Chevron v. Natural Resources Defense Council, Inc*.[59] First, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[60] Second, if a statute is silent or ambiguous with respect to an issue, a court then must defer to the agency provided its analysis "is based on a permissible construction of the statute."[61]

The FCC's construction of the TCPA in a given administrative case is subject to administrative review under a deferential standard that assumes it is permissible unless "arbitrary, capricious, or manifestly contrary to the statute."[62]

Conversely, where a case raises an issue under the statute that is within the FCC's jurisdiction to interpret, federal courts may refer the issue of interpretation to the FCC pur-

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ate numbers randomly or sequentially could be characterized as an ATDS based on the theoretical potential to reengineer that system. As one court explained, in rejecting the argument that *capacity* should be read to include the potential capacity to be modified:

> The problem with this reasoning is that, in today's world, the possibilities of modification and alteration are virtually limitless. For example, it is virtually certain that software could be written, without much trouble, that would allow iPhones "to store or produce telephone numbers to be called, using a random or sequential number generator, and to call them." Are the roughly 20 million American iPhone users subject to the mandates of § 227(b)(1)(A) of the TCPA? More likely, only iPhone users who were to download this hypothetical "app" would be at risk.

*Hunt v. 21st Century Mortgage Corp.*, No. 2:12-CV-2697-WMA, 2013 WL 5230061, at *4 (N.D. Ala. Sept. 17, 2013).

[58]*See* 47 U.S.C.A. § 227(b)(2).

[59]*Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

[60]*Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

[61]*Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[62]*Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

suant to the primary jurisdiction doctrine.[63] In evaluating TCPA cases, the Seventh Circuit has held that district courts are bound by the Hobbs Act[64] to apply FCC rulings that are on point.[65] Where an FCC determination is not on point, a district court need not apply it.[66]

By contrast, the Ninth Circuit has held that fully adjudicated FCC rulings must be applied to an issue where Congress is silent and has delegated rulemaking authority to the FCC[67] but FCC pronouncements are not entitled to

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[63]*See, e.g.*, *Charvat v. EchoStar Satellite, LLC*, 630 F3d 459, 466 (6th Cir. 2010) (referring an issue to the FCC in the interest of promoting uniformity on an issue over which the agency had discretion and unique expertise in construing the statute, where the legal issue turned on the interpretation of several provisions of the TCPA and its implementing regulations). The doctrine of primary jurisdiction "allows courts to refer a matter to the relevant agency 'whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . . .'" *Id., quoting U.S. v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-64 (1956).

[64]28 U.S.C.A. §§ 2341 to 2353.

[65]*See CE Design, Ltd. v. Prism Busin. Media, Inc.*, 606 F.3d 443 (7th Cir. 2010).

[66]*See Thrasher-Lyon v. CCS Commercial, LLC*, No. 11 C 04473, 2012 WL 3835089, at *3 (N.D. Ill. Sept. 4, 2012) (holding that the Hobbs Act did not prevent the court from ruling that an FCC order exempting liability for calls in a creditor-debtor relationship did not apply in a robocall case); *see also Kolinek v. Walgreen Co.*, No. 13 C 4806, 2014 WL 518174, at *2-3 (N.D. Ill. Feb. 10, 2014) (stating that while a district court cannot decline to apply the FCC's ruling "[i]f the FCC's interpretation governs," it "does, of course, have the authority to decide whether the FCC's interpretation. . . governs this case"; concluding that the FCC's interpretation of 'prior express consent,' which is not defined by the TCPA, did govern in that case to bar plaintiff's claim), *vacated on other grounds*, 2014 WL 3056813, at *2-3 (N.D. Ill. July 7, 2014) (granting motion for reconsideration of dismissal of TCPA case based on subsequent FCC ruling on "prior express consent").

[67]*See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014) (applying *Chevron* deference to an FCC ruling on vicarious liability "[b]ecause Congress has not spoken directly to this issue and because the FCC's interpretation was included in a fully adjudicated declaratory ruling. . . ."); *see also Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012) (deferring to an FCC report and order prohibiting "dual purpose" calls where neither party argued that the interpretation set forth in the report and order was "unreasonable or otherwise not entitled to this court's deference.").

deference on issues that the statute clearly addresses.[68]

A suit under the TCPA may be brought in either state or federal court.[69]

In recent years, there has been a flood of TCPA putative class action suits over ostensibly unsolicited text messages. A prevailing plaintiff may recover injunctive relief plus the greater of actual damages or $500 per violation, increased up to three times the amount of an award if the court finds that the defendant "willfully or knowingly" violated the statute or it's implementing regulations.[70]

The TCPA does not provide expressly for vicarious liability but has been construed to allow for vicarious liability to the extent that the conduct of an employee or agent or third-party telemarketer acting within the scope of authority may be attributed to a company.[71] In the context of telephone calls to residential telephone lines using prerecorded messages, the FCC has ruled that an advertiser (or "seller" in the terminology of the FCC), which generally is *not* directly liable for any TCPA violations unless it initiates a call, potentially could be held vicariously liable for advertisements sent out on its behalf, but only if agency can be established under federal common law principles.[72] In a footnote, the FCC also suggested that vicarious liability could be established through evidence of a formal agency relation-

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[68]*Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951, 953 (9th Cir. 2009).

[69]*Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 753 (2012).

[70]47 U.S.C.A. § 227(b)(3).

[71]*See, e.g.*, *In re: Jiffy Lube Int'l, Inc. Text Spam Litig.*, 847 F. Supp. 2d 1253, 1257 (S.D. Cal. 2012) (holding that the plaintiff had stated a claim for vicarious liability under section 227(b)(1)(A) where the defendant hired the entity that sent the text message at issue in the case); *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125, 1129 (W.D. Wash. 2012) (holding that a defendant may be liable for the transmission of messages that it did not physically send where the defendant "controlled sending the message."); *Accounting Outsourcing LLC v. Verizon Wireless Personal Communications, L.P.*, 329 F. Supp. 2d 789, 806 (M.D. La. 2004) (holding that TCPA liability could extend to advertisers hired to send unsolicited messages and holding that "congressional tort actions . . . implicitly include the doctrine of vicarious liability, whereby employers are liable for the acts of their agents and employees."), *citing Meyer v. Holley*, 357 U.S. 280, 285 (2003).

[72]*See Matter of Joint Petition Filed by DISH Network, LLC*, 28 FCC Rcd. 6574 (2013).

ship, apparent authority or ratification.[73] Although an argument could be made that this ruling should not apply to text messages sent using an ATDS,[74] the Ninth Circuit has held that it is entitled to Chevron deference and potentially may be applied both to hold a merchant liable for outsourced telemarketing (as contemplated by the FCC ruling) and hold to a third-party marketing consultant vicariously liable.[75]

Needless to say, vicarious liability is often difficult to prove because of the need to establish agency or apparent authority and ratification.[76]

The TCPA does not provide for aiding and abetting liability.[77] The Supreme Court has explained in a different context that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also

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[73]*See Matter of Joint Petition Filed by DISH Network, LLC*, 28 FCC Rcd. 6574, 6590 n.124 (2013).

[74]The prohibition on using an ATDS is set forth in 47 U.S.C.A. § 227(b)(1)(A)(iii). The FCC's ruling in *DISH Network* involved cases brought under a different provision of the TCPA, sections 227(b)(1)(B) and 227(c)(5), which afford a private cause of action for a person who has received more than one call to a residential telephone line using a prerecorded message from the same entity. There is no equivalent provision governing the use of an ATDS.

[75]*Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014).

[76]*See, e.g.*, *Thomas v. Taco Bell Corp.*, 582 F. App'x 678 (9th Cir. 2014) (holding that Taco Bell could not be held vicariously liable for a text message sent by the Chicago Area Taco Bell Local Owner's Advertising Association where the association and the entities that sent out the text message were not acting as agents for Taco Bell, Thomas could not establish reliance on any apparent authority with which these entities may have been cloaked, and Taco Bell did not ratify the text message); *Lary v. VSB Financial Consulting, Inc.*, 910 So. 2d 1280, 1293 (Ala. App. 2005) (holding that a defendant who exercised no direct control and played no part in any decision to send unsolicited advertisements was not liable under the TCPA); *Charvat v. Farmers Insurance Columbus, Inc.*, 178 Ohio App. 3d 118, 132 (2008) (granting summary judgment for the defendant, holding that TCPA liability could not be imposed where the plaintiff could not show any agency relationship between the defendant and the third party that sent the text message at issue in the case).

[77]*See* 47 U.S.C.A. § 227(b)(1)(A); *Baltimore-Washington Tel. Co. v. Hot Leads Co., LLC*, 584 F. Supp. 2d 736, 746 (D. Md. 2008); *see also Matter of Joint Petition Filed by DISH Network, LLC*, 28 FCC Rcd. 6574, 6585-86 (2013) (declining to expand responsibility under the TCPA beyond direct or vicarious liability to circumstances where a call aids or benefits a seller).

sue aiders and abettors."[78]

For interactive computer services[79] that generate text messages from computers or HTTP applications, a provision of the Telecommunications Act potentially could insulate a business from liability under the TCPA for sending text messages that make available the technical means to restrict access to further messages that a recipient deems objectionable.[80] The Communications Decency Act,[81] which is codified in the Telecommunications Act at 47 U.S.C. § 230(c)(2)(B), provides that no provider or user of an interactive computer service shall be held liable on account of "any action taken to enable or make available to . . . others the technical means to restrict access to" harassing, or otherwise objectionable material.[82] Section 230(c)(2)(B), therefore, "covers actions taken to enable or make available to others the technical means to restrict access to objectionable material."[83] A business that qualifies as an interactive computer service and sends text messages that make available the technical means to restrict access to further messages that a recipient deems objectionable therefore potentially may be insulated

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[78]*Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994) (holding that a federal securities statute did not allow claims for aiding and abetting a primary violation because the statute was silent and Congress "knew how to impose aiding and abetting liability when it chose to do so.").

[79]An *interactive computer service* is broadly defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet." 47 U.S.C.A. § 230(f)(2). Companies that provide computer-to-text or similar services plainly would fit within this definition.

[80]*See* 47 U.S.C.A. § 230(c)(2)(B); *see generally infra* § 37.05[4] (analyzing the provision in greater detail).

[81]The applicability of the CDA to unsolicited emails is separately addressed in section 29.08.

[82]*See* 47 U.S.C.A. § 230(c)(2)(B).

[83]*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1174–75 (9th Cir. 2009) (finding that section 230(c)(2)(B) extended protection to a distributor of Internet security software that filtered adware and malware); *see also Pallorium, Inc. v. Jared*, Case No. G036124, 2007 WL 80955 (Cal. Ct. App. Jan. 11, 2007) (finding that section 230(c)(2)(B) extended protection to the creator of a website-based system through which third parties could identify the source of unwanted e-mails and block future e-mails from that source); *see generally infra* § 37.05[4].

from liability.[84]

Businesses intending to send commercial text messages may wish to review the Mobile Marketing Association guidelines on best practices,[85] in addition to strictly complying with the TCPA and its implementing regulations. Given the current volume of litigation, companies also may wish to consider email marketing as an alternative. The CAN-SPAM Act allows senders to proceed with a campaign based on opt-out, rather than opt-in consent, and the statute provides relatively clear guidelines on permissible practices and does not allow for a private cause of action by individuals who receive unsolicited commercial messages (only Internet access services and various government agencies may sue and many potential state law claims are preempted by the CAN-SPAM Act).[86]

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[84]*See, e.g.*, *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104 (N.D. Cal. 2011) (finding that it was reasonable for Microsoft to conclude that plaintiff's SPAM e-mails were "harassing" and thus "otherwise objectionable" and granting immunity for filtering the SPAM under section 230(c)(2)(A) of the CDA); *Holomaxx Technologies v. Yahoo!, Inc.*, *CV-10-4926-JF*, 2011 WL 865794 at *5 (N.D. Cal. Mar. 11, 2011) (ruling the same way in evaluating a virtually identical complaint against Yahoo!).

[85]*See* http://www.mmaglobal.com/bestpractice

[86]*See generally supra* § 29.03.

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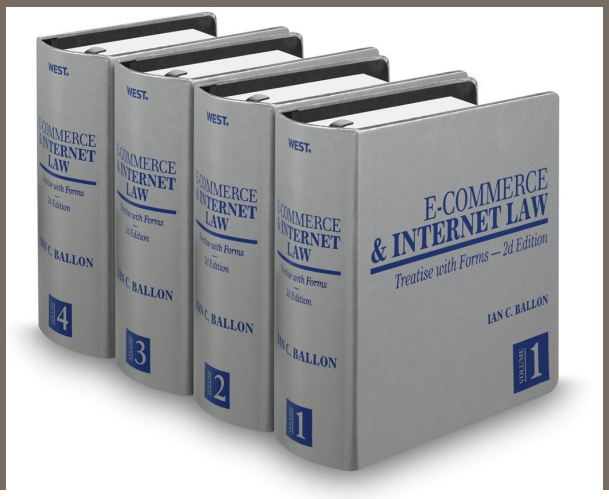


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Mr. Ballon, who is admitted to practice in California, the District of Columbia and Maryland and in the U.S. District Court for the District of Colorado, represents companies in copyright, trademark, trade secret, right of publicity, privacy and security and other Internet-related cases and in defense of data privacy, security, TCPA, advertising and Internet and mobile class action suits.

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- Exhaustive coverage of the latest law and trends in data privacy, data security, TCPA and CAN-SPAM Act litigation (including class action litigation) – the most comprehensive available anywhere!
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- The interplay between the DMCA, the CDA and other safe harbors, defenses and exemptions available to cloud service providers, operators of social networks, mobile providers, app developers and app store hosts, service providers and employer-owned computer networks.
- The parameters of federal preemption of right of publicity and other IP claims under the Telecommunications Act.
- The latest analysis on the interplay between Internet, cloud and mobile business and antitrust law (updated by Emilio Varanini)
- New sections addressing the common law copyright issues for sound recordings in digital media and California's law prohibiting sites and services from restricting user criticism
- Updated analysis of state security breach laws in the 48 states that have them and in D.C., Puerto Rico and Guam – analyzed holistically the way a practitioner would, rather than merely by chart or graph.
- Music licensing (updated by Tucker McCrady)
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- Complete analysis of security breach case law, statutes and trends
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- Latest law on sponsored links, database protection, screen scraping and search engine optimization
- Complete, updated catalogue of state statutes governing state security breach notification laws, email marketing and online dating
- Latest case law on subpoenaing data from internet, mobile and social network sites and what is permissible under ECPA and state statutory and common law privacy laws
- Hundreds of new and recent cases and FTC data privacy, security and COPPA enforcement actions and settlements
- The most comprehensive authority available on the law of digital media, the cloud, mobile and social media law as well as e-Commerce and internet law.