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Mobile Marketing Derailed: How Curbing Cell-Phone Spam in *Satterfield v. Simon & Schuster* May Have Banned Text-Message Advertising

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MOBILE MARKETING DERAILED: HOW CURBING CELL-PHONE SPAM IN *SATTERFIELD V. SIMON & SCHUSTER* MAY HAVE BANNED TEXT-MESSAGE ADVERTISING

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ABSTRACT

The risk of receiving cell-phone spam—in the form of unsolicited text messages—grows as advertisers increasingly target cell-phone users. The Telephone Consumer Protection Act of 1991 (TCPA) clearly prohibits unsolicited telephone calls made by an automated telephone dialing system (ATDS) without the recipient's express prior consent. But until the Ninth Circuit's decision in Satterfield v. Simon & Schuster, it was unclear how TCPA applied to text messages. Simon & Schuster argued their text messages were not "calls" under the TCPA and were not sent by an ATDS. The Ninth Circuit disagreed and held a text message is a "call." The court also held an ATDS means any equipment with capacity to store or dial random or sequential telephone numbers, regardless of whether such calls were actually made. This sweeping rule arguably applies to any computer. The court also adopted narrow legal definitions of "brand" and "affiliate" that could hinder any business seeking third-party advertisers to send messages on its behalf. This Article explores how Satterfield exposes mobile advertisers to significantly increased liability.

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[*] Gareth S. Lacy, University of Washington School of Law, Class of 2011. Thank you Professor Jane K. Winn of the University of Washington School of Law and Thomas Hackett, Article Editor, for offering valuable feedback. Thank you also to Matthew Staples, Associate, Wilson Sonsini Goodrich & Rosati, for sharing his expertise in this area of law.

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INTRODUCTION

In 2004 Laci Satterfield downloaded a free ringtone for her eight-year-old son's cell phone from www.nextones.com.[1] Two years later publishing giant Simon & Schuster launched an advertising campaign using text messages to promote Stephen King's latest horror novel, *Cell*.[2] The company outsourced the advertising to ipsh!, Inc. (ipsh!), a mobile marketing firm with 100,000 cell-phone numbers purchased from various Web sites including Nextones.[3]

At half-past midnight on January 18, 2006, Satterfield's son

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[1] Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 949 (9th Cir. 2009); Brief for Defendants-Apellees at 4., Satterfield v. Simon & Schuster, Inc., 569 F.3d 946 (9th Cir. 2009) (No. 07-16356), 2007 WL 4856754.

[2] Jeffrey A. Trachtenberg, *Stephen King Tries to Ring Up Book Sales*, WALL ST. J., Jan. 23, 2006, at B1. (King's book is about a supernatural force transforming the world's cell-phone users into flesh-eating zombies.) *See* Janet Maslin, *Invasion of the Ring Tone Snatchers*, N.Y. TIMES, Jan. 23, 2006, at E1 *available at* http://www.nytimes.com/2006/01/23/books/23masl.html.

[3] Before downloading the ringtone, Satterfield had checked a box next to the following statement: "Yes! I would like to receive promotions from Nextones affiliates and brands. Please note, that by declining you may not be eligible for our FREE content. By checking Submit, you agree that you have read and agreed to the Terms and Conditions." Satterfield v. Simon & Schuster, 569 F.3d at 949.

received Simon & Schuster's text-message advertisement:

> The next call you take may be your last . . . Join the Stephen King VIP Mobile Club at www.cellthebook.com. RplySTOP2OptOut. PwdbyNexton.[4]

The message terrified the young boy. Satterfield wrote "STOP" in response. Then she sued Simon & Schuster and ipsh![5] for sending an unsolicited text-message advertisement in violation of the Telephone Consumer Protection Act of 1991 (TCPA).[6] She later sought to certify a class of 60,000 people who received similar messages.[7]

Simon & Schuster moved for summary judgment by arguing: TCPA did not apply because text messages were not "calls," the messages were not sent by a prohibited ATDS, and Satterfield consented to receive promotions from Nextones affiliates and brands.[8] The district court ruled for Simon & Schuster.[9] But the Ninth Circuit reversed and held: (1) a text message is a "call" under TCPA; (2) an ATDS is any equipment with capacity to store, produce, or call random or sequential numbers; and (3) Simon & Schuster was not an "affiliate" or "brand" of Nextones and therefore Satterfield did not consent to receive the text-message advertising.[10] The decision reinstated Satterfield's effort to certify a $90-million class action lawsuit.[11]

This Article will describe the laws regulating text-message

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[4] *Satterfield*, 569 F.3d at 949.

[5] Corrected Complaint for Damages and Injunctive Relief at 1, Satterfield v. Simon & Schuster, Inc., No. C 06-2893 CW (N.D. Cal. June 26, 2007), 2006 WL 1787153, *rev'd*, 569 F.3d 946 (9th Cir. 2009).

[6] 47 U.S.C. § 227 (2006) *et seq.*

[7] First Amended Class Action Complaint for Damages and Injunctive Relief, Satterfield v. Simon & Schuster, Inc., No. 406CV02893 (N.D. Cal. Sep. 17, 2009), 2009 WL 3441944; *9th Cir. Hangs Up on Text Message Spam*, 16 No. 7 ANDREWS CLASS ACTION LITIG. REP. 23 (Aug. 19, 2009).

[8] *Satterfield*, 569 F.3d at 950.

[9] *Id.*

[10] *Id.* at 951, 952, 955.

[11] *9th Cir. Hangs Up on Text Message Spam*, 16 No. 7 ANDREWS CLASS ACTION LITIG. REP. 23 (Aug. 19, 2009).

advertising and will explore how *Satterfield v. Simon & Schuster* exposes mobile advertisers to liability under TCPA. In particular, the court's broad definition of a prohibited ATDS—any computer with capacity to generate random numbers—may further restrict text-message marketing. The court's definitions of "affiliate" and "brand" may also discourage the use of plain language in terms and conditions displayed to consumers visiting Web sites.

I. TEXT-MESSAGE ADVERTISING AND MOBILE SPAM PREVALENCE

Text messaging, or short message service (SMS), allows cell-phone users to send and receive 160-character text-only messages.[12] Carriers charge per text message or offer monthly flat rates.[13] SMS supports sending messages phone-to-phone or Internet-to-phone.[14] Phone-to-phone messages are directed to cell-phone numbers. Internet-to-phone messaging allows users to send their message to an e-mail address assigned by the wireless carrier; the carrier then converts this e-mail into a text message.[15]

Text messaging is big business. In 2008 American cell-phone users sent an average of seven billion text messages per month, up 20 percent from 2007.[16] The mobile advertising market, including text-

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[12] The European Telecommunication Standards Institute (ETSI) first developed an SMS technical standard in the early 1990s. Today the Third Generation Partnership Project (3GPP) develops and maintains an SMS standard inter-nationally. *See* 3rd Generation Partnership Project, Technical Realization of Short Message Service (SMS), Technical Report 3GPP TS 23.040, http://www.3g pp.org/specification-numbering (last visited Apr. 24, 2010).

[13] Steven Masur & John Maher, *Mobile Phone Text Message Spam: Building A Vibrant Market for Mobile Advertising While Keeping Customers Happy*, 7 VA. SPORTS & ENT. L. J. 41, 44-45 (2007).

[14] Joffe v. Acacia Mortgage Co., 121 P.3d 831, 837-38 (2005).

[15] Every cell-phone number has an e-mail address that is typically the user's cell-phone number and the wireless carrier's domain address. For example, the AT&T cell-phone number (783) 836-5464 would have an e-mail address: 7838365464@att. wireless.net. E-mails sent to that address would be converted to text message and then delivered to the user's cell phone. *See Joffe*, 121 P.3d at 837-38.

[16] Liz Farmer, *Conn.-based Vesta Mobile hoping u r ready 4 txt msg mrktng*, DAILY

message marketing, is projected to be worth $12 billion by 2011.[17] Text messaging is now more popular than cell phone calls.[18]

A broad range of technology providers are involved in creating, processing, and distributing text-message advertising.[19] In *Satterfield*, for example, five companies accessed Satterfield's phone number before she received the text-message advertisement.[20] In an effort to self-regulate, more than 600 carriers, advertisers, manufacturers, and software providers formed the Mobile Marketing Association (MMA) in 2000 to issue voluntary best practices guidelines for the mobile advertising industry.[21]

Despite these efforts, private lawsuits alleging spam text messaging (also known as wireless spam, cellular spam, mobile spam or m-spam)

REC. (Baltimore), Mar. 27, 2008, *available at* http://findarticles.com/p/articles/mi_qn4183/is_20080327/ai_n24975493.

[17] Susan Moore, *Gartner Says Telecom Carriers Are Well Placed to Win Advertising Revenue if They Overcome Key Challenges*, GARTNER NEWSROOM, Aug. 26, 2008, http://www.gartner.com/it/page.jsp?id=747112.

[18] Priya Ganapati, *Texting Finally More Popular Than Calling Among U.S. Mobile Users*, WIRED, Sep. 22, 2008, http://www.wired.com/gadgetlab/2008/09/us-finally-catc/.

[19] Linda A. Goldstein, *Mobile Advertising and Web 2.0*, 962 PRAC. L. INST./PAT. 315, 324 (2009); *see also* MOBILE MARKETING ASSOCIATION, UNDERSTANDING MOBILE MARKETING: TECHNOLOGY & REACH (May 2007), *available at* http://www.mmaglobal.com/uploads/MMAMobileMarketing102.pdf.

[20] Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 950 (9th Cir. 2009). First, Nextones sold customer phone numbers to MIA. MIA then sold those numbers to ipsh!, the mobile advertising company Simon & Schuster hired. Employees at ipsh! wrote the text messages for Simon & Schuster and converted them to a file format deliverable to wireless carriers. Those files—embedded with telephone numbers—were sent to mBlox, a mobile transaction networking service company or "aggregator." (Aggregators combine, on one network, all direct communications to wireless carriers.) mBlox transmitted the messages to carriers that routed them to customers. *See generally* Eric Goldman, *Ninth Circuit Revives TCPA Claim-Satterfield v. Simon & Schuster*, TECHNOLOGY & MARKETING LAW BLOG, July 3, 2009, http://blog.ericgoldman.org/archives/2009/07/ninth_circuit _r.htm (last visited Apr. 10, 2010).

[21] MOBILE MARKETING ASSOCIATION, U.S. CONSUMER BEST PRACTICES GUIDELINES VERSION 5.0 (June 1, 2010), http://www.mmaglobal.com/bestpractices.pdf [hereinafter GUIDELINES].

continue to target mobile advertisers.[22] American cell-phone users received 1.5 billion spam messages in 2008—a 37 percent increase from the 1.1 billion messages received in 2007.[23]

II. HOW *SATTERFIELD* RESTRICTS MOBILE ADVERTISING

Two federal laws regulate text-message advertising: (1) TCPA[24] and its FCC regulations[25]; and (2) the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM)[26] and its FCC regulations.[27] TCPA permits private lawsuits[28] and does not preempt state anti-spam laws.[29] In contrast, CAN-SPAM generally prohibits private lawsuits[30] and preempts most state law.[31] *Satterfield* ultimately

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[22] Jack Gordon, *FDCPA and Other Consumer Rights Lawsuit Statistics*, WEBRECON LLC, Jan. 7, 2010, http://webrecon.com/news/?p=131; Bridget M. O'Neill, *Wireless Spam This Way Comes: An Analysis of the Spread of Wireless Spam and Proposed Measures to Stop It*, 22 J. MARSHALL J. COMPUTER & INFO. L. 229 (2003).

[23] Richi Jennings, *SMS Text Message Spam is a Minor Problem*, FERRIS RESEARCH BLOG, July 14, 2008, http://www.ferris.com/2008/07/14/sms-text-message-spam-is-a-minor-problem/. Jennings argues U.S. cell-phone spam is still rare relative to other countries; approximately one-third of one percent of total U.S. messages were spam in 2007. But cell-phone spam has become a significant problem internationally. For example, 200 million Chinese cell-phone users received spam text messages in 2008. *Beijing Investigates Spam Attack*, BBC WORLD NEWS, http://news.bbc.co.uk/2/hi/business/7311242.stm (March 24, 2008); *see also* Terrence O'Brien, *Text-Message Spam Continues to Grow Around the World*, SWITCHED, May 4, 2009, http://www.switched.com/2009/05/04/text-message-spam-continues-to-grow-around-the-world/.

[24] 47 U.S.C. § 227(b)(1)(A)(iii) (2006).

[25] 47 C.F.R. § 64.1200 (2010).

[26] 15 U.S.C. § 7712(b) (2006).

[27] 47 C.F.R. § 64.3100 (2010).

[28] 47 U.S.C. § 227(b)(3) (2006).

[29] 47 U.S.C. § 227(e) (2006); *see, e.g.*, Stenehjem v. FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828.

[30] FTC is vested with primary enforcement authority. 15 U.S.C. § 7706(a) (2006). State attorneys general also have civil enforcement power. 15 U.S.C. § 7706(f)(1). And Internet providers may bring civil actions. 15 U.S.C. § 7706(g). *See generally*, Gordon v. Virtumundo, 575 F.3d 1040, 1048 (2009).

[31] Decisions interpreting 15 U.S.C. § 7707(b) have found no preemption when the state law does not expressly regulate spam. *See, e.g.*, Gordon v. Virtumundo, 575

rested its decision on TCPA. The court held a text message is a call under TCPA, equipment sending the message is prohibited if it has the *capacity* to dial randomly or sequentially, and consent to receive messages from an "affiliate" or "brand" is limited to corporate relationships based on ownership or control.[32] This holding will likely make lawful mobile advertising more difficult for businesses.

A. Text Messages Are Calls Under TCPA

TCPA prohibits "any call . . . using any [ATDS] . . . to any telephone number assigned to . . . a cellular telephone service . . ." unless the recipient gave prior express consent.[33] TCPA does not define "call." *Satterfield* affirmed a 2003 FCC determination that "call" means "both voice calls and text calls to wireless numbers, including, for example, short messages service (SMS) calls . . ."[34] While previous judicial decisions had reached similar conclusions, *Satterfield* is the first opinion to conduct a *Chevron/Mead*[35] analysis determining the

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F.3d 1040, 1060-64 (2009); Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348 (2006) (pre-empting only causes of action for immaterial misrepresentation, not falsity sounding in tort). In other words, CAN-SPAM does not preempt state laws prohibiting "falsity or deception." *See generally* Katherine Wong, *The Future of Spam Litigation After Omega World Travel v. Mummagraphics*, 20 HARV. J.L. & TECH. 459, 469-72 (2007).

[32] *Satterfield*, 569 F.3d at 950; *see generally* The Complex Litigator, In Satterfield v. Simon & Schuster, Inc., Ninth Circuit defers to FCC and construes text messages as "calls" under TCPA, June 22, 2009, http://www.thecomplexlitigator.com/post-data/2009/6/22/in-satterfield-v-simon-schuster-inc-ninth-circuit-defers-to.html (last visited Apr. 22, 2010).

[33] 47 U.S.C. § 227(b) (2006); 47 C.F.R. § 64.1200 (2010).

[34] *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C.R. 14014, 14115 ¶ 165, 2003 WL 21517853 (2003) (Report and Order); *see also* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 19 F.C.C.R. 15927, 15934 (2004) (confirming "prohibition on using [ATDS] to make calls to wireless phone numbers applies to text messages . . . as well as voice calls.").

[35] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984); U.S. v. Mead Corp., 533 U.S. 218, 226-27 (2001); *see generally* Evan J. Criddle, Chevron's *Consensus*, 88 B.U.L. REV. 1271 (2008); William N. Eskridge, Jr.

appropriate level of deference to give the FCC opinion.[36]

Before *Satterfield*, defendants had argued messages sent Internet-to-phone (e-mails converted into text messages) were not calls and therefore CAN-SPAM applied and prevented private lawsuits. For example in *Joffe v. Acacia Mortgage Corp.*, the defendant argued TCPA did not apply because text messages were first e-mailed. But the *Joffe* Court rejected that argument and held TCPA also applies to text messages originally sent by e-mail: "[w]hether a text message is sent phone-to-phone or Internet-to-phone, the end result is the same."[37]

Satterfield affirmed this prohibition on Internet-to-phone messages also applies to text messages sent phone-to-phone. In part, *Satterfield* relied on the FCC's determination that "it is unlawful to make *any call* using an [ATDS] . . . to any wireless telephone number . . . . *This encompasses both voice calls and text calls* to wireless numbers including, for example, short message service . . ."[38] *Joffe* had cited the same FCC order, but had not conducted a *Chevron/Mead* analysis regarding the appropriate level of deference.[39] *Satterfield* is therefore the first decision to do so.

First, *Satterfield* determined Congress intended an ordinary meaning of "to call": "to communicate or try to get into communication with a person by telephone."[40] The court also noted the purpose

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& Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamden, 96 GEO. L.J. 1083 (2008).

[36] Two other decisions have followed *Satterfield* to affirm text messages are calls under TCPA. Abbas v. Selling Source, LLC, No. 09 CV 3413, 2009 WL 4884471 (N.D. Ill. Dec. 14, 2009) (reaching the same conclusion without *Chevron* deference); Lozano v. Twentieth Century Fox Film Corp., No. 09-CV-6344, 2010 WL 1197884 (N.D. Ill Mar. 23, 2010) (deferring to the FCC's 2003 opinion).

[37] Joffe v. Acacia Mortgage Co., 121 P.3d 831, 838 (Ariz. Ct. App. 2005).

[38] Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 952 (9th Cir. 2009) (citing *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C.R. 14014, 14115 (2003)) (emphasis added).

[39] *Joffe*, 121 P.3d at 837 n.6.

[40] *Satterfield*, 569 F.3d at 954 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 318 (2002)); *accord Joffe*, 121 P.3d at 835 (noting "when the word call is used as a verb, one of its most common meanings is to communicate or try to

of TCPA was to prohibit "communicat[ing] with others by telephone in a manner that would be an invasion of privacy" and "a voice message or a text message are not distinguishable in terms of being an invasion of privacy."[41] Next, the court found the FCC's interpretation of "call" reasonable because it was consistent with the dictionary definition "that text messaging is a form of communication used primarily between telephones."[42] Applying *Chevron*, the court deferred to the FCC's interpretation and therefore held a text message is a "call" under TCPA.[43]

The court's holding, that a text message is a call under TCPA, may increase the likelihood of mobile advertisers being found liable for text-message spam, but those following best practices guidelines should not be significantly affected.[44] In particular, guidelines from MMA already prohibit sending unsolicited messages, require that consumers affirmatively opt-in, and mandate that all messages contain directions on how to opt-out.[45] Moreover, selling mobile opt-in lists is prohibited.[46] In sum, although text messages are now clearly calls, the best practices guidelines are largely consistent with TCPA rules governing such calls for advertising purposes.

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communicate with by tele-phone."). While other courts have subsequently agreed a "text message" is a "call," the Ninth Circuit's reasoning is somewhat problematic. In particular, the court relied on the *verb* form "to call" ("to communicate with or try to get into communi-cation . . . by a telephone"), but TCPA clearly uses "call" as a *noun*—"It shall be unlawful for any person . . . *to make any call* . . . using any [ATDS] . . ." *Compare Satterfield*, 569 F.3d at 954 *with* 47 U.S.C. § 227(b)(1) (2006) (emphasis added).

[41] *Satterfield*, 569 F.3d at 954.

[42] *Id.*

[43] *Id.*

[44] William B. Baker & Scott D. Delacourt, Important Mobile Marketing Decision by the Ninth Circuit, http://www.wileyrein.com/publications.cfm?sp=articles &id=5271 (last visited Apr. 22, 2010).

[45] *See* GUIDELINES, *supra* note 21, at 13-14, 16.

[46] *Id.* at 16.

B. ATDS Means "Capacity" to Dial Randomly or Sequentially

TCPA prohibits using an ATDS to call any cellular telephone service without express prior consent. *Satterfield* is the first circuit court decision construing the definition of an ATDS under TCPA. Based on the statute's text, the court interpreted ATDS very broadly: "equipment which has the *capacity* to both (1) store or produce numbers to be called using a random or sequential number generator and (2) to dial such numbers."[47]

Such a broad definition poses a serious challenge to mobile advertisers because all computers arguably have the capacity to generate random numbers. Therefore, under *Satterfield*, a large portion of mobile marketers are potentially at risk. In response, advertisers formed the Mobile Advocacy Coalition (MAC) to lobby the FCC to protect underlying technology providers from liability based on *Satterfield's* new definition of ATDS.[48] Although the FCC's 2003 opinion[49] suggested any capacity would be sufficient to render equipment an ATDS, such a broad interpretation might not be

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[47] *Satterfield*, 569 F.3d at 949 (citing 47 U.S.C. § 227(a)(1) (2006); 47 C.F.R. § 64.1200(f)(1) (2010)) (emphasis added). The district court had held TCPA did not apply because Simon & Schuster's messages were sent to a targeted list of numbers and therefore not randomly generated. But *Satterfield* found the district court had focused on the wrong issue: "[A] system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it." *Id.* at 951.

[48] Mobile Advocacy Coalition, *Mobile Marketing: What's At Stake & What We're Doing About It*, http://www.mobileac.org/2009/06/mobile-advocacy-coalition.html (June 24, 2009, 1:59 PM EST). MAC plans to petition the FCC for an exemption from liability as "mere conduits" of advertising. This would amount to a finding that the "sender," for TCPA liability purposes, is the user of the mass texting technology rather than the underlying technology provider. There is precedent for such exemptions: the FCC exempted carriers and fax broadcasters from liability as mere conduits. *Cf.* Portuguese Am. Leadership Council of the U.S., Inc. v. Investors' Alert, Inc., 956 A.2d 671 (2008); Lunney v. Prodigy Servs. Co., 94 N.Y.2d 242 (1999).

[49] *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C.R. 14014, 14091-93, 2003 WL 21517853 (2003).

entitled to deference without formal notice-and-comment rulemaking.[50] Nevertheless, MAC's plans are nascent and therefore advertisers who have relied on their equipment not being an ATDS under TCPA should review their practices in light of *Satterfield.*

One issue the Ninth Circuit did not reach was whether the equipment used to send the message to Satterfield actually *dialed* Satterfield's number within the meaning of TCPA. TCPA does not define the word "dial."[51] The *Joffe* court had interpreted "dial" to mean "operate or manipulate a device in order to make or establish a telephone call or connection."[52] *Joffe* therefore concluded sending Internet-to-phone text messages was dialing because "[e]ven though Acacia used an attenuated method to dial a cellular telephone number, it nevertheless did so."[53] Advertisers using computers to send messages might consider raising this issue in an effort to mitigate *Satterfield's* focus on capacity to dial random or sequential numbers.

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[50] "An agency interpretation must be preceded by some minimum of process to merit deference; simple agency pronouncements, opinion letters, and policy statements fall below that minimum." Abbas v. Selling Source, LLC, No. 09 CV 3413 at *12, 2009 WL 4884471 (N.D. Ill. Dec. 14, 2009) (citing Krzalic v. Republic Title Co., 314 F.3d 875, 881 (7th Cir. 2002)). The FCC's original notice of proposed rulemaking only requested comments "on the various technologies used to dial telephone numbers . . . and whether an autodialer can generate phone calls from a database of existing numbers." *In re* Rules and Regulations Implementing Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 F.C.C.R. 17459, 17474, 2002 WL 31084939 (Sept. 18, 2002). This notice arguably did *not* request comment on whether *all* systems with capacity to dial randomly or sequentially should be considered an ATDS. Therefore, to the extent the 2003 FCC opinion spoke to this issue, it may have done so without process.

[51] 47 U.S.C. § 227(a)(1)(B) (2006).

[52] Joffe v. Acacia Mortgage Co., 121 P.3d 831, 838 n.10 (2005) (citing WEBSTER'S NINTH COLLEGIATE 349 (1990)) (internal quotations omitted).

[53] *Id.* at 839. For a criticism of this view see J. Wesley Harned, *Telemarketers Gone Mobile: The Telephone Consumer Protection Act of 1991 and Unsolicited Commercial Text Messages*, 97 KY. L. J. 313, 330 (2009) (arguing text messages may not fall under TCPA because sending them does not involve dialing).

C. *"Affiliate" and "Brand" Defined Narrowly by Ownership and Control*

When Satterfield downloaded the ringtone onto her son's cell phone, she consented to receive "promotions from Nextones affiliates and brands."[54] *Satterfield* held that Simon & Schuster was not an "affiliate" or "brand" of Nextones and therefore Satterfield did not consent to the text-message advertising. The court's interpretations of "affiliate" and "brand" impose narrow legal definitions on these terms that undermine the move to jargon-free Web site disclosures.

Simon & Schuster argued the various agreements between Nextones, MIA, and ipsh! permitted advertising to Satterfield. In particular, Nextones had licensed its subscribers' telephone numbers, including Satter-field's, to MIA. MIA then sold the numbers to ipsh!, Simon & Schuster's advertiser.[55] When ipsh! sent the message with the tag line "PwdbyNexton," this was an attempt to label the advertisement as a Nextones message. Simon & Schuster argued it was therefore an affiliate of Nextones and was authorized to send the message:

> Thus, although Nextones shares no corporate structure with [Simon & Schuster] and is not a corporate "affiliate" in a strict legal sense, [Simon & Schuster] submit that the fact that Nextones licensed its subscriber list for use in this campaign constitutes the requisite degree of affiliation . . .[56]

The court rejected this plain reading of "affiliate"—a meaning often employed in online terms and conditions in an effort to simplify language for consumers.[57] Instead, *Satterfield* appears to have imposed

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[54] Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 949 (9th Cir. 2009).

[55] *See supra* note 20.

[56] Defendants' Motion for Summary Judgment at 20, Satterfield v. Simon & Schuster, Inc., 2006 U.S. Dist. Ct. Motions 2893, (N.D. Cal. Apr. 2, 2007) (No. 06-2893 CW), 2007 U.S. Dist. Ct. Motions LEXIS 35856.

[57] *See generally* Christina L. Kunz et al., *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, 57 BUS. LAW. 401, 410 (2001) (explaining terms should be clear and readable); *accord* FEDERAL TRADE COMMISSION, DOT

technical definitions of "affiliate" and "brand" taken from corporate governance and trademark law.[58]

First, the Ninth Circuit found "[t]he term affiliate carries its own independent legal significance . . . [it] refers to a corporation that is related to another corporation by shareholding or other means of control . . ."[59] The court therefore held Simon & Schuster was not an affiliate of Nextones because Nextones neither owned nor controlled Simon & Schuster.[60] Second, the court imposed an equally technical definition of "brands" as "goods identified as being . . . of a single firm."[61] Satterfield did not consent on this basis either because the text message advertised a Simon & Schuster product, not a Nextones product. Furthermore, adding "PwdbyNexton" to the message did not transform Simon & Schuster into a Nextones affiliate or brand.[62]

The court's decision to impose technical definitions on terms and conditions may seriously restrict future efforts to conduct mobile advertising campaigns.[63] For example, it is unclear how companies

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COM DISCLOSURES 14 (2000), http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf (recommending clear language and syntax and avoiding legalese or technical jargon to make disclosures effective and understandable to consumers); U.S. SECURITIES AND EXCHANGE COMMISSION, A PLAIN ENGLISH HANDBOOK 3 (1998) *available at* http://www.sec.gov/pdf/handbook.pdf.

[58] *See* Goldman, *supra* note 20.

[59] *Satterfield*, 569 F.3d at 955 (quoting Delaware Ins. Guar. Ass'n v. Christiana Care Health Servs., Inc., 892 A.2d 1073, 1077 (Del. 2006) (quoting BLACK'S LAW DICTIONARY 59 (7th ed. 1999))) (internal quotations omitted).

[60] *Satterfield*, 569 F.3d at 955.

[61] *Id.* at 955 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 268 (2002)).

[62] *Id.* ("Nextones's only role in this case was simply supplying the numbers to MIA, who in turn supplied the numbers to ipsh! The record also shows no agreement between Nextones and Simon & Schuster.").

[63] Ronnie London, *Has The 9th Circuit Raised The Bar For Text-Message Affiliate Marketing?* PRIVACY & SECURITY LAW BLOG, June 24, 2009, http://www.privsecblog.com/2009/06/articles/main-topics/marketing-consumer-privacy/has-the-9th-circuit-raised-the-bar-for-textmessage-affiliate-marketing/ (last visited Apr. 10, 2010). For criticism of the lack of uniformity in privacy policies see Robert Sprague & Corey Ciocchetti, *Preserving Identities: Protecting Personal Identifying Information Through Enhanced Privacy Policies and Laws* 9 ALB. L.J. SCI. & TECH. 91, 124-33 (2009)

should now identify a third party on their Web site who markets to their customers; describing third parties as "affiliates" will no longer suffice. Moreover, companies can no longer insulate themselves from TCPA liability by stamping messages with the signature of the company that obtained the customer's consent.[64]

This decision also raises significant questions as to what constitutes adequate consent to receive messages. Under MMA best practices, Nextones would have been responsible for collecting user consent to receive promotions, and MIA would have been responsible for using that data in accordance with MMA guidelines.[65] These guidelines for affiliate marketing would also have required Simon & Schuster be identified in the message and in opt-out language.[66] It remains unclear, however, whether such disclosures are still sufficient after *Satterfield.*

CONCLUSION

Satterfield held unsolicited text messages sent by an ATDS are unlawful under TCPA because: (1) text messages are calls; (2) the system sending the messages is an ATDS if it has the capacity to generate numbers randomly or sequentially; and (3) the terms "affiliate" and "brand," when used in online terms and conditions, are defined narrowly.

The court's definition of an ATDS presents a serious challenge to advertisers because all computers arguably have the capacity to generate random numbers. Furthermore, the decision's narrow, technical definitions of "affiliate" and "brand" are troublesome because they may discourage plain language in online terms and conditions and make it difficult for future companies to hire third-party marketing

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(exploring collection and dissemination of personal identifying information and determining there is little regulation of online privacy policies).

[64] London, *supra* note 63.

[65] Defendants' Motion for Summary Judgment at 20, Satterfield v. Simon & Schuster, Inc., 2006 U.S. Dist. Ct. Motions 2893, (N.D. Cal. Apr. 2, 2007) (No. 06-2893 CW), 2007 U.S. Dist. Ct. Motions LEXIS 35856; GUIDELINES, *supra* note 21.

[66] GUIDELINES, *supra* note 21.

companies. Marketers using third-party lists of telephone numbers must therefore continue to obtain the appropriate warranties, covenants, and indemnity provisions regarding how the numbers were collected, whether the third party is permitted to disclose the numbers, and the ability of marketers obtaining those numbers to use them. And companies hiring third-party marketing companies must ensure the customers who opted-in actually consented to receive text messages.

PRACTICE POINTERS

- When seeking consent from customers, ensure terms and conditions identify exactly what the customer will receive and who will send it. Eschew the use of any terms that have vague or ambiguous meanings such as "brand" or "affiliate" in favor of more precise terms such as "third parties."
- Do not send text messages to customers who did not expressly consent to receive messages.
- Identify all companies that have access to a customer's phone number and ensure each has complied with any restrictions on the customer's express consent.
- Vendors providing lists of phone numbers to marketers that will use the numbers to send text messages should ensure appropriate contractual terms and conditions govern the marketers' uses.
- Marketers that obtain phone numbers from vendors should negotiate appropriate representations, warranties, and indemnities regarding the scope of consent that vendors obtained from consumers.