Telephone Consumer Protection Act
Facebook v Duguid: Punctuation Matters

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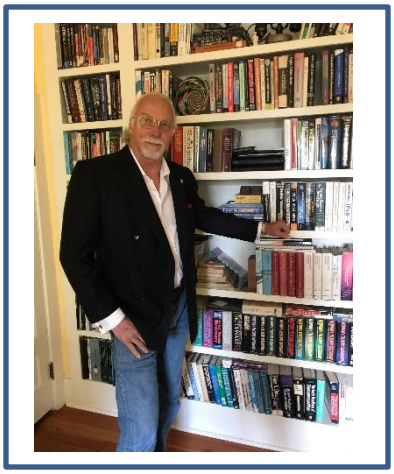

The decision of the Supreme Court of the United States (SCOTUS) in the matter of Facebook v Duguid has been perhaps the single most anticipated in the realm of the Telephone Consumer Protection Act (TCPA), at least in the last decade or so, and all over a punctuation mark—a comma, to be exact. The legal battles over that comma are the stuff of legends and the implications of that decision are considerable, if not monumental. The decision leaves a lot of unanswered questions, however, and even raises a few in the mind of this consultant. I'll explore those in another article at another time.

TCPA in Summary

In an effort to address a growing number of unsolicited faxes, telephone marketing calls and certain other telemarketing practices thought to be invasions of privacy, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), codified at 47 U.S.C. § 227. Initially, the focus of the plaintiff's bar (read *class action suits*) was on the transmission of unsolicited fax advertisements. As fax communications faded in popularity, the plaintiff's bar shifted their attention to voice calls to cellular telephones.

Most of us know, at least in general terms, about the restrictions on unsolicited telemarketing calls to consumers and the National Do-Not-Call (NDNC) Registry designed to end those annoyances…or opportunities, depending on your perspective. Just to refresh your memory, the TCPA states "It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States… (47 USC 227(b)(1)(iii))

The second provision then incorporates that definition in setting out the scope of the prohibition: "It shall be unlawful for any person to make 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…." Id. § 227(b)(1)(A)(iii).

The TCPA defined the term *automatic telephone dialing system* (ATDS) to mean "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" at § 227(a)(1).

The FCC subsequently expanded the reach of the TCPA to cover SMS messaging, aka text messaging, which had grown in popularity to the point of ubiquity and the abuses of which allegedly had become considerable.

Over time the volume of class action cases grew exponentially and the circuits and even individual courts split with respect to their interpretation of the statutory language and, in particular, the significance of the comma in the provision "to store or produce telephone numbers to be called, using a random or sequential number generator". Specifically, did the phrase "using a random or sequential number generator" apply to both "store" and "produce", or only "produce". The battle between the plaintiff's bar and defendant's bar was in full gear and so was the battle between the forces of technological evolution, common sense, and linguistics.

There is a lot more to the TCPA than the limited space here allows. See my previous article *Rumplestiltskin, LLP Volume II: The Dark Side of Dialers: Words Matter* for a more detailed discussion of the TCPA.

Facebook v Duguid in Summary

Noah Duguid alleged that Facebook sent him a text login notification in violation of the TCPA by using equipment that drew telephone numbers from a stored list. Facebook did indeed send a login notification as a standard security measure in service of its end users. Facebook denied any TCPA violation as the list comprised telephone numbers provided by its customers rather than numbers generated randomly or sequentially and that, therefore, an autodialer, as described in the statutory language, was not employed.

The District Court for the Northern District of California sided with Facebook, but the Ninth Circuit Court of Appeals overturned that decision in favor of Duguid. Facebook appealed to the Supreme Court, which overturned the Ninth Circuit, ruling that "We hold that a necessary feature of an autodialer under §227(a)(1)(A) is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called." As Facebook, in this case, neither stored numbers nor produced numbers using a random or sequential number generator, it was *off the hook*, so to speak.

The SCOTUS opinion goes beyond an interpretation of the language of the statute to apply a little common sense, as well. "It would make little sense…to classify as autodialers all equipment with the capacity to store and dial telephone numbers, including virtually all modern cell phones."

I Happen to Agree, by the Way

As a consulting/testifying technical expert, I strive to avoid expressing opinions that might be construed as legal rather than technical in nature. As I am not a linguist and did not major in English, I also tend to avoid opining on sentence structures, as well. (Note: I admit to being pretty good at diagraming sentences while in junior high school.)

With respect to the Facebook v Duguid matter, however, I have no reservations in expressing my concurrence with the SCOTUS decision. In the last five years, I have written dozens of expert reports and declarations and have testified in dozens of TCPA individual and class actions in federal and state courts and arbitrations. In each case, I have gone to considerable lengths to point out that telephony systems, including PBXs and Central Offices (COs) have temporarily stored telephone numbers since the days of crossbar/crossreed technology (1937) and semi-permanently since the introduction of speed dial in the 1970s. Heck, my cell phone and even my desk phone have stored speed dial numbers for more than 25 years. I have long and repeatedly taken the position that storing telephone numbers would qualify a system as an ATDS is absurd, and that the concept of using a random or sequential number generator to do so is beyond absurd.

While the Facebook decision clearly narrowed the TCPA by resolving this linguistic dilemma and applying some common sense, the TCPA is sufficiently broad so as to leave plenty of issues unresolved, at least in my humble opinion.

I have long maintained that “Words Matter.” Turns out that “Punctuation Matters”, as well. If Thomas Paine were asked to weigh on this matter, I think he would agree that “Common Sense” matters a great deal.

Ray Horak is a seasoned author, writer, columnist, telecom consultant, and industry analyst who provides litigation support services as a consulting and testifying expert across a wide range of telecom matters, including the TCPA. He also frequently conducts corporate compliance reviews to assess the risk levels associated with customer contact and related systems, policies and procedures in the context of the TCPA, with the goal of minimizing, if not eliminating, the risk of adverse judgments.

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