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J. Wesley Harned
University of Kentucky

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Telemarketers Gone Mobile: The Telephone Consumer Protection Act of 1991 and Unsolicited Commercial Text Messages

J. Wesley Harned

INTRODUCTION

By the early 1990s, a majority of American consumers had grown tired of intrusive and frustrating telemarketing calls, in large part because these unsolicited calls were automated and thus unavoidable. This created a need for legislation, which was fulfilled by the Telephone Consumer Protection Act of 1991 (TCPA). The decade and a half since the enactment of the TCPA have seen courts struggle to apply the statute to complex situations and new technologies. The advent of Simple Message Service messaging (SMS or text messaging) as a mainstream form of communication in the world of advertising has brought center stage the debate over whether the TCPA should apply to unsolicited commercial text messages.

Although telemarketing via text message is still in its infancy, text messaging is certainly a novel way for businesses to communicate directly with consumers—and advertisers know it. In fact, text message advertising has become the advertising medium of choice in other parts of the world, especially Europe. Some European companies are going so far as to offer free cellular minutes and text messaging to users who agree to receive advertising on their cellular telephones. It is clear that businesses and advertisers alike see an access route to the consumer conscience through text messaging. It should then come as no surprise when the problem of

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1 B.B.A., 2005, University of Kentucky; M.B.A., 2006, University of Kentucky Gatton College of Business and Economics; J.D., expected 2009, University of Kentucky College of Law. The author would like to thank Professor Mark Kightlinger for reviewing drafts of this Note and offering insightful suggestions for improvement. Also, the author would like to thank his family for their love and support.


8 Smith, supra note 4.
unsolicited commercial text messages becomes more widespread in this
country and courts become even more engaged in attempting to apply the
TCPA to this new business practice.

This Note will begin with a brief history and description of text
messaging technology. Next, in Part II the TCPA itself will be examined,
including its background and text. The focus will then shift to the two
cases that have addressed the question of whether the TCPA applies to
unsolicited commercial text messages in Part III. Part IV will focus on
whether a text message is a "call" for purposes of the TCPA. Part V will be
devoted to discussing whether an automatic telephone dialing system can
even be used to send SMS messages, a requirement for TCPA application.

The main objective of this Note is to raise questions regarding the
applicability of the TCPA to text messaging. Throughout the discussion,
much attention will be given to the reasoning of the two courts that have
addressed the issues presented. Although one court has determined
that the TCPA applies to text messaging, its reasoning should be closely
examined. The purpose here is not to criticize the court but to assess the
merits of the arguments advanced in support of its position. In the end, it
will be seen that while it may be that a text message constitutes a call for
purposes of the TCPA, an "automatic telephone dialing system" cannot be
used to send a text message, and therefore, the TCPA is not applicable to
unsolicited commercial text messages.

I. THE TEXT MESSAGING PHENOMENON

Finding someone who has not heard of text messaging in today's society
would likely be a difficult task. Not long ago, however, text messaging was a
mere blip on the mass communication radar. The world's first text message
was sent by Neil Papworth in December of 1992. The message read "Merry
Christmas," which was only fitting as the man on the receiving end of the
transmission, Richard Jarvis, was at a Christmas party near the headquarters
of Vodafone in Newbury, England. Although the industry quickly came
to know this technology as "Short Message Service" messaging, it would
take the better part of a decade before text messaging would emerge as a
popular form of wireless communication. It is estimated users will send
2.3 trillion text messages in 2008 alone, up from 1.9 trillion in 2007, and
sales from text messaging services will rise to $60.2 billion in 2008, up from
$52 billion in 2007. As these figures show, text messaging is rising in

9 Victoria Shannon, R Top Story 4 2day, Txt Msgs R 15 Yrs Old, From a Simple Christmas
Message a "Cultural Phenomenon" Has Taken Root, INT'L HERALD TRIBUNE, Dec. 6, 2007, at 1,
available at 2007 WLNR 24074104.
10 Id.
11 Id.
12 Briefing: Text Messages Revenue Grow 16% in 2008, INT'L HERALD TRIBUNE, Dec. 17,
popularity as a form of communication throughout the world despite its relatively short history as a form of mobile communication.

Analyzing the application of the TCPA to text messaging requires a brief description of the technology involved. Text messaging "allows cellular telephone subscribers to send and receive short messages... usually limited to 160 or so characters on their cellular telephones." Text messages are sent between cellular telephone devices using cellular telephone numbers. There are two ways that text messages can be sent. The first type of text message is phone-to-phone messaging. Phone-to-phone messaging involves sending a text message directly from one cellular telephone to another. After typing the message into the cellular telephone, the user designates or enters into the telephone a cellular telephone number to which the message will be sent and sends the message. The SMS message is first transmitted to the user's cellular telephone carrier, which relays the message to the receiving party's carrier, at which point the text message is forwarded to the receiving party's cellular telephone.

The second type of text message involves the Internet and is called, predictably, Internet-to-phone messaging. With this type of message, the text message is initially delivered over the Internet as an email directed to an email address assigned by a cellular telephone carrier to a subscriber. Cellular telephone service providers actually receive an email message, and after processing and converting that message to an SMS message, the service provider sends the message on to the customer's cellular telephone as a text message. As an illustration:

[A]ssume cellular [service provider] "Wireless" has assigned to its customer the cellular telephone number (123) 456-7890 and has also given its customer an email address [composed of this telephone number] and [the

15 See id.
16 Joffe, 121 P.3d at 837.
17 Id.
18 Id. (citations omitted).
19 In the Matter of Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 19 F.C.C.R. at 5063.
20 Id.
service provider’s] domain name, “wireless.com.” An email sent to that email address, 1234567890@wireless.com, will travel from the sender’s computer over the Internet to Wireless’[s] domain . . . . [There,] Wireless will automatically convert the [email] into an SMS message and forward that message to the customer’s cellular telephone.22

What results is an Internet-to-phone text message. With this brief description of SMS technology in hand, the focus will now turn to the TCPA and its application to this new form of communication technology.

II. The Telephone Consumer Protection Act of 1991

By 1991 “[u]se of the telephone to market property, goods, and services directly to business customers, as well as individual customers, [was] not only a common practice, but also a high growth industry.”23 Telemarketing Magazine estimated that “U.S. expenditures on telemarketing [had] grown from $1 billion to $60 billion” over the ten years leading up to 1991.24 Estimates also suggested that “annual telemarketing sales in the United States quadrupled to $435 billion” between 1984 and 1990.25 This increase in sales was due in large part to the utilization of computer assistance by “an estimated 82 percent of America’s businesses conducting telemarketing campaigns” by 1991.26 As a result, between 1990 and 1991 the Federal Communications Commission (FCC) alone documented over 2300 complaints related to telemarketing calls.27 In addition, the Federal Trade Commission, state regulatory agencies, local telephone companies, and congressional offices also reported receiving substantial numbers of such complaints.28 By 1991, consumer complaints regarding telemarketing calls had become so vociferous that federal legislators began to move on regulating telephone solicitation calls.29

In the early 1990s, Senator Larry Pressler (R–S.D.) and Representative Edward J. Markey (D–Mass.) sponsored the first pieces of legislation aimed

22 The preceding example of the Internet-to-phone SMS messaging system was supplied by the Joffe court. 121 P.3d at 837 (citing In the Matter of Rules and Regulations Implementing the Controlling Assault of Non-Solicited Pornography and Marketing Act of 2003, Comments of T-Mobile USA, at 5–6 (Apr. 30, 2004) (codified at 47 C.F.R. pt. 64), http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516182561)).
24 Id.
28 Id.
at regulating unsolicited telephone calls. Senator Pressler's bill was intended to regulate unsolicited telephone solicitations "transmitted by a live person, facsimile machine, and automatic dialing system," and the bill called on the FCC to promulgate standards to that end. Representative Markey's bill sought to "impose[ ] regulations on unsolicited advertising using facsimile machines or automated dialing systems." Both bills, however, were criticized as vague and overbroad in application. Senator Pressler's bill included within its reach telephone calls made by live persons for "other commercial purposes." It was argued that because the phrase "other commercial purposes" was not defined in Senator Pressler's bill, the term could be interpreted to include survey research. Through the efforts of several advocacy groups, survey research was eventually exempted from Senator Pressler's bill. Representative Markey's bill faced similar scrutiny in that its application extended to telephone calls which "encourage a commercial transaction." However, the committee report on Representative Markey's bill clarified this language by stating that the bill was not directed at survey research. Regardless, Senator Ernest Hollings (D-S.C.) consolidated the language and provisions of these two bills, and on July 11, 1991, he introduced a new bill that would become the TCPA.

The stated purpose of the TCPA is "to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." The TCPA expressly prohibits the making of "any call . . . using any automatic telephone dialing system . . . 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." This last catch-all clause was specifically aimed at the problem of unsolicited calls to cellular telephones as Congress found that all too often the called party bore the cost of unsolicited calls placed to cellular or paging telephone numbers.

30 See id.
31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
38 S. REP. NO. 102-178, at 1.
For example, cellular telephone users are stuck paying for each incoming call regardless of whether a cellular telephone user pays for a bundle of minutes or for each used minute.

It is worth noting at the outset that the TCPA is not applicable to every telemarketing communication. First, in order for the TCPA to apply, a call must be made. Further, the TCPA applies only to unsolicited calls. In other words, the TCPA applies only to prohibited calls made without the "prior express consent of the called party." Finally, a call must be made using an "automatic telephone dialing system" or an "artificial or prerecorded voice" in order for the TCPA to apply. Absent the use of an "automatic telephone dialing system" or an "artificial or prerecorded voice," a call will not be subject to the TCPA, even if such call is unsolicited. Because the TCPA does not define the term "call," whether a text message is a call will likely be the most controversial issue with regard to the TCPA and text messaging, although other requirements may present their own unique challenges.

When the statutory requirements are met, the TCPA provides for a private right of action and allows such action to be brought "in an appropriate court of [a] state." This clause presumably allows a person to bring an action under the TCPA in state or federal court. Injunctive relief and damages are both available in cases where a violation of the TCPA is found. The amount of damages recoverable under the TCPA is $500 or a plaintiff's actual monetary loss, whichever is greater. However, if a court finds that a defendant has willfully or knowingly violated the TCPA, the court may increase an award of damages by as much as three times.

The TCPA also expressly authorized the FCC to "require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations." The FCC, however, declined to create a national do-not-call database, citing cost and feasibility as deterrents. Instead, the FCC promulgated rules implementing company specific do-not-call registries, which must be created, maintained, and honored by telemarketers.

43 Id.
44 Id.
46 Id.
47 Id. § 227(b)(3)(B).
48 Id. § 227(b)(3).
49 Id. § 227(c)(3).
for a period of five years.\textsuperscript{51} While the FCC declined to implement a national do--not--call database, the Federal Trade Commission has since stepped in and created the National Do--Not--Call Registry, although not without some industry resistance.\textsuperscript{52}

It then fell to the courts to interpret the provisions of the TCPA and the regulations promulgated by the FCC. However, courts not only had to do battle with the plain language of the TCPA itself, they had the additional task of adapting the TCPA to emerging and unforeseen technologies which might become useful tools for telemarketers. One such communication tool that surfaced is text messaging.

III. THE LEGAL LANDSCAPE

At present, only two courts have addressed the issue of whether the TCPA applies to unsolicited commercial text messages. Most recently, the U.S. District Court for the Northern District of California addressed the issue in Satterfield \textit{v. Simon \& Schuster}.\textsuperscript{53} The Satterfield case concerned automatic telephone dialing systems and consent with respect to text messaging, but did not reach the question of whether a text message is a call.\textsuperscript{54} The other case addressing the TCPA as applied to text messaging is the Arizona Court of Appeals’ case, \textit{Joffe v. Acacia Mortgage Corp.}\textsuperscript{55}

A. Satterfield \textit{v. Simon \& Schuster}

The plaintiff in Satterfield \textit{v. Simon \& Schuster} “visited www.nextones.com (Nextones) to download a free ringtone” for her son’s cellular telephone.\textsuperscript{56} In the process of obtaining the free ringtone, the plaintiff signed up to become a member of Nextones. In doing so, she checked the empty box which read: “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." The plaintiff then clicked "Submit," thus agreeing to the Nextones Terms and Conditions, one of which was that Nextones and its affiliates may contact a user's cellular telephone number in connection with any text message offering or other campaign. On January 18, 2006, at half past midnight a little more than a year after the plaintiff had signed up for Nextones, the plaintiff's son received a text message on his phone, which stated: "The next call you take may be your last . . . Join the Stephen King VIP Mobile Club at www.cellthebook.com. RplySTOP2OptOut. PwdByNexton." The message frightened the plaintiff's son, so the plaintiff sent a reply message of "STOP." The plaintiff was charged for this reply message. The text message received by the plaintiff's son was sent as part of a promotional campaign conducted by the defendants. The plaintiff commenced an action alleging the defendants' conduct was "a textbook violation of the TCPA." The defendants in Satterfield moved for summary judgment, arguing the text message was not sent using an automatic telephone dialing system and the plaintiff had consented to receiving such text messages. The plaintiff in Satterfield conceded that "the equipment at issue [did] not contain or use a random or sequential number generator." Instead, the plaintiff in Satterfield pointed to the TCPA definition of automatic telephone dialing system and argued that "the phrase 'using a random or sequential number generator' modifies only the last antecedent 'produce telephone numbers to be called' [and] not 'to store.'" The Satterfield court, however, rejected this argument, concluding that through a proper grammatical reading of the definition, "using a random or sequential number generator" modifies "store," "produce," and "called." Because the plaintiff conceded the equipment used by the defendants did not store, produce, or call randomly or sequentially generated numbers, the Satterfield court held that an automatic telephone dialing system was not in use and did not reach the question of whether a text message is a call. The court continued,
however, stating that regardless of whether an automatic telephone dialing system was in use, there could be no violation of the TCPA because the plaintiff had consented to receiving such text messages. 70 Although the Satterfield court provides the only authority on consent in context of the TCPA and text messaging, consent is fairly self explanatory and will not be discussed further.

B. Joffe v. Acacia Mortgage Corp.

While the Satterfield court did not reach the question of whether a text message is a "call" and only touched briefly on automatic telephone dialing systems in conjunction with text messaging, the court in Joffe v. Acacia Mortgage Corp. delved much deeper into both issues. In Joffe, the plaintiff, Rodney Joffe, received an unsolicited text message on his cellular telephone from Acacia, a mortgage company. 71 Some months later, Joffe received a second unsolicited text message from Acacia. 72 The court noted, "Acacia's messages to Joffe were part of a marketing campaign to advertise [sic] low interest rates on home mortgages." 73 "Acacia programmed its computers to send the solicitations as electronic mail messages . . . over the Internet to consumer e-mail addresses." 74 As with any Internet-to-phone message, "Acacia's computers generated [Joffe's] cellular telephone number, '(602)XXX-XXXX,' plus his cellular telephone carrier's domain name, 'att.net,' and sent the solicitations to the e-mail address 602XXXXXXX@att.net." 75 Pursuant to his private right of action, Joffe filed a complaint in Arizona state court alleging Acacia had violated the TCPA. 76 The trial court stated, "By doing advertising in this manner, [Acacia] shifted some of the cost of its advertising to those receiving the telephone calls." 77 The trial court granted partial summary judgment in favor of Joffe. 78 Acacia appealed, but the Arizona Court of Appeals affirmed the order, holding that although text messaging was involved, Acacia nevertheless called Joffe using an automatic telephone dialing system in violation of the TCPA. 79

The Arizona Court of Appeals appeared comfortable in its position that the TCPA applies to text messaging, but further legal analysis may cast doubt on that conclusion. The next two parts will present and critically discuss

70 Id.
72 Id.
73 Id.
74 Id.
75 Id.
76 Id.
77 Id.
78 Id. at 834.
79 Id. at 843.
the reasoning behind the Joffe court’s holding that Acacia called Joffe using an automatic telephone dialing system. These parts will assess the merits of the arguments advanced by the Joffe court in support of its position that a text message is a “call,” and that a text message can be sent using an automatic telephone dialing system. This analysis will ultimately support the conclusion that the TCPA cannot apply to unsolicited commercial text messages.

IV. CAN A TEXT MESSAGE BE A “CALL” UNDER THE TCPA?

In order for the TCPA to apply, a call must be made.80 The obvious and most controversial issue is whether a text message can be said to be a “call” for purposes of the TCPA. In a practical sense, sending a text message is an alternative to making a call using a cellular telephone. While the court in Satterfield did not reach the issue, the Joffe court concluded a text message is a call under the TCPA.81 While further analysis may cast some doubt on the Joffe court’s reasoning, there is clearly some merit in its conclusions.

A. The Meaning of “Call”

As the Joffe court noted, the term “call” is not defined in the TCPA.82 The court settled on the common meaning of “call” associated with telephone use and concluded, “given that the TCPA was designed to regulate the receipt of automated telephone calls, Congress used the word call to refer to an attempt to communicate by telephone.”83 To this point, it is difficult to argue with the definition of call chosen by the court, as “attempt to communicate by telephone” is the traditional meaning of the word “call.” However, by rejecting Acacia’s interpretation of call, the court arguably stretches this traditional meaning of the word. On appeal, Acacia argued the TCPA applied only to “ordinary telephone calls . . . that present the potential for two-way real time voice ‘intercommunication.’ ”84 The court concluded that the TCPA does not limit the attempt to communicate by telephone, i.e., the call, to two-way real time voice “intercommunication.”85 This certainly seems to be an expansion of the traditional “attempt to communicate by telephone” meaning of “call.” The Joffe court then set out to explain its reasoning.

The Joffe court noted, “the TCPA states it ‘shall be unlawful for any person . . . to make any call . . . using an automatic telephone dialing system .
to any telephone number assigned to a ... cellular telephone service.”

The court said that “it is the act of making a call, that is, of attempting to communicate to a cellular telephone number ... that the TCPA prohibits,” and “whether the call had the potential for a two-way real time voice communication is irrelevant.” This led to the court’s holding that “an attempt to communicate by telephone constitutes a call under the TCPA even if the attempted communication does not present the potential for two-way real time voice intercommunication.” However, in attempting to explain its reasoning, the court merely restated its conclusion. What the court failed to do is explain why an attempt to communicate by telephone without the potential for two-way real time voice intercommunication is a “call.” The court provided little on which to base a conclusion that Congress intended such a broad meaning of the word. If Congress intended the meaning of call under the TCPA to extend beyond its traditional definition, why did Congress not use a word or phrase with a broader meaning, maybe even “attempting to communicate through the use of a telephone”? Such a phrase would suggest that the TCPA’s prohibition also extends to conduct other than traditional telephone calls. It could be that Congress contemplated only one type of “call” and no thought was given to other potential uses of the word. Or perhaps Congress was satisfied that other TCPA provisions would clarify that the statute was intended to reach a broader range of activities and technologies than that involved with traditional telephone calls. The Joffe court certainly thought the latter to be true, and it pointed out other parts of the TCPA as support for its position.

In support of its view that “calls” under the TCPA do not require two-way voice intercommunication, the Joffe court cited the phrase “artificial or prerecorded voice,” found in TCPA section (b)(1)(A). The court concluded since the TCPA “prohibits any call using an artificial or prerecorded voice to a telephone number assigned to a cellular telephone service,” its interpretation of call must be correct because “[a] call made by an artificial or prerecorded voice has no potential for a real time voice intercommunication.” This conclusion is logical and provides some support for the court’s position, but the Joffe court went further, citing the case of Irvine v. Akron Beacon Journal for additional support.

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87 Id. at 836.
88 Id.
89 See id. at 835-36.
90 Id. at 836.
91 Id.
93 Joffe, 121 P.3d at 831.
At issue in *Irvine* was TPCA section (a)(4), which defines "telephone solicitation" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of ... goods ... or services." The defendant in *Irvine* used an autodialer to generate a telemarketing solicitation list. The autodialer called numbers from a pre-programmed list of disconnected telephone numbers, and, depending on the type of sound signal received, the autodialer recorded which of the telephone numbers had been reconnected and were working. As soon as the autodialer detected the sound signal, it recorded the information and dropped the call. The defendant in *Irvine* asserted the calls were not telephone solicitations under the TCPA because no solicitors were on the calls when they were placed. The court rejected the argument, stating there was "no language in the statute requiring that a conversation take place."

Although the *Joffe* court found the reasoning of the *Irvine* court persuasive and useful as support for its position, the *Irvine* case adds little and arguably does harm to the *Joffe* court's position. First, it is true the TCPA has no language requiring that a conversation take place, but this does not provide a clear solution to the problem. It seems the *Irvine* court was speaking to the fact that the TCPA only requires one to make a call, just as telephone solicitation requires only the initiation of a telephone call. The *Irvine* court stated, "Whether a solicitor is at the other end of the phone or not, when the telephone rings, the intrusion into the home and the seizing of the telephone line is the same." Here, the court seemingly referred to instances where the telephone rings but the caller hangs up, or ends the call, before the receiving party can answer. It is in this sense that the TCPA does not require a conversation to take place; the *Irvine* court makes no mention of the potential for two-way voice intercommunication. Further, the *Irvine* case arguably exposes the *Joffe* court's position to an *expressio unius* counterargument. The term "telephone solicitation" involves "the initiation of a telephone call or message ..." while the TCPA section relevant here prohibits only calls. Although such canon-based arguments can be countered, this could be interpreted as evidence of a conscious decision to leave messages out of the TCPA prohibitions. In the

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95 Id. at 1108-09.
96 Id. at 1109.
97 Id.
98 Id. at 1118.
99 Id.
101 *Irvine*, 770 N.E.2d at 1119.
end, the soundness of the Joffe court's reasoning that a call under the TCPA has a broader meaning than the traditional "attempt to communicate by telephone" remains questionable. However, the Joffe court may have overlooked an argument that better supports its position.

While the reasoning given by the Joffe court is somewhat suspect, there exists an argument not advanced by the Joffe court which supports that court's conclusion. This argument utilizes the specific language of the TCPA. The TCPA states, in part, "It shall be unlawful . . . to make any call. . . 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." Utilizing the maxim noscitur a sociis, or "it is known from its associates," each of the enumerated services involves by implication a "called party" who is "charged for the call." It follows then that sending a page through a paging service would involve making a call for purpose of the TCPA. Arguing by analogy to paging, a text message, especially a phone-to-phone message, could be a "call" for purpose of the TCPA. Both a page and a phone-to-phone message involve communications over a telephone line without the potential for real time two-way voice intercommunication. Although the noscitur a sociis argument is somewhat weaker when applied to Internet-to-phone messages, it could still be argued not all of the services enumerated in TCPA section (b)(1)(A) necessarily involve only communication over telephone lines. For example, "specialized mobile radio service" and "other radio common carrier service" seemingly involve communication via radio signal and arguably do not involve telephone lines at all. From this one could argue that the word "call" under the TCPA was intended to extend beyond its traditional meaning associated with telephone use, all the way to SMS messages. The language of the TCPA itself can be used as additional support for the Joffe court's position that a text message is a call under the TCPA.

The paging service analogy certainly has its limits, especially when applied to Internet-to-phone messages such as those sent in Joffe. Instead of communicating solely over a telephone line, as paging entails, Internet-to-phone messages bring computers and email into the mix. This could stretch the noscitur a sociis argument too far, as an ever-expanding definition of "call" might extend the TCPA's coverage into areas such as email, an area possibly covered by other federal statutes. In fact, section 14(b) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act) directs the FCC to issue rules protecting

104 The canon-based argument is that the last clause in § 227(b)(1)(A)(iii), which states "or any services for which a charged party is called," implies that a "paging service" involves a "called party" and the party receiving a page is "charged for the call." Id. (emphasis added).
consumers from "unwanted mobile services commercial messages," or MSCMs. An MSCM is a "commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service (as such term is defined in [47 U.S.C. 332(d)(1)]) in connection with such service." The Joffe court even noted "[t]he legislative history of the CAN-SPAM Act reflects § 14 was inserted into the statute to address unwanted text messages sent to wireless devices including cellular telephones." However, this is not to say that the CAN-SPAM Act has preempted the TCPA. To the contrary, section 14(a) of the CAN-SPAM Act states, "$\text{[n]}$othing in this chapter shall be interpreted to preclude or override the applicability of [the TCPA] . . . ." Therefore, further support remains for the position that text messages are "calls" under the TCPA, as Congress contemplated that the CAN-SPAM Act and the TCPA could have dual applicability.

B. The FCC's Position on the Issue

Near the end of its discussion of the definition of "call," the Joffe court cites a 2003 order issued by the FCC that arguably provides substantial support for its position. The FCC order reflects the FCC's opinion that the TCPA ban on making "any call using an automatic telephone dialing system" extends to encompass "text calls to wireless numbers." Does this resolve the debate over whether a text message is a call? The answer depends on the weight to be given to a federal agency opinion or interpretation. While this Note does not propose to explore such administrative law issues in depth, it is worth noting that a full Chevron-Mead analysis would be needed to determine the actual legal significance of the FCC's statements. Moreover, regardless of the outcome of such an

110 See Joffe, 121 P.3d at 837.
112 In the case of Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984), the U.S. Supreme Court established a two-prong analysis for determining whether a court should defer to an agency's interpretation of a regulation. This analysis asks first whether Congress has spoken directly to the issue and if so, such interpretation controls. If not, the second prong allows the court to determine whether the agency's answer is based on a "permissible construction of the statute." In the later case of United States v. Mead Corp., 533 U.S. 218, 226-27 (2001), the Supreme Court added another layer to the analysis. The Mead decision requires courts to determine whether a statute includes authorization for deference to agency interpretation. This Note seeks the best interpretation of the word "call" rather than a definition that might be found "reasonable" by a court under principles of judicial deference.
analysis, the goal of this Note remains to assess the merits of the arguments, including those advanced by the FCC on the issue.

In short, the FCC’s position is that a text message is a call. The FCC order states that the TCPA prohibition “encompasses both voice calls and text calls to wireless numbers . . . provided the call is made to a telephone number assigned to such service.” The FCC then makes several references to costs placed on wireless telephone subscribers. The FCC appears to draw support for its position from the last catch-all clause in TCPA section (b)(1)(A)(iii). That clause states, “or any service for which the called party is charged . . .” The FCC order states, “The commission has long recognized . . . that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.” The FCC order observes that most wireless customers pay a fixed rate for a “bucket” of minutes, and they are charged for any minutes used over the bucket allowance. The FCC notes the bucket “could be exceeded more quickly if consumers receive numerous unwanted telemarketing calls.” Anyone with a cellular telephone plan knows such plans are now, at least in part, designed around the number of text message “minutes” allowed, and most users are aware of how much extra text messages cost. There may be, however, another type of cost shifted to the consumer when an unsolicited commercial text message is sent. In business, an important anecdote is “time is money.” No saying better captures the spirit of the marketing and advertising industry, where the most time-consuming task is gaining access to the consumer. If advertisers can access consumers at any moment by cellular telephone, they shift the time burden of advertising to the consumers in the form of nuisance and inconvenience. In this sense, receiving a text message would be no less of a cost-shifting activity than receiving a traditional call on a cellular telephone. In the sense that the TCPA is meant to protect consumers from bearing the cost of unsolicited telemarketing practices, the FCC’s point that the TCPA applies equally to “text calls” is well taken.

Again, the weight to be given to the FCC’s opinion on the issue of whether a text message is a call depends heavily upon a determination outside the scope of this note. But there must nevertheless be some weight accorded to the FCC’s views. When the FCC’s interpretation is placed

114 Id.
115 Id.
118 Id.
119 Id.
alongside the arguments in support of the Joffe court’s position, a fairly sound argument begins to emerge that a text message could constitute a call under the TCPA. In fact, the only real argument that has been put forward opposing that position seems to be that “call” under the TCPA should be given its most narrow, traditional meaning, i.e., an attempt to communicate by telephone with the potential for real time two-way voice intercommunication. There is support for the notion that the word “call,” for purposes of the TCPA, was intended to have a broader meaning, one that extends to encompass non-traditional telephone communications such as text messages. Even so, does this mean that the TCPA applies to text messaging? As discussed below, there may be an as of yet unforeseen obstacle in the way of the TCPA’s application to text messaging.

V. CAN A TEXT MESSAGE BE SENT USING AN AUTOMATIC TELEPHONE DIALING SYSTEM?

In the text messaging context, even if a call is made, it must be made using an “automatic telephone dialing system” for the TCPA to apply. The TCPA defines an “automatic telephone dialing system” as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” The issue of the use of an automatic telephone dialing system in conjunction with text messaging was presented in both Satterfield and Joffe. As discussed above, the Satterfield court briefly addressed the plaintiff’s grammatical challenge to the definition of automatic telephone dialing system. Ultimately the Satterfield court held no automatic telephone dialing system was in use, after the plaintiff conceded the equipment at issue did not contain or use randomly or sequentially generated numbers.

On the other hand, the defendant in Joffe offered a more sound critique of the definition of automatic telephone dialing system as it applies to text messaging. Although the defendant in Joffe conceded “its computers

121 See generally Joffe, 121 P.3d at 831.
122 Section (b)(1)(A) of the TCPA also prohibits making “any call ... using any automatic telephone dialing system or an artificial or prerecorded voice ....” However, text messaging involves the transmissions of text and not sounds, e.g., voices. Therefore, only an “automatic telephone dialing system” would be applicable to text messaging.
126 Satterfield, 2007 WL 1839807, at *4–6; see supra notes 64–68 and accompanying text.
randomly or sequentially produced telephone numbers," the defendant argued "it did not contact Joffe by using equipment that called or dialed his cellular telephone number." 128 This argument went further than the plaintiff's argument in *Satterfield*, calling into question the meaning of the terms "call" and "dial" in the definition of automatic telephone dialing system. The court in *Satterfield* did not address this issue, and the *Joffe* court, after devoting only a footnote to addressing the meaning of "dial," concluded that by sending a text message, Acacia used an automatic telephone dialing system to call Joffe's cellular telephone number. 129 However, the issue of whether text messaging involves dialing a cellular telephone number likely presents the biggest obstacle for applying the TCPA to text messaging. Thus, it is possible that any equipment which generates only text messages cannot be an automatic telephone dialing system.

The equipment used by the defendant in *Joffe* generated an email message which was sent to an email address consisting of Joffe's cellular telephone number and his service carrier's domain name. Once the message reached that email address, it was converted by Joffe's cellular service carrier into SMS format and transmitted to Joffe's cellular telephone as an SMS message. This chain of events did not involve any function traditionally associated with dialing a telephone number—the entry of a telephone number into a telephone using a keypad or rotary dial. Nevertheless, the *Joffe* court was persuaded that text messaging, particularly Internet-to-phone messaging, involves dialing a cellular telephone number.

As with the word "call," the word "dial" is not defined in the TCPA. 130 The *Joffe* court stated that "In the context of the phrase 'to dial such numbers' the words 'to dial' mean to 'operate' or 'manipulate' a device 'in order' to make or establish a telephone call or connection." 131 But the *Joffe* court's definition raises even more questions. What does it mean "to operate or manipulate a device"? In their respective verb forms, the word "operate" means "to control the functioning of" 132 and the word "manipulate" means "to... operate, or control by the hands... especially in a skillful manner." 133 It appears as though under the *Joffe* court's definition of "to dial," phone-to-phone messaging would involve dialing. In sending a phone-to-phone message, a user operates or manipulates a device as the user controls the functioning of a cellular telephone or operates it with his hands. The *Joffe* court, however, was addressing Internet-to-phone messaging, and it is less

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129 *Id.* at 839.
131 *Joffe*, 121 P.3d at 838 n.10.
133 *Id.* at 1064.
certain whether the court's definition of "to dial" is applicable to that type of message.

As seen above, Internet-to-phone messages are initially transmitted as emails but are later converted into SMS messages by the receiving party's cellular service provider. Presumably the equipment at issue in Joffe was a "device." But if the equipment was a computer which generated mass email messages and sent the emails to randomly or sequentially generated email addresses, was the equipment being operated or manipulated? Operating or manipulating a device connotes human interaction in that one must control the functioning of the device or operate the device with his hands. This idea conforms to the traditional notion of dialing a telephone number—a person causing a telephone number to be entered into a telephone using a keypad or rotary dial. The equipment in Joffe generated email messages and sent them to randomly or sequentially generated email addresses consisting of cellular telephone numbers and domain names. It would be difficult to say that someone was controlling the functioning of such equipment or operating the equipment by hand. To the contrary, the equipment at issue in Joffe presumably generated and sent the email messages automatically. Without the human interaction implied by "to operate or manipulate," it appears that Internet-to-phone messages do not involve dialing as that word is defined in Joffe. The Joffe court, however, appears to dodge the straightforward definition of dialing. The court concluded "Acacia used an attenuated method to dial a cellular telephone number." The court does not explain its approval of, and the TCPA does not authorize, the use of an attenuated, or weakened, method of dialing. Add in the fact that in a practical sense, sending a text message is normally thought of as an alternative to dialing and calling another party, and it seems difficult to argue that Internet-to-phone messaging involves dialing a telephone number as the Joffe court concluded.

Finally, it is notable that the TCPA requires that the automatic dialing system use "a random or sequential number generator." The equipment in Joffe randomly or sequentially generated email addresses to which Internet-to-phone messages would initially be sent. In concluding that Acacia used an automatic telephone dialing system to call Joffe, the Joffe court implied that an email address is a number for purposes of the definition of automatic telephone dialing system. This is yet another area in which the Joffe court either overlooked or ignored the statutory requirements for an automatic telephone dialing system in rushing to the conclusion that Acacia called Joffe using an automatic telephone dialing system.

134 Joffe, 121 P. 3d at 839.
Although the TCPA provides no statutory definition for "dial," the *Joffe* court was quickly persuaded that Acacia dialed Joffe's cellular telephone number when it sent Joffe Internet-to-phone messages. However, the issue of whether text messaging involves dialing a telephone number may not be as cut and dry as the *Joffe* court suggests. Despite the court's conclusion to the contrary, it is hard to square the *Joffe* court's definition of dialing with the process of sending an Internet-to-phone message. Absent the use of an automatic telephone dialing system, the TCPA cannot apply to text messaging generally, let alone to unsolicited commercial text messages.

**CONCLUSION**

When Congress enacted the TCPA in 1991 there was no way to foresee the advances in communication technology that would take place over the next fifteen years. Congress did its best, though, to anticipate those changes and structure the TCPA accordingly. Times have certainly changed since then, and text messaging has emerged as a popular form of mobile communication. Advertisers were not far behind this new trend in communication, and now advertising to mobile devices is fast becoming a business strategy, especially abroad. While this marketing tactic is not yet widespread in the United States, it should not be a surprise when advertisers begin utilizing text messaging as a cheap and effective medium for communicating with consumers.

Using cellular telephones to advertise through text messaging presents a unique problem under the TCPA. Obviously the TCPA was enacted to address the problem of unsolicited telephone advertising, but should the TCPA apply to text messaging merely because cellular telephones are used? Taking up this difficult question, the court in *Joffe* concluded that a text message involves making a call. Notably, the FCC has also voiced its opinion that a text message is a call for purposes of the TCPA. The issue remains open for debate, but even assuming a text message is a call, the TCPA may still not apply to unsolicited commercial messages.

The issue of whether an automatic telephone dialing system can be used to send a text message presents the toughest obstacle for applying the TCPA to text messaging. The *Joffe* court provides less than satisfactory support, and sometimes none at all, for its position that sending a text message involves use of an automatic telephone dialing system. The

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137 See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C.R. 14014, 14092 (June 26, 2003), 2003 WL 21517853 ("It is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies.").

138 See *supra* notes 6–8 and accompanying text.
arguments opposing the *Joffe* court's conclusion seem better reasoned. Text messaging does not involve dialing a cellular telephone number, and for this and other reasons, text messages cannot be sent using an automatic telephone dialing system. If such a conclusion is reached, then the TCPA cannot be applied to unsolicited commercial text messages.

Receiving definitive answers to the questions of whether a text message is a call and whether an automatic telephone dialing system can be used to send a text message will take time. Although the *Joffe* court answered both questions in the affirmative, that Arizona Court of Appeals' decision is far from binding. As these issues are addressed by more courts, the *Joffe* court's conclusions with respect to both issues must be critically evaluated. While the words "call" and "dial" on their own seem easy enough to interpret, new technologies such as text messaging will push the definitions of those words and test the applicability of the TCPA.

Times have changed since 1991, and with it the technology through which people communicate. The purpose of the TCPA remains the protection of consumer interests, but it may just be that new forms of communication technology, such as text messaging, will render the TCPA obsolete. If such is the case, another question, albeit beyond the scope of this Note, arises: Should courts be able to extend the TCPA's reach, or should it be left to Congress to amend the TCPA or enact entirely new legislation to address its shortcomings? The average American consumer is on the move now more than ever, and telemarketers have gone mobile trying to catch up. The only question now is whether the TCPA will remain as the consumer's gatekeeper or fall by the wayside when unsolicited consumer text messages become the new vehicle for mass telemarketing.