No. 19-511

# In the Supreme Court of the United States

FACEBOOK, INC.,
*Petitioner*,

v.

NOAH DUGUID, ET AL.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF *AMICI CURIAE* PROFESSIONAL ASSOCIATION FOR CUSTOMER ENGAGEMENT AND NOBLE SYSTEMS CORPORATION IN SUPPORT OF PETITIONER


KARL H. KOSTER
Chief Intellectual Property and Regulatory Counsel
NOBLE SYSTEMS CORPORATION
1200 Ashwood Parkway
Atlanta, GA 30338
Telephone: (404) 851-1331
kkoster@noblesystems.com

*Counsel for Amicus Curiae Noble Systems Corporation*

MICHELE A. SHUSTER
*Counsel of Record*
JOSHUA O. STEVENS
MAC MURRAY & SHUSTER LLP
6525 West Campus Oval
Suite 210
New Albany, OH 43054
Telephone: (614) 939-9955
Facsimile: (614) 939-9954
mshuster@mslawgroup.com

*Counsel for Amicus Curiae Professional Association for Customer Engagement*


SEPTEMBER 10, 2020


Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**OTHER AUTHORITIES**

## INTEREST OF *AMICI CURIAE*[1]

Founded in 1983, the Professional Association for Customer Engagement ("PACE") is a non-profit trade association dedicated to the advancement of companies that engage customers in a compliant manner using a variety of channels, including telephonically. For over 35 years, PACE has tracked technology, market trends, and legal/regulatory developments relevant to the customer engagement industry. It has members operating across the country and internationally. PACE's members include not only for-profit enterprises but also charities and professional fundraisers.

Founded in 1989, Noble Systems Corporation ("Noble") is a manufacturer and service provider to the contact center industry. Noble provides various equipment and software including outbound dialers to the contact center industry. Noble provides both premised-based solutions and hosted contact center software-as-a-service solutions, domestically and internationally. Noble has been a member of PACE since 2003.

---

[1] The undersigned counsel timely notified counsel of record for Respondent and the United States of their intention to file an *amicus curiae* brief and such counsel have consented to the same. Petitioner previously filed a consent for *amicus curiae* briefs with the Court. No party or counsel for a party in this proceeding authored, in whole or in part, or monetarily contributed to this brief.

## SUMMARY OF ARGUMENT

This Court is deciding between two competing statutory interpretations of the Telephone Consumer Protection Act ("TCPA"). These interpretations pertain to the definition of an automatic telephone dialing system ("ATDS"). An expansive interpretation follows from a presumption that the statutory definition is ambiguous, but this is predicated on a limited understanding of technical terms in the statute. The TCPA's statutory definition of an ATDS is not ambiguous when the plain language is read in context with, and an understanding of, the referenced technology. The expansive interpretation originates from the Ninth Circuit in *Marks v. Crunch San Diego, LLC,* 904 F.3d 1041 (9th Cir. 2018). The other interpretation is narrower, flows from the plain text of the statute, and originates from the Eleventh Circuit in *Glasser v. Hilton Grand Vacations Co.,* 948 F.3d 1301 (11th Cir. 2020).

This circuit split is further widened with the Second Circuit adopting an expansive interpretation in *Duran v. La Boom Disco, Inc.,* 955 F.3d 279 (2d Cir. 2020), followed by the Seventh Circuit also adopting a narrow interpretation in *Gadelhak v. AT&T Servs.*, *Inc.*, 950 F.3d 458 (7th Cir. 2020), and most recently the Sixth Circuit adopting an expansive interpretation in *Allan v. Pennsylvania Higher Education Assistance Agency,* No. 19-2043, 2020 U.S. App. LEXIS 23935 (6th Cir. July 29, 2020).

The statutory ATDS definition, at its core, is based on technology. Knowledge of the relevant digital computer and dialer technology provides helpful and

necessary context to interpret the statutory terms. The Ninth, Second, and Sixth Circuits' interpretations are sparse with respect to explaining how the underlying technology operates. Further, their decisions are predicated on an understanding that the technology cannot perform certain recited functions. However, that understanding is inconsistent with how digital electronic technology and dialers operated at the time of the TCPA's enactment.

Specifically, the Ninth Circuit predicated its interpretation of the ATDS statutory definition in *Marks* in part on the erroneous understanding that "a device could not use 'a random or sequential number generator' to store telephone numbers." *Marks,* 904 F.3d at 1050. This fundamentally pertains to the capabilities of the relevant technology (i.e., number generators). Based on this erroneous understanding, the Ninth Circuit found the statutory language ambiguous and was thus improperly steered into adopting an expansive interpretation of an ATDS.

The Second Circuit adopted a similar expansive ATDS interpretation, also based on a faulty assumption of the underlying technology. Namely, "[c]ommon sense suggests that any number that is stored using a number-generator is also *produced* by the same number-generator; otherwise, it is not clear what 'storing' using a number-generator could mean." *Duran,* 955 F.3d at 284 (footnote omitted) (emphasis in original). *Duran* concluded the statutory language was ambiguous based on a lack of understanding how technology at that time could use a number generator

to store, but not necessarily produce, a number to be dialed.

Finally, the Sixth Circuit in *Allan* also adopted an expansive interpretation by following *Marks'* assumption of what technology could not do and *Duran's* "common sense" understanding of how technology operated. *Allan*, 2020 U.S. App. LEXIS 23935 at *10 (6th Cir. July 29, 2020) (slip op. at 7).

Evidence shows that dialers prior to the passage of the TCPA in 1991 incorporated a sequential number generator that was used to store numbers into memory. Then a random number generator produced these stored numbers either for immediate dialing or to be stored in a file for subsequent dialing. Thus, as discussed below, certain dialer technologies were known to incorporate both types of number generators to separately produce and store telephone numbers for dialing. With this understanding, it becomes clear the ATDS definition does not contain surplusage.

Thus, the expansive interpretations in *Marks, Duran,* and *Allan* are based on finding the statutory language ambiguous, as a consequence of a limited understanding of the capabilities of contemporary dialer technology. In contrast, other courts reviewing dialer technology available prior to the passage of the TCPA have arrived at a comparatively narrower interpretation of the ATDS definition; one which adheres to the plain language of the statute. Specifically, the Eleventh Circuit in *Glasser* explicitly considered contemporaneous dialer technology when forming its narrow interpretation. *Glasser* found that dialer technology operation explained the so-called

"oddity of 'storing' telephone numbers using a number generator." *Glasser,* 948 F.3d at 1307.

This Court should consider the capabilities of relevant contemporaneous dialers and the operation of digital electronics technology when interpreting Congress' statutory definition of an ATDS. Because equipment at that time was capable of using a random number generator and/or a sequential number generator for producing and storing numbers to be dialed, the statutory language is not ambiguous. With a basic understanding of the underlying technology, any perceived ambiguity in the language evaporates. A narrow interpretation of the ATDS definition, i.e., one that requires a random or sequential number generator, is therefore consistent with the plain language of the statute.

Finally, this Court should understand that the narrow ATDS definition is properly calibrated to prevent the critical harms of indiscriminate dialing by using random and sequential number generators. Aligning the interpretation of the ATDS definition with the statutory text, as the Seventh and Eleventh Circuits have done, protects consumers and critical infrastructure from the harms the TCPA was designed to prevent. The Court should not attempt to re-write the ATDS definition to accommodate new dialer technologies nor to accommodate a presumption of what Congress might have intended. "As in any case of statutory construction, our analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as

well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citations omitted).

## ARGUMENT

### I. Statutory Construction Stops If The Meaning Of The Statute Is Plain

> This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.

*Bostock v. Clayton County, Georgia*, 590 U.S. ___, ___ 140 S. Ct. 1731, 1749 (2020) (slip op. at 24).

Understanding a statute's terms may involve consulting extrinsic references. Courts may consult dictionaries or technical treatises to aid in their interpretation of statutory terms. See e.g., *Wisconsin Central Ltd. v. United States*, 585 U.S. ___, 138 S. Ct. 2067 (2018) (consulting various sources for the meaning of "money"). Understanding the context of the statutory language at the time of its passage may involve consulting historical sources. "[H]istorical sources can be used for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context." *Bostock,* 590 U.S. at ___, 140 S. Ct. at 1750 (slip op. at 25).

Understanding the context of the ATDS statutory definition benefits from a basic understanding of the relevant technology of that time. The statutory language defining an ATDS employs various technology-based phrases such as "random and sequential number generators," "store," and "produce" numbers. Understanding whether or how such number generators could "store" or "produce" a number is directly relevant to interpreting the text of the ATDS definition. While contact centers today rarely employ a strategy of dialing random or sequential telephone numbers, historical technical resources are relevant when interpreting the plain meaning of the ATDS statutory definition and key to determining whether the definition is ambiguous. One type of historical technical resource useful for explaining dialer technology are U.S. patents.

The technological context shows that the plain language of the TCPA is not ambiguous. Once the text is determined to be unambiguous, it is unnecessary to consult the legislative history or Congressional intention behind the passage of the TCPA. "Of course, some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language. Cf. post, at 40 (ALITO, J., dissenting). But that has no bearing here. 'Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.'" *Bostock*, 590 U.S. at ___, 140 S. Ct. at 1749 (slip op. at 24) (quoting *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011)) (emphasis in original).

Finally, if the plain language of the statue is not ambiguous, it should not be rejected based on the speculation of adverse consequences, such as causing an increase of "robocalls."[2] The cause of unwanted and illegal calls is complex. It should not be presumed that one interpretation would minimize or aggravate the volume of such calls and this aspect should not sway the Court here to favor one particular interpretation over the other. Furthermore, attempting to rewrite the plain language of the statute in an attempt to update the statute to cover new technologies is not the role of this Court. "The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us." *Bostock*, 590 U.S. at ___, 140 S. Ct. at 1753 (slip op. at 31).

---

[2] There is no industry-wide accepted definition of what constitutes a robocall. Even the Federal Communications Commission ("FCC") and the Federal Trade Commission ("FTC") have differing definitions of a robocall. *Cf*, e.g., https://www.fcc.gov/news-events/podcast/robocalls stating while a robocall has become a general term for any kind of annoying call, the FCC has a specific definition that depends on whether the call is made to a wireless phone or a landline phone and https://www.ftc.gov/news-events/media-resources/do-not-call-registry/robocalls reflecting the FTC considers a pre-recorded telemarketing call to be a robocall.

## II. Background – The Two Alternative Interpretations Of The ATDS Statutory Definition

This Court is asked to interpret the statutory definition of an "automatic telephone dialing system" ("ATDS"). The TCPA defines an ATDS as follows:

> (1) The term 'automatic telephone dialing system' means equipment which has the capacity –
>
> (B) to store or produce telephone numbers to be called, using a random or sequential number generator; and
>
> (B) to dial such numbers.

Pub. L. No. 102-243, § 227, 105 Stat. 2394, 2395.

This Court must decide between essentially two interpretations adopted by various circuit courts. The distinction was distilled by the Eleventh Circuit as follows:

> The first question is what to do with the clause: "using a random or sequential number generator." Does it modify both verbs ("to store" and "[to] produce") or just one of them ("[to] produce" but not "to store")?

*Glasser v. Hilton Grand Vacations Co.,* 948 F.3d at 1306.

The Ninth Circuit adopted the latter approach in *Marks* by holding that an ATDS is equipment that "has

the capacity – (1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator – and to dial such numbers." *Marks,* 904 F.3d at 1052. Specifically, a random or sequential number generator is not necessarily required in this expansive interpretation. It is sufficient under *Marks* for equipment to be an ATDS by merely having the capacity to store numbers to be called and dial them. This interpretation was adopted by the Second Circuit and most recently, the Sixth Circuit.

On the other hand, other circuits such as the Seventh and Eleventh Circuits have adopted a narrower interpretation of the statutory ATDS definition. The Eleventh Circuit held in *Glasser* that the recited random or sequential number generator phrase modifies both verbs, i.e., "store" and "produce." *Glasser,* 948 F.3d at 1306-1307.[3] Thus, the narrower interpretation requires equipment have the capacity of using a random or sequential number generator to store or produce the numbers to be dialed.

---

[3] The Third Circuit also implied an adoption of the narrower definition in a 2018 opinion stating "Ultimately, Dominguez cannot point to any evidence that creates a genuine dispute of fact as to whether the Email SMS Service had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers." *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018).

## III. Understanding The Technology Aids In Interpreting The Statutory ATDS Definition

The ATDS definition involves various technological concepts, including "random and sequential number generators" that "store" and "produce" telephone numbers to be dialed. This technology was used in dialers preceding the passage of the TCPA. Noble Systems Corp., Comments in Response to the FCC's Request for Comments on the Interpretation of the TCPA in Light of the Ninth Circuit's Decision in *Marks v. Crunch San Diego*, WC Docket Nos. 18-152 & 02-278, FCC DA 18-1014 (Oct. 16, 2018) at 10-11, App. 39-41 ("Noble Comments"). The Ninth Circuit rooted its interpretation of the ATDS statutory definition on the technical understanding that:

> . . . a number generator is not a storage device; a device could not use 'a random or sequential number generator' to store telephone numbers. Therefore, Marks asserts, it does not make sense to read 'store' in subdivision (A) as applying to telephone numbers to be called, using a random or sequential number generator.

*Marks,* 904 F.3d at 1050.

*Marks* is sparse as to why a number generator is not a storage device or why it could not be used to store numbers. However, this understanding is fundamentally predicated on how the underlying technology operates. It follows that if this understanding is incorrect, then *Marks'* ATDS

expansive interpretation is based on a faulty premise and should not be adopted.

### A. Understanding How Information Is Stored

Modern transistorized digital electronics inherently store a number in order to process it. Noble Comments at 7, App. 34-35. Sequential number generators in the 1980's could have been constructed using special purpose digital electronic integrated circuits (a.k.a. 'chips' that are designed to perform a particular function) or implemented by using a programmable computer processor (i.e., a computer chip programmed to perform various functions), whereas random number generators were typically implemented using a computer processor. Noble Comments at 8-10, App. 35-39. Whether the number generator is implemented using a programmed computer processor or a special purpose integrated circuit, both use transistors to store the number in binary form. Such storage may be fleeting and transient in nature.

At another level, numbers can also be stored by digital electronics for a longer time by being copied into digital memory. This may be accomplished by using integrated circuits dedicated to storing information in memory, which again use transistors. As discussed below, dialer technology prior to the passage of the TCPA incorporated both random and sequential number generators, and such equipment stored numbers to be dialed, both in a transient manner as well as in a longer-term manner. Noble Comments at 10, App. 38-39. Thus, *Marks*' premise that a number generator cannot store a number is inconsistent with

basic electrical/computer engineering technology, as well as certain examples of dialer technology of the late 1980's.

### B. Fundamentals Of Storing Numbers In Computer-Based Dialers

Automated dialing systems at the time of the TCPA's enactment were based on electronic digital computers. These types of computers at the time stored information in binary form. That is, information such as numbers and letters were represented by a combination of ones and zeros (known as "bits"). These bits, in turn, were represented and stored using transistor logic where a bit was indicated by the presence or absence of a voltage. The fundamental unit for storing a bit, known as a storage cell, involves an arrangement of transistors known as a "flip-flop." The flip-flop circuit could change its state as needed to represent either a one or zero (hence, the name flip-flop).

Any information processed by a computer can be reduced to a series of bits that are stored by cascading (i.e., placing in a serial arrangement) literally hundreds of thousands of flip-flops. A computer processor chip incorporates hundreds of thousands of transistors, some of which are configured to store information being processed. These temporary stores of information in a computer processor are known as "registers" and are constructed of cascaded flip-flops. These registers are a special form of internal storage optimized for use in the computer processor and are comparatively limited in storage capacity.

A computer processor may move information from an internal register to another form of memory known as random access memory ("RAM") for subsequent access. This is also a form of "storing" and involves retaining the information in another form of memory, which is also constructed of transistors. Typically, RAM is constructed using chips with larger storage capacities than found in a computer processor chip. Thus, computer systems (including smartphones and tablets) are commonly available for purchase with different amounts of RAM. However, the same fundamental transistor circuity is used to store numbers in RAM as are used in a computer processor. Noble Comments at 7, App. 34-35.

Originally, RAM was referred to as "primary memory" and was distinguished from "secondary memory." Noble Comments at 7, App. 34-35. Secondary memory included technology such as floppy disks, magnetic tapes, and hard disks, and was often used to store information (i.e., files) for a longer term. Hard disks did not employ flip-flop transistor circuitry to store data, but rather employed magnetic storage material to permanently retain the information after power was removed from the computer.

Creating sequential or random numbers could be commonly accomplished by using a computer processor circuit that was programmed to perform these functions or in some instances by using a dedicated circuit designed to only perform those functions. Noble Comments at 9, App. 37-38. In either case, transistor circuitry would store these numbers, if only transiently. Thus, one skilled in the art at that time

would know that any random or sequential number generated by digital electronics would necessarily involve, at a very basic level, using transistors to "store" the number generated, at least on a transient basis.

However, relying on this rather basic, transient form of "storing" information (though technically accurate) adds comparatively little to the scope of the statute. A more nuanced and appropriate understanding of "storing" a number in the context of a dialer would be to associate this term with storing a number in primary memory for immediate dialing or in secondary memory for later dialing. As discussed below, dialer technology at the time of the passage of the TCPA stored generated numbers in this manner.

## IV. To "Store" A Number In A Dialer Likely Refers To Storing the Number For Subsequent Access

A preferred understanding is that "storing" the telephone number by a number generator refers to longer-term storage of the telephone number in primary memory (e.g., RAM) or in a file maintained in secondary memory (e.g., disk). This is the operation of one type of dialer technology described in U.S. Patent 4,741,028, ("'028 Patent") entitled "Method of Randomizing Telephone Numbers," filed in 1986 and issued in 1988, several years prior to the passage of the TCPA in 1991.

### A. Problems Caused By Indiscriminate Dialing

Prior to the passage of the TCPA, some callers adopted a strategy of indiscriminate dialing by dialing random or sequential telephone numbers within a central office code. A dialer could be configured to dial telephone numbers within a specified range; such as dialing all 10,000 numbers of a single central office code (i.e., 555-XXXX) in a metropolitan area.

However, indiscriminate dialing caused certain problems. If numbers within this range were randomly dialed, then two obvious problems could arise. First, any numbers in that range assigned to important services such as hospitals, police, nursing homes, or emergency responders could be dialed. Second, as more and more random numbers are generated within this range and called, it becomes increasing likely that duplicate telephone numbers would be selected and dialed, resulting in repeated calls to the same number. From the caller's perspective, it would be difficult to dial all the numbers in the number range without duplicating many calls to the same numbers.

On the other hand, dialing all 10,000 numbers sequentially would avoid dialing duplicate numbers and would also ensure all numbers were dialed. However, this approach guarantees all numbers assigned to hospitals, police, etc. would be dialed. Another problem arose due to the telephone technology available at that time. An answering party would remain connected to the caller for up to thirty seconds after the answering party hung up provided the caller remained on the line by playing a pre-recorded

message. Thus, calling a sequence of telephone numbers to play a message could result in 'tying up' multiple telephone lines at a business assigned sequential telephone numbers. Noble Comments at 12, App. 42. This would, effectively cause that business (e.g., hospital or police station) to be temporarily incommunicado.

The '028 Patent describes a dialer that the TCPA was presumably intended to encompass. The '028 Patent describes a method of blending random and sequential number generator technologies to dial telephone numbers within a defined number range. The numbers would be initially dialed in a random manner, but then at a certain point any remaining undialed numbers are dialed in a sequential manner. Specifically, the dialer first generates a sequence of telephone numbers within a specified range, which are stored into an array in memory. Next, a random number is generated and used to point to one of the sequential telephone numbers in the array. That telephone number from the array is produced to create a record that is either dialed immediately or stored in a file for later dialing. In either case, after the telephone number is selected, it is flagged in the array as having been selected. Then, the process is repeated wherein another random number is generated and used to produce another corresponding telephone number from the array. However, if that other telephone number is flagged as having been previously dialed, then no record is created and that number is neither dialed nor stored. Otherwise, the number is dialed immediately or stored for later dialing.

If all 10,000 numbers in a central office code are to be dialed, then at some point, e.g., after 9000 numbers are flagged, it is highly likely that subsequently randomly generated numbers will point to telephone numbers in the array that were previously flagged and dialed. Thus, to prevent the dialer from repeatedly selecting numbers already flagged, the dialer is configured at some point to then sequentially process the unflagged numbers in the array and sequentially call them.[4] In this manner most of the sequentially stored numbers are randomly dialed, but at some point, the remaining sequentially generated numbers in the array are dialed in sequence.

The '028 Patent shows in Figure 1 (reproduced below) an array (element 4) of telephone numbers that are sequentially generated and stored. A telephone number in the array is identified by the randomly generated number and then produced for creating sequential records in operation 32, which are then dialed or stored in operation 34.

---

[4] It should be noted that the sequential processing/dialing of telephone numbers in a list is, by itself, distinct from dialing sequentially generated numbers. In this example, the array of stored telephone numbers is, in fact, sequentially generated and the remaining unflagged numbers in the array are processed sequentially.

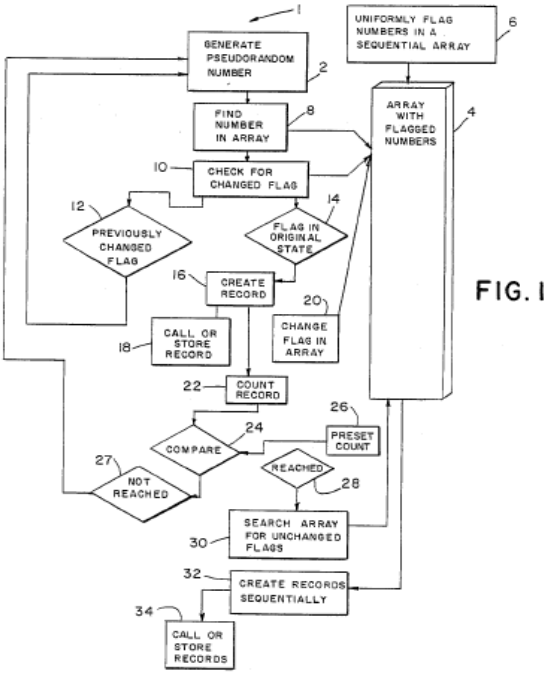
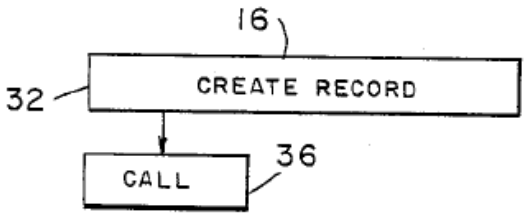


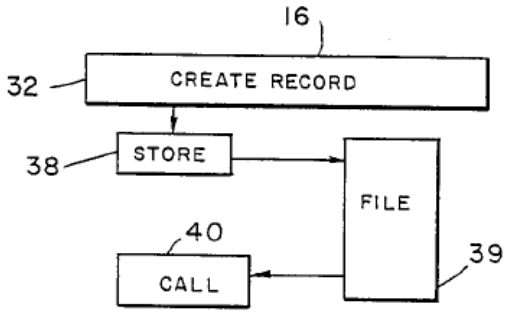

FIG. 1

The randomly generated number is not necessarily dialed *per se* but can be used to produce the corresponding sequentially generated number from the array, which in turn is used to create the record that is dialed or stored. For example, the randomly generated number may be 13, and the 13$^{th}$ sequentially generated telephone number in the array is selected for immediate or delayed dialing.

The '028 Patent explicitly indicates that the telephone numbers resulting from this process can be dialed immediately as shown below.




The '028 Patent also discloses that the generated records resulting from this process can be stored in a file, and then dialed at a later time.




To recap, the '028 Patent discloses generating a sequence of telephone numbers that are stored in an array. Next, a random number generator is used to retrieve a corresponding telephone number from the array. That number produced from memory can be used to create a record for immediate dialing or stored

in longer term memory for subsequent dialing. Consequently, a dialer implementing this technology could use a sequential number generator for storing 10,000 telephone numbers in an array in RAM. The dialer then uses a random number generator to produce the numbers (i.e., select, retrieve, and provide the number from memory) for immediate or subsequent dialing. The random number generator may also be involved in further storing the number (albeit in a different manner, i.e., in a file) for dialing at a later time.

The harm committed by indiscriminate dialing is the same, regardless of whether the dialing occurs by dialing sequentially generated numbers, randomly generated numbers, or as in the case in the '028 Patent, using a combination of random and sequential number generators. Furthermore, the harm committed by indiscriminate dialing is the same regardless of whether the telephone numbers are dialed immediately after each number is generated or stored in a file and dialed later. The statutory prohibition against using an ATDS in the TCPA encompasses all such technological variations of indiscriminate dialing.

## V. *Marks*' ATDS Interpretation Is Premised On A Limited Understanding Of The Underlying Technology

The Ninth Circuit determined that the statutory text in *Marks* is ambiguous. "After struggling with the statutory language ourselves, we conclude that it is not susceptible to a straightforward interpretation based on the plain language alone." *Marks,* 904 F.3d at 1051. However, this conclusion is based on an erroneous

understanding that "a device could not use 'a random or sequential number generator' to store telephone numbers." *Marks,* 904 F.3d at 1050. This understanding is incorrect at a basic level because digital electronic random or sequential number generators inherently store numbers. However, in light of the above discussion of dialer technology, the statutory text referencing using a number generator to store a telephone number could be interpreted as referring to storing the number in an array in RAM or in a file as described in the '028 Patent.

The '028 Patent discloses a technique of generating records with numbers that could be dialed immediately or stored for later dialing. Further, the '028 Patent discloses dialer technology incorporating both random and sequential number generator functions. It would be consistent with the goal of Congress to ban any variation of indiscriminate dialing, whether by using a random number generator, a sequential number generator, or a combination of the two. It would also be reasonable for such a ban to encompass dialing numbers that were immediately produced for dialing or that were previously stored for subsequent dialing. The statutory language is consistent with encompassing these technological variations.[5]

---

[5] Soon after the TCPA's passage, the FCC also recognized that random or sequential number generation is critical to the ATDS definition: "The prohibitions of § 227(b)(1) clearly do not apply to functions like 'speed dialing,' 'call forwarding,' or public telephone delayed message services (PTDMS), because the numbers called are not generated in a random or sequential fashion." 7 FCC Rcd 8752, 8776 (1992).

Thus, the statutory language is not ambiguous once it is recognized how dialers could variously store and produce numbers for dialing using different number generators. The statutory ATDS definition is, in fact, susceptible to a straightforward interpretation based on the plain language and is precisely tailored to cover variations in the technology.

## VI. *Duran's* ATDS Interpretation Is Also Premised On A Limited Understanding Of The Underlying Technology

The Second Circuit based its expansive ATDS interpretation in *Duran* on the following technological understanding:

> As discussed above, under the first approach, an ATDS would need to be able either to "store" or "produce" numbers using a random- or sequential-number-generator. But what this approach cannot explain is why the statute, in order to achieve its ends, includes both verbs. Common sense suggests that any number that is stored using a number-generator is also produced by the same number-generator; otherwise, it is not clear what "storing" using a number-generator could mean. It would be odd for Congress to include both verbs if, together, they merely created redundancy in the statute.

*Duran,* 955 F.3d at 284 (footnote omitted).

*Duran* relies on "common sense" to conclude that a number generator storing a number must also have necessarily produced that number, because otherwise

there is a lack of understanding of "what 'storing' using a number generator could mean." *Id.*

An understanding of dialer technology demonstrates how a number generator could store a number, but not produce it for dialing. As described in the '028 Patent, sequential telephone numbers are generated and stored into an array. Next, the '028 Patent describes using a random number generator to produce the stored number from the array into a record. Thus, while the sequential number generator stores the number into the array, the number is produced (i.e., selected, identified, and retrieved) for dialing using the random number generator. Thus, it is possible for different number generators to have different roles with respect to storing and producing numbers that are dialed.

Furthermore, because a dialer could use a sequential number generator to store the numbers in an array and then use a random number generator to produce the number for immediate or subsequent dialing, the recitation of "store" is not necessarily superfluous with "produce." This addresses a key reason why some decisions found the statutory language ambiguous. Specifically, *Marks* presumed "a device could not use 'a random or sequential number generator' to store telephone numbers." *Marks* at 1051. *Duran* admittedly found the same language unclear. "If the numbers are stored, must they be stored 'using a random or sequential number generator' (whatever that might mean)?" *Duran*, 955 F.3d at 283.

*Duran* characterized these as "technical questions [that] are not easily resolved." *Id.* at 283. In light of how dialer technology functioned at the time, the

answers become clear and the statutory language is not ambiguous.

It is not necessarily "odd for Congress to include both verbs" in the ATDS statutory definition and consequently the two verbs together do not create surplusage. *Duran,* 955 F.3d at 284. In fact, considering available dialer technology, the plain language is precisely aligned with the goals of banning various forms of indiscriminate dialing. The plain language of the ATDS definition encompasses potential variations of technology used to accomplish indiscriminate dialing. "[T]here is plenty of evidence that Congress wanted the statute to eradicate machines that dialed randomly or sequentially generated numbers." *Glasser,* 948 F.3d at 1311. The plain language reading of the ATDS definition is consistent with this goal.

## VII. Circuits Considering the Underlying Technology Find A Narrow ATDS Interpretation Consistent with the Plain Language

### A. *Glasser* – Eleventh Circuit

The Eleventh Circuit analyzed the ATDS definition in *Glasser,* which expressly considered the *Marks* decision. *Glasser* concluded that:

> We appreciate, as shown, a key source of the court's hesitation—the instinct against "using a random or sequential number generator" to "store" telephone numbers. But this approach creates problems of its own, as we have also shown. To adopt this reading, one must separate

> the statute's two verbs ("to store or produce"), place the verbs' shared object ("telephone numbers to be called") in between those verbs, then insert a copy of that shared object to the statute, this time after the now separate verb "to produce" to make clear that "using a random or sequential number generator" modifies only "to produce." That looks more like "surgery," in the words of Hilton, than interpretation.

*Glasser,* 948 F.3d at 1311 (internal citations omitted).

*Glasser* did not find storing telephone numbers using a number generator ambiguous once dialer technology was understood.

> The first hiccup is the oddity of "stor[ing]" telephone numbers using a number generator. But this problem fades when one considers how automatic phone-dialing technology works and when one keeps in mind the goal of giving content to each word and phrase in the statute.

*Glasser,* 948 F.3d at 1307.

*Glasser* also recognized that numbers produced by a random number generator could be dialed immediately or stored for later dialing.

> One last point turns on history. The regulatory record confirms that, at the time of enactment, devices existed that could randomly or sequentially create telephone numbers and (1) make them available for immediate dialing or (2) make them available for later dialing. *See Noble Systems Corp. Comments at 13.*

> Sometimes storage would happen; sometimes it wouldn't. Under this reading, § 227(a) occupied the waterfront, covering devices that randomly or sequentially generated telephone numbers and dialed those numbers, or stored them for later dialing.

*Glasser,* 948 F.3d at 1307.

In light of the explanation about how dialer technology could use a random number generator to produce a number for immediate dialing or store it for subsequent dialing, *Glasser* arrived at a narrow ATDS interpretation consistent with the plain language of the statute.

### B. *Gadelhak*– Seventh Circuit

The Seventh Circuit analyzed the ATDS definition in *Glasser* and adopted a similar interpretation. *Gadelhak* acknowledged that while an argument could be made that a number generated must be stored, albeit fleetingly, before it is dialed, *Gadelhak* found that "storing" a number is more likely reflective of storing a number for subsequent dialing.

> The record before the FCC reveals that at the time of the statute's enactment, devices existed with the capacity to generate random numbers and then store them in a file for a significant time before selecting them for dialing. See Noble Systems Corp., Comments in Responses to the FCC's Request for Comments of the Interpretation of the TCPA in light of the 9th

> Circuit's Decision in *Marks v. Crunch San Diego 12015 (Oct. 16, 2018)*. . . .

*Gadelhak,* 950 F.3d at 465.

It is not by coincidence that the two circuits that examined dialer technology narrowly interpreted the statutory language consistent with its plain meaning. The other circuits reached an expansive interpretation predicated on incorrect assumptions of how the technology functioned, leading to an incorrect determination the statutory language was ambiguous.

## VIII. If The Statutory Language Is Unambiguous, Then The Court's Work Is Done

This Court's precedent is clear with respect to interpreting statutory language. "[W]hen the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton County, Georgia*, 590 U.S. at ___, 140 S. Ct. at 1749 (2020) (slip op. at 24).

The circuits interpreting the ATDS definition without a technological understanding of the statutory terms reached an expansive interpretation. The expansive interpretation encompasses equipment that stores a number and then dials it, which is incredibly broad. This is so broad, that without any further limitation, it impermissibly encompasses using modern smartphones to call a wireless contact whose number

is stored in a list. See *ACA Int'l v. FCC*, 885 F.3d 687, 692 (D.C. Cir. 2018).[6]

To avoid this undesirable outcome, courts adopting this expansive definition have been forced to implicitly narrow this broad language by grafting the phrase "automatically dialing" into the statutory definition. Specifically, the telephone number is not merely dialed, but "automatically dialed."

*Marks* interpreted the ATDS definition as initially not including this term:

> Accordingly, we read § 227(a)(1) to provide that the term automatic telephone dialing system means equipment which has the capacity — (1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator — and to dial such numbers.

*Marks,* 904 F.3d at 1052.

But *Marks* later modified its interpretation by inserting another word, "automatically," into the statutory definition:

---

[6] A recent Kansas District Court decision also agreed with *Glasser* and *Gadelhak* that the *Marks* interpretation would give the ATDS definition an impermissibly broad sweep. *Hampton v. Barclays Bank Del.*, 2020 U.S. Dist. LEXIS 145294 (D. Kan. Aug. 13, 2020), *75. ("Finally, the second interpretation permits the same sweep that *ACA International* concluded was too broad. That is, *ACA International*'s concern about the FCC's broad definition of 'capacity' also applies to the definition of an autodialer's functions.") (internal citations omitted) (citing *Glasser*, 948 F.3d at 1309).

> Because we read § 227(a)(1) to provide that the term "automatic telephone dialing system" means equipment which has the capacity — (1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator — *and to dial such numbers automatically* (even if the system must be turned on or triggered by a person).

*Marks,* 904 F.3d at 1053 (emphasis added).

The motivation was based on inferring what Congress meant. "By referring to the relevant device as an '*automatic* telephone *dialing* system,' Congress made clear that it was targeting equipment that could engage in automatic *dialing*. . ." *Marks*, 904 F.3d at 1052 (emphasis in original). However, implicitly reading "automatic" dialing into the statute leads to an odd conclusion: namely that Congress meant to allow indiscriminate dialing by manually dialing randomly or sequentially generated telephone numbers but meant to prohibit automatic dialing of randomly or sequentially generated telephone numbers. That odd conclusion illustrates the risk of selecting a path based on guessing Congressional intent.

Similarly, *Allan* addresses the Eleventh Circuit's "concern that the more expansive interpretation of 'store' would capture everyday use of smart phones." *Allan*, slip op. at 14, 2020 U.S. App. LEXIS 23935 at *22. *Allan* resolves this practical problem by implicitly adding "automatic" to the statutory definition. "To that end, the autodialer ban applies to *automatic* dialing systems or artificial or prerecorded voice messages

only." *Allan,* slip op. at 15 (emphasis in original), 2020 U.S. App. LEXIS 23935 at *25.

This approach bootstraps the meaning of "automatic" from the term being defined (automatic telephone dialing system) into the statutory definition itself. These courts have presumed that Congress must have intended to incorporate this word into the definition, based on the term being defined. This again leads to the absurd conclusion that Congress considered it acceptable to use equipment that facilitated manually dialed calls (as opposed to automatically dialing) using randomly or sequentially generated telephone numbers.

The definition of an ATDS drafted by Congress is fundamentally a technology-based definition. Presumably Congress was cognizant of risks that a technological oriented definition could become obsolete. Presumably Congress did not forget to include any words or intend for words to be implicitly read into its definition of an ATDS. This Court should not attempt to modify the plain language of the ATDS definition to: (1) update it for modern technology, (2) address potential adverse practical impacts, or (3) guess the intent of Congress. These are not reasons why judges should "freely invest old statutory terms with new meanings…" *New Prime Inc. v. Oliveira*, 586 U.S. ___, 139 S. Ct. 532 (2019) (slip op. at 7). While it may be tempting to modernize the definition of an ATDS in light of what Congress might have wanted, this Court should "not join this guessing game. It is not our function 'to rewrite a constitutionally valid statutory text under the banner of speculation about what

Congress might have' intended." *Wisconsin Central Ltd. v. United States*, 585 U.S. ___, 138 S. Ct. at 2073 (2018) (slip op. at 7).

## CONCLUSION

Two competing interpretations of the ATDS statutory definition are before this Court. The expansive interpretation was adopted in *Marks* by the Ninth Circuit, in *Duran* by the Second Circuit, and in *Allan* by the Sixth Circuit. These are all predicated on the ATDS definition being considered ambiguous based on a limited understanding of how dialer technology could use a number generator to store a number. In contrast, other circuits, such as the Eleventh and Seventh Circuits, considered dialer technology in interpreting the statutory text and adopted a narrow interpretation consistent with the plain language of the statute.

Dialer technology available prior to the passage of the TCPA was capable of generating sequential telephone numbers that were stored in an array and using a random number generator to produce the number from the array. After the number was produced, it could be dialed immediately or stored for subsequent dialing. Thus, it is evident that the technology at the time used random or sequential number generators to store or produce numbers to be dialed.

Consequently, a basic understanding of relevant technology shows that the plain language of the statutory text is not ambiguous. The plain language of the ATDS definition was intended to cover equipment

that variously used random or sequential number generators to store or produce numbers that were dialed.

Congress knew that indiscriminate dialing causes the same harm regardless of whether the number was randomly or sequentially generated and regardless of when or how the number was dialed. Because indiscriminate dialing was to be avoided regardless of the combination of technology used, Congress did not incorporate surplusage words in the ATDS definition.

Contemporaneous dialer technology shows the statutory language is not ambiguous, but instead is precisely tailored for its intended purpose. The Court should not be tempted to update the interpretation of the ATDS definition beyond its plain language to address assumptions of what Congress might have intended to accomplish with the TCPA. The narrower ATDS interpretation of *Glasser* is the appropriate interpretation of the statutory text This Court should accordingly reverse the decision below.

Respectfully submitted,

KARL H. KOSTER
Chief Intellectual Property
and Regulatory Counsel
NOBLE SYSTEMS CORPORATION
1200 Ashwood Parkway
Atlanta, GA 30338
Telephone: (404) 851-1331
kkoster@noblesystems.com

*Counsel for Amicus Curiae*
*Noble Systems Corporation*

MICHELE A. SHUSTER
*Counsel of Record*
JOSHUA O. STEVENS
MAC MURRAY & SHUSTER LLP
6525 West Campus Oval
Suite 210
New Albany, OH 43054
Telephone: (614) 939-9955
Facsimile: (614) 939-9954
mshuster@mslawgroup.com

*Counsel for Amicus Curiae*
*Professional Association for*
*Customer Engagement*

# APPENDIX

# APPENDIX

## TABLE OF CONTENTS

## APPENDIX A

**United States Patent**

**Frimmel, Jr. et al.**

**Patent Number: 4,741,028**

**Date of Patent: Apr. 26, 1988**

# METHOD OF RANDOMIZING TELEPHONE NUMBERS

Inventors: **James J. Frimmel, Jr.,** Reston; **Alan R. Trefzger,** Sterling, both of Va.

Assignee: **International Telesystems Corporation,** Herndon, Va.

Appl. No.: **890,644**

Filed: **Jul. 30, 1986**

**Int. Cl.**[4] ..... **H04M 1/27**

**U.S. Cl.** ..... 379/355; 379/92

**Field of Search** ..... 379/67-69, 379/88-89, 92, 355-359, 209, 10, 11; 364/717

**References Cited**

U.S. PATENT DOCUMENTS

| | | | |
|---|---|---|---|
| 3,703,727 | 11/1972 | Knowlton | 364/717 X |
| 3,792,203 | 2/1974 | Martin | 379/357 X |
| 3,943,289 | 3/1976 | Sheldon et al. | 379/69 |
| 4,121,830 | 10/1978 | Buckley | 364/717 X |
| 4,201,896 | 5/1980 | Bower et al. | 379/67 |
| 4,438,296 | 3/1984 | Smith | 379/69 |

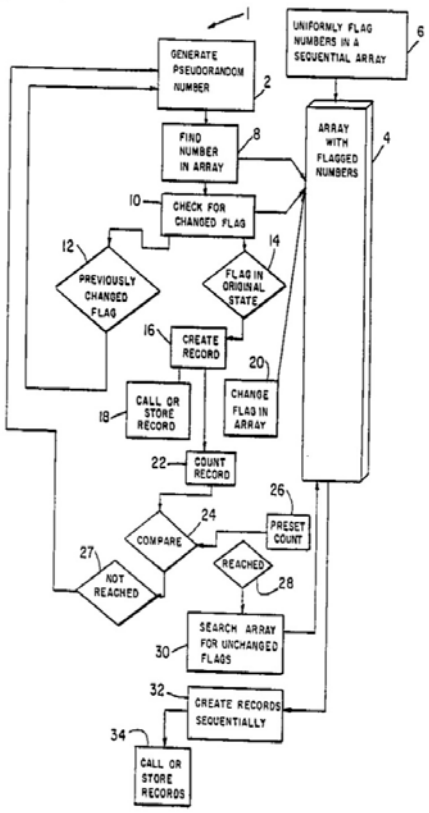
*Primary Examiner*–James L. Dwyer
*Attorney, Agent, or Firm*–James Creighton Wray

**ABSTRACT**

Pseudorandom numbers are generated for telephone dialing in telephone call management systems by selecting a range of numbers to be dialed, successively randomly generating numbers within that range, comparing each randomly generated number as it is generated with numbers previously generated and recorded or called. When a new randomly generated number matches a previously generated number, a further number is generated and the compared. When no match is encountered, the new number is recorded or called. After recording or calling a predetermined amount of numbers within the range, remaining numbers to complete the range of numbers are selected sequentialy from an array of numbers. The final numbers are recorded or called in sequence, but the steps between the final numbers vary randomly according to the random generation of the numbers in the first part.

App. 3

**9 Claims, 1 Drawing Sheet**



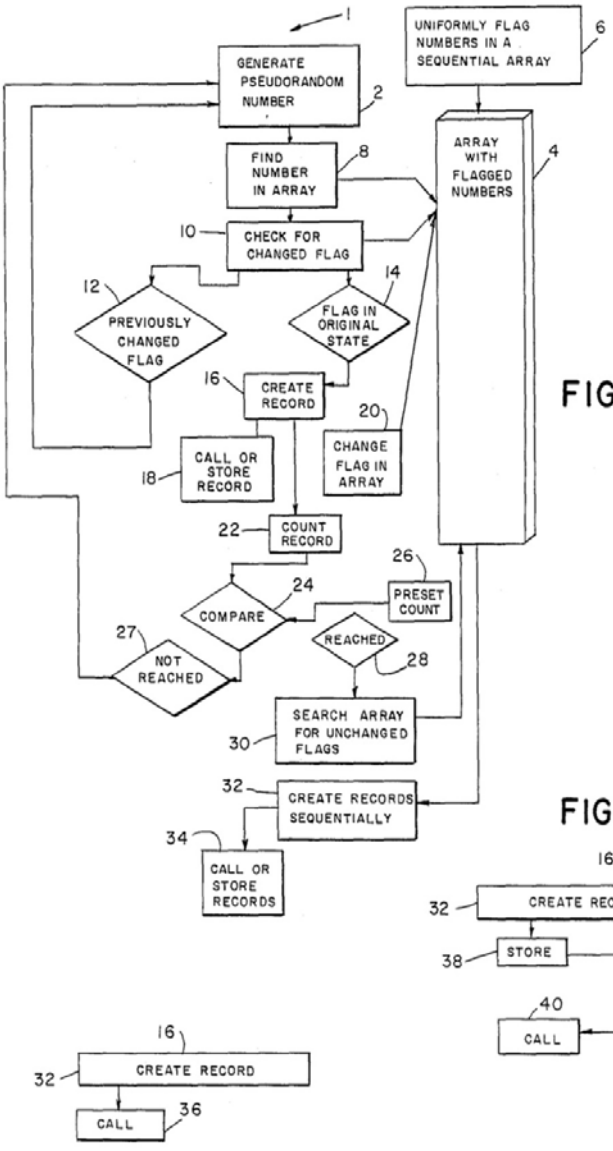



FIG. 1




FIG. 3




FIG. 2

# METHOD OF RANDOMIZING TELEPHONE NUMBERS

## BACKGROUND OF THE INVENTION

This invention relates to telephone call management systems and particularly to choosing numbers for dialing.

Telephone call management systems may dial sequential numbers in a particular telephone exchange. That creates a problem in that some of the number sequences may be assigned to the same subscriber. A system that sequentially dials numbers may successively dial a backup number in a single office.

To try to avoid that difficulty, a base number may be chosen and may be incremented by a fixed value, as each number is called in succession. The result is that all numbers may be called in a particular exchange. In large offices with more than 10 lines, for example, repeated calls may be directed to the same office. A problem exists in how to call numbers to ensure that all numbers are called within an exchange but to avoid calling numbers sequentially at a single location.

## SUMMARY OF THE INVENTION

The present invention overcomes and avoids the problems of the prior art by generating random or pseudorandom numbers. First the range to be called is chosen. For example, in a three-digit exchange, 10,000 calls may be made to seven-digit telephone numbers within that exchange. The present system randomly selects the last four digits. The computer generates random or pseudorandom numbers and calls them. The

system keeps track of what numbers have been called so far. Each new number selected is checked to see if it has been called previously. If that number has been called, another random number is chosen until an as-yet-uncalled number is reached. That avoids calling sequentially, which could result in ringing each phone in an office in succession.

The present system may be used by calling a number as soon as it is generated or by generating records for all numbers and then calling the numbers according to their position on the generated records. It is preferable to generate randomly as many numbers as reasonably possible, flagging numbers in an array as a new number is generated, and then to fill in the remaining numbers in sequence by checking the array for unflagged numbers for adding to records of the randomly generated numbers. For example, generating records for all numbers in an exchange requires generating 10,000 possible numbers. It is preferable to generate the first 90% of the 10,000 numbers with random generation and then to fill in the remaining numbers in sequence with numbers from an array which have been flagged to indicate that those numbers have not been randomly generated.

It is possible to generate a pseudorandom number by dividing a prime number by another prime number, for example 7, and by dividing the result again by that same number, e.g, 7. Each result may be used or the ensuing fraction may be used. Both exist in never-repeating patterns.

Pseudorandom numbers are generated for telephone dialing in telephone call management systems by

selecting a range of numbers to be dialed, successively randomly generating numbers within that range, and comparing each randomly generated number as it is generated with flags in an array, which indicate numbers previously generated and recorded or called. When a new randomly generated number matches a previously generated number, a further number is generated and then compared. When no match is encountered, the new number is recorded or called. After recording or calling a predetermined amount of numbers withing the range, remaining numbers to complete the range of numbers are selected by finding ungenerated or uncalled numbers in the array and adding numbers from the array to the generated or called numbers when no match is encountered. The final numbers are recorded or called in sequence, but the steps between the final numbers vary randomly according to the random generation of the numbers in the first part.

The preferred system creates the final group of records from numbers in the table in sequential order of the numbers.

The preferred system creates an array of sequential numbers and uniformly flags each number in an original condition, for example, with a binary one. A newly generated number is checked to see if the number in the table has its original flag, one. If so, the flag is changed to the generated number indicator, e.g., zero, and a record is created for that newly generated number. When, upon checking, a zero or other generated number indicator is found, the system simply generates another number and tries again.

Finally, after a predetermined amount of new numbers have been successfully pseudorandomly generated, the system looks in the array for all flags still in their original condition. Records are created sequentially for numbers associated with those flags.

The present invention is a method of checking previously generated numbers against current ones.

The invention provides a means of indicating or remembering what numbers have been previously generated.

After recording or calling a predetermined amount of numbers within a selected range according to this invention, the remaining numbers to complete the range of numbers are selected by checking flags in an array indexed by the generated or called numbers and adding a number to the generated or called numbers based on that index into the array where a flag value denoting no previously generation is encountered. The final numbers are recorded or called in sequence, but the steps between the final numbers vary randomly according to the random generation of the numbers in the first part.

The present invention provides a telephone call management random dialing system. An array containing 10,000 flags or a range of flag elements is initialized so that all elements contain the value denoting no previous generation. A pseudorandom number is generated from arrays of possible numbers. The generated random number is used to index into an array of flags. A file record is created for the generated random number and the flag indexed by that number

is set to a value indicating that the number has been generated. A further pseudorandom number is generated from a range of possible numbers. That further random generated number is checked for having been previously generated by checking the corresponding array flag. The array is indexed by the further number, and a further file record is created for the further number upon finding that the corresponding array element has the value denoting no previous generated. Other pseudorandom numbers are generated and checked to see whether flags by the other random numbers have been changed in the array. The flags corresponding to those numbers are set to a value denoting generation, and file records are created for those numbers. At a time when less than a predetermined percentage of possible numbers have unchanged flags in the array, the array is checked for the elements still flagged as not previously generated. File records are generated or calls are made for those numbers. If records were generated, records are used to call after the generation of random records is complete.

The preferred method of generating sequential records of numbers to be called in a telephone call management system comprises selecting a three-digit exchange and randomly generating numbers selected from the last four digits of seven-digit telephone numbers in the exchange, generating a four-digit random number, and checking with a flagged array indexed by those random numbers to determine if a flag has been changed for the generated random number. If the flag corresponding to the generated random number is set to the value denoting previous

generation, the invention generates another random number. If a flag is set to the value denoting no previous generation for the generated random number, the system changes the flag and creates a record with the generated random number. The system continues to generate random numbers and to check each random number as generated with flags by previously generated random numbers, generating another random number upon finding a flag value denoting previously generation and creating a record with the most recently generated random number and setting the corresponding flag upon finding a number not previously generated. The system counts the records created in sequence with the randomly generated numbers and, upon a predetermined count, creates records with previously non-generated numbers.

The preferred telephone call management number generating system chooses the range to be called, generates pseudorandom numbers, checks an array for previously generated numbers, checks each subsequently pseudorandomly generated number against the array of previously generated numbers using the number as the index into the array, sets the array element indexed by each number by the value denoting previous generation, calls each number not previously in the record, and generates another pseudoransom number upon finding that a generated pseudorandom number matches a previously generated number.

The preferred system then creates records from numbers not previously flagged or generated in the array in sequential order of the numbers.

In one modification of the invention, numbers are generated pseudorandomly in ten groups of one thousand each. The last three digits are randomized.

These and other and further objects and features of the invention are apparent in the disclosure which includes the specification with the above and ongoing description and claims and the drawings.

## BRIEF DESCRIPTION OF THE DRAWINGS

FIG. **1** is a schematic flowchart for creating a record of generated numbers and comparing the generated numbers with flagged numbers in an array.

FIG. **2** is a schematic representation of calling numbers upon generations of each new number.

FIG. **3** is a schematic representation of calling numbers after a whole file has been generated.

## DESCRIPTION OF THE INVENTION

The present invention provides a telephone call management random dialing system. A pseudorandom number is generated from 10,000 possible numbers. A file record is created for the generated random number. The generated random number is called or is stored in a file. A further pseudorandom number is generated from 10,000 possible numbers. That further random generated number is compared with earlier random numbers generated, called or stored and flagged in an array. A further file record is created for the further number upon finding no matches in the array. The further number is called or is stored in the file. Other pseudorandom numbers are generated and checked to

see whether the other random numbers have been generated. At a time when a predetermined percentage or less of possible numbers remains ungenerated, an array is checked for the ungenerated numbers, and a file is filled with the heretofore ungenerated numbers which are called in numerical sequence. When calls are not made immediately upon generating numbers, file records are generated for those numbers and the numbers are dialed after randomizing part of or the entire exchange.

The preferred method of generating numbers to be called in a telephone call management system comprises selecting a three-digit exchange and randomly generating numbers selected from the last four digits of seven-digit telephone numbers in the exchange. Generated four-digit random numbers are checked with an array which indicates previously generated random numbers to determine if a record exists for each newly generated random number. If an indication does exist for that generated random number, the invention generates another random number. If a record does not exist for the generated random number, a record is created with the generated random number. The system continues to generate random numbers in sequence and checks each random number as generated with records of previous random numbers, generating another random number upon a record match and creating a record with the most recently generated random number upon no match. The system counts the records created with the randomly generated numbers and, upon a predetermined count, creates further records in

numerical sequence with previously non-generated numbers.

The preferred telephone call management number generating system chooses the range to be called, generates pseudorandom numbers, calls the pseudorandom numbers in the order generated, makes a record of previously generated called numbers, checks each subsequently pseudorandomly generated number with records of previously generated called numbers, calls each number not previously shown in the record, makes a new record for the called number, and generates another pseudorandom number upon finding that a generated pseudorandom number matches a previously generated number.

The preferred system further counts the generated and called numbers, checks a sequential table of numbers for numbers previously generated and calls and creates a record upon finding a number in the table which has not been generated for calling.

## DETAILED DESCRIPTION OF THE DRAWINGS

A system for randomly generating telephone numbers is generally referred to by numeral **1** in FIG. **1.** In the first step, any number, for example, a four-digit number is generated pseudorandomly **2.** That number generated in step **2** is checked with previously generated and flagged numbers. For example, an array **4** of previously uniformly flagged **6** sequential numbers is checked **8** with the new number. If a match is found, for example, if a changed flag is found **12,** a new number is generated **2.** The new number is checked **10** with previously generated numbers. If no match, e.g.,

an unchanged flag is found **14,** a record **16** is created and called or stored **18.** The system continues to generate **2** numbers and to check **10** the numbers with previously stored records **4.** Upon finding that a number has been previously generated, a new number is generated **2.** If the number has not been generated previously **14,** a new record **16** is created and the flag in the array **4** is changed **20.** The number of records is counted **22.** If comparison **24** shows that the predetermined count **26** has not been reached **27,** a new number is generated **2.** When the predetermined count **26** is reached **28,** the last numbers are generated sequentially by searching **30** through the array **4.** When an unchanged flag is found, a new record is written **32.** The array **4** is provided with all numbers in the selected range. As a record **16** is created, that number is found in array **4** and the flag is changed **20** by that number in array **4.** After the predetermined count is reached **28,** remaining numbers of array **4** are written **32** and called or stored **34.**

As shown in FIG. **2**, records created in Steps **16** and **32** are concurrently used in a DTMF tone generator to place a call **36.** Alternately, as shown in FIG. **3**, the records created in steps **16** and **32** may be added **38** to file **39** and subsequently called **40.** In one embodiment of the invention, after creation of 9,000 records of pseudorandom generated numbers, the final 10% or 1000 numbers are created in sequence.

The flagging and changing of the flagging may be accomplished, for example, by adding or changing a binary character adjacent the number.

While the invention has been described with reference to specific embodiments, modifications and variations may be made without departing from the scope of the invention which is defined in the following claims.

We claim:

**1.** The telephone call management random dialing method comprising generating a pseudorandom number from a range of possible numbers stored in an array, creating a record for the generated number and flagging the number in the array, generating a further pseudorandom number from the range of numbers, comparing that further generated number with earlier generated numbers and generating a further record for the further number upon finding that the number has not previously been generated and flagging the further number in the array, generating other pseudorandom numbers, checking to see whether the other numbers have been previously generated and creating file records in sequence for those other numbers that have not previously been generated and flagging the other numbers in the array, upon a time when less than a predetermined percentage of possible numbers in the range remain ungenerated, checking the array for the ungenerated numbers in numerical sequence and generating the heretofore ungenerated numbers in numerical sequence, generating file records for those last mentioned numbers and dialing the last mentioned numbers.

**2.** The method of generating sequential records of numbers to be called in a telephone call management system comprising selecting a three-digit exchange and randomly generating numbers selected from the last

four digits of the seven-digit telephone numbers in the exchange, after generating a four-digit random number, checking with an array indicating previously generated numbers to determine if a previous generation indication exists for the generated random number, if an indication does exist for the generated random number, generating another random number, if an indication does not exist for the generated random number, creating a record with the generated random number, making an indication in the array, continuing to generate random numbers and checking each other random number as generated with indications of previously generated random numbers, generating another random number upon finding an indication and creating a record with the most recently generated random number upon finding no indication and changing that indication in the array, counting the records created and, upon a predetermined count, creating records with previously non-generated numbers.

**3.** The telephone call management number generating method comprising choosing the range of numbers to be called, generating pseudorandom numbers within the range, calling the pseudo-random numbers in the order generated, marking previously generated called numbers, checking each subsequently pseudo-random generated number with previously generated and called numbers, calling each number not previously called, generating another pseudo-random number upon finding that a subsequently generated pseudo-random number matches a previously generated and called number.

**4.** The system of claim **3** further comprising counting the generated and called numbers, subsequently checking an array of numbers with markings by numbers previously generated and called and creating a record upon finding a number in the array which has not been generated and called until reaching a predetermined count.

**5.** The method of claim **3** further comprising stopping the pseudorandom generating after a predetermined percentage of the range of numbers has been called.

**6.** The method of claim **5** further comprising completing the range of numbers by calling and creating records from ungenerated numbers in an array in sequential order of the numbers.

**7.** The telephone call management method with random number generation comprising making an array of all numbers in numerical sequence in a range of numbers to be called, uniformly flagging numbers in the array, generating a first pseudorandom number, finding the first generated number in the array, checking a flag by that number in the array, if the flag has been changed, generating a new number, if the flag in the array by the first generated number has not been changed, creating a record of the first generated number and changing the flag in the array by the first generated number, using the created record for making a telephone call, generating a second pseudorandom number, finding the second generated number in the array, checking the flag by the second generated number in the array, if the flag has been changed generating a new number, if the flag has not been

changed, changing the flag in the array by the second generated number and creating a record of the second generated number, using that second generated number for making a telephone call, generating an nth pseudorandom number wherein n is a whole number greater than two and less than the number of numbers in the range of numbers, finding the n number in the array, checking the flag in the array by the n number, generating a further number if the flag has been changed, if the flag is in its original state creating a record of the n number and changing the flag by the n number in the array, using the record of the n number to make a telephone call, continuing the generating of pseudorandom numbers, the finding of the generated numbers in the array, the checking of flags in the array by the generated numbers and the creating records and changing flags in the array and using the records to place telephone calls, counting records, comparing the record count with a preset count, if the preset count has not been reached, continuing to generate pseudorandom numbers to find numbers in the array to check the numbers to create records and change flags and use the numbers, if the preset count has been reached, searching the array in numerical sequence for unchanged flags and creating records in numerical sequence of numbers in the array by flags which remain unchanged, and using the records to make telephone calls.

**8.** The method of claim **7** wherein the using steps comprise making telephone calls when the records are created.

**9.** The method of claim **7** wherein the using steps comprise storing records in sequence as the records are created for later use in making telephone calls.

* * * * *

## APPENDIX B

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

**WC Docket No. 18-152 & 02-278**
**FCC DA 18-1014**

**[Filed October 16, 2018]**

| | |
|---|---|
| Request for Comments of the | ) |
| Interpretation of The TCPA in | ) |
| Light of the 9th Circuit's Decision | ) |
| *Marks v. Crunch San Diego* | ) |
| | ) |

**COMMENTS OF NOBLE SYSTEMS CORPORATION**

Karl Koster
Chief Intellectual and Regulatory Counsel
Noble Systems Corporation
1200 Ashwood Parkway
Atlanta, GA 30338

## SUMMARY

Noble Systems, a provider of contact center premised-based software and cloud-based solutions, submits these comments in response to the Commission's Public Notice of Comments On Interpretation of the Telephone Consumer Protection Act ("Public Notice") in light of the 9th Circuit's ruling in *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept 20, 2018) ("*Marks*"). The Commission seeks comments, in part, to augment the record being developed in relation to *ACA Int'l v. FCC,* 885 F.3d 687 (D.C. Cir. 2018) ("*ACA Int'l*"). The *Marks* decision resulted in a broad holding where the court stated: "we read § 227(a)(1) to provide that the term automatic telephone dialing system means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers.[1]

The *Marks* court essentially adopted the plaintiff's proposed construction verbatim, which was premised on an incorrect technical understanding of the operation related to a "random or sequential number generator." On that incorrect basis, it appears the *Marks* court found the statutory definition ambiguous. Finding the statutory language ambiguous is a precondition for delving into the contextual and statutory interpretive aids in order to interpret the

[1] As noted infra, the *Marks* decision stated two slightly different holdings, which vary as to whether dialing occurs "automatically" or not.

TCPA's autodialer definition anew. The resulting holding of the court is inconsistent with itself (as there are two differing statements of the holding in the decision), overly broad, and ambiguous as to its scope and application.

The *Marks* court appears to have accepted the plaintiff's contention "that a number generator is not a storage device; a device could not use 'a random or sequential number generator' to store telephone numbers" and used this understanding as the basis for finding the statutory language ambiguous.[2] However, a review of the technology at the time prior shows that this understanding is incorrect. First, all digital electronic devices that generate numbers for processing inherently store the number in some form of memory. Second, existing technologies at the time, as borne out by various identified U.S. patents, show that such random or sequential number generators used for dialing telephone calls further stored the numbers produced in files and then dialed the number. Thus, such devices could:

1) produce and dial a number (repeating as needed), or

2) produce a number, store it in a file (repeating as needed), and then dial the numbers in the file.

Because random and sequential number generators unequivocally stored numbers that were to be dialed, it makes sense to read the statutory language as

---

[2] *Marks*, p. 19.

proposed by the defendant, consistent with its plain meaning. Specifically, an ATDS encompasses equipment either stores or produces numbers, by either a random or sequential number generator, and which numbers are then dialed. Indeed, this interpretation covers the two alternatives shown to exist in dialers at that time, as borne out by U.S. Patent 4,741,028.

Thus, because the court did not have an adequate understanding of the technology at the time, the statutory language is not ambiguous as found by the court. Rather, the statutory language appears deliberately and carefully crafted to cover two known modes of operation for dialing numbers using random or sequential number generators. Because the statutory language is not ambiguous, it was improper for the court to proceed to interpret the language anew.

The Commission should be cognizant that the statutory language is not ambiguous, and is deliberately crafted to cover the known contemporaneous dialer technology at the time the TCPA was passed. The Commission does not have any basis from deviating from the plain meaning of the ATDS statutory definition in the TCPA in forming its rules.

In addition, comments are provided regarding the *Marks* court's opinion on a portion of the *ACA Int'l* text allegedly supporting that the statutory language is ambiguous, as well as the record supporting the Commission's ability to adapt to evolving technology under the TCPA.

[*Table of Contents Omitted in the Printing of this Appendix*]

* * *

## I. OVERVIEW

One of the most dangerous roads to travel is found at the intersection of law and technology. While some courts regularly address complex technologies,[3] many others do so infrequently and may not be versed in addressing technological issues. Many appellant judges are admittedly limited in their understanding of technology, including digital electronics. As will be seen, a failure to understand the technology can result in an "accident" at this intersection, leading to poorly formed legal conclusions, including a conclusion that the TCPA statutory definition of an ATDS is ambiguous, when in fact, the statutory language is spot-on in addressing the technology and statutory goals of that time.

A proper understanding of the statutory definition of an ATDS in the TCPA, as well as evaluating the *Marks* decision, requires some basic understanding of the digital technologies used in that era, which is prior to the passage of the TCPA in 1991. With this understanding, it becomes evident that the TCPA's statutory language is not ambiguous. It becomes evident that random and sequential number generators

---

[3] The Federal Circuit Court of Appeals is assigned to handle all appeals involving adjudication of patents, and therefore regularly address complex technology. Some of the judges in that court have formal technical or scientific educational backgrounds.

used by telephone dialers in that era both "produced" and "stored" numbers. Further, in light of identified patents describing how random and sequential numbers could be used in dialers, it makes the utmost sense for the statute to be drafted using the existing language in order to encompass two obvious variations of how dialers could dial random or sequential numbers. In light of this understanding, the statutory language is not ambiguous and there is no justification to fashion an alternative interpretation of an ATDS based on reliance of the canons of statutory interpretation.

The *Marks* decision interpreting the scope of an ATDS is inconsistent, illogical, and ambiguous in its scope and application. The Commission should not follow the road taken by *Marks* and the Commission conclude the statutory language is, in fact, not ambiguous. The Commission should first ensure it has a thorough understanding of digital technology used in dialers at that time prior to evaluating whether the statutory definition of an ATDS is ambiguous. Once the technology is understood, the Commission will find the statutory language is clear, and the Commission is then obligated to use the plain language of the statute in fashioning its rulings.

## II. OVERVIEW OF THE *MARKS* DECISION

### a. ATDS Statutory Definition

The *Marks* court addressed the statutory interpretation of an ATDS, which is quite familiar by now:

The statute defined "automatic telephone dialing systems" (ATDS) as follows:

> (1) The term 'automatic telephone dialing system' means 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.
>
> **Pub. L. No. 102-243, § 227, 105 Stat. 2394, 2395.**[4]

**b. The Court Ignored The Context Of Particular Statutory Language At Issue**

The *Marks* court properly ascertained that *ACA Int'l* set aside the Commission's 2015 and earlier regulatory orders interpreting the statutory ATDS definition, and set forth to interpret that language anew. The *Marks* court properly identified the first step of the analysis as starting with the "plain language of the statute."[5] The court also noted that "[i]t is also 'a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (*Id.*) In addition, the court stated: "In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue,

---

[4] *Marks* at 7.

[5] *Marks* at 18.

as well as the language and design of the statute as a whole." (*Id*.)

The key language at issue is "store or product telephone numbers to be called, using a random or sequential number generator," which the court found to be ambiguous. Thus, it is appropriate to delve into the context surrounding this particular statutory language. As discussed below, this conclusion appears to turn on the understanding that a "random or sequential number generator" found in dialing equipment could not store numbers. However, there is no evidence in the decision itself that the court delved into the meaning and understanding of this "particular statutory language at issue" (i.e., "random or sequential number generator" and its ability to "store" numbers), nor investigated the context of these terms from a technological perspective. After examining the context and particulars of these terms, it will be evident that the plain language of the statute is not ambiguous, and therefore the plain language of the statute should be applied.

**c. The Court Did Not Explain Why The Statutory Language is Ambiguous and Did So Without Understanding the Particular Technology at Issue**

The court sets up its conclusion that the statutory language of the ATDS definition is ambiguous with the following:

> Marks and Crunch offer competing interpretations of the language of § 227(a)(1)(A), but both parties fail to make sense of the

statutory language without reading additional words into the statute.

Marks points out that a number generator is not a storage device; a device could not use "a random or sequential number generator" to store telephone numbers. Therefore, Marks asserts, it does not make sense to read "store" in subdivision (A) as applying to "telephone numbers to be called, using a random or sequential number generator." 47 U.S.C. § 227(a)(1)(A). Instead, Marks contends that we should read the definition as providing that an ATDS is "equipment which has the capacity (A) to [i] store [telephone numbers to be called] or [ii] produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." In other words, a piece of equipment qualifies as an ATDS if it has the capacity to store telephone numbers and then dial them.

Crunch, in turn, argues that due to the placement of the comma in the statute, the phrase "using a random or sequential number generator" modifies both "store" and "produce." Therefore, Crunch argues that the best reading of the statute defines an ATDS as "equipment which has the capacity (A) to store [telephone numbers produced using a random or sequential number generator]; or [to] produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." As such, to qualify as an ATDS,

> according to Crunch, a device must store telephone numbers that have been produced using a random or sequential number generator.
>
> After struggling with the statutory language ourselves, we conclude that it is not susceptible to a straightforward interpretation based on the plain language alone. Rather, the statutory text is ambiguous on its face.[6]

The court's holding on the interpretation of the definition of an ATDS is virtually identical to that posited by Marks.[7] These are shown below for comparison:

- Marks' Proposed Interpretation of the ATDS Definition:

  > [A]n ATDS is "equipment which has the capacity (A) to [i] store [telephone numbers to be called] or [ii] produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[8]

- Courts Holding on the ATDS Definition:

  > Accordingly, we read § 227(a)(1) to provide that the term automatic

---

[6] *Marks*, at 19-20.

[7] When not italicized, "Marks" refers to the plaintiff and "Crunch" refers to the defendant.

[8] *Marks*, p. 19.

> telephone dialing system means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers.

It follows that the court was persuaded by the argument that "Marks points out that a number generator is not a storage device; a device could not use "a random or sequential number generator" to store telephone numbers."[9]

The court's basis for concluding the statutory language is ambiguous is not explicitly stated and thus appears predicated on adopting the understanding that a random or sequential number generator cannot be a storage device.[10] Based on that understanding, the conclusion is reached by the court that the statutory language is ambiguous. However, there is no discussion in the decision as to the context nor operation of the

---

[9] The court seems to denigrate Marks interpretation as "reading additional words into the statute", but if the court's holding is similar to *Marks* interpretation, then this would apply to the court's own interpretation as well. It is unclear exactly what "additional words" the court is referring to in Marks' interpretation.

[10] This position was also bolstered by amicus briefs; see, e.g., Brief *Amici Curiae* National Consumer Law Center and National Association of Consumer Advocated, Docket #91, filed 5/21/2018, "Numbers cannot be stored using a random or sequential number generator, so the phrase 'using a random or sequential number generator' must modify only the word 'produce.'" (Page 10.)

particular terms: "random or sequential number generator" and "store" numbers.

It would follow that if one of ordinary skill in the art would understand that random or sequential number generators as found in dialers of that time actually did storing numbers, then this would refute the basis for reaching the conclusion that the statutory language is ambiguous. This is where the intersection of the law meets technology, and without an understanding of some basic technological aspects, an accident is waiting to happen.

Without attempting to overwhelm regulators with technical details, an attempt is made to demonstrate that in the timeframe just prior to the passage of the TCPA (late 1991), one skilled in the art of digital electronics as applied to dialing technology would understand that the terms "random number generator" and "sequential number generator" would have the ability to "store" numbers for dialing. Further, they would have understood that "storing" the numbers could occur at different levels, such that "storing" could refer to copying the number into a file.

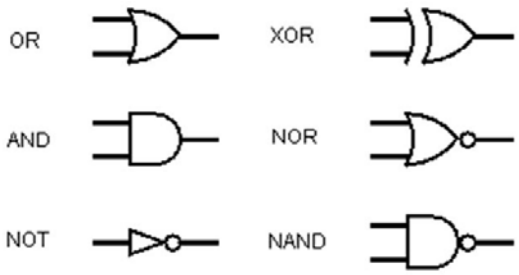
## III. RANDOM AND SEQUENTIAL NUMBER GENERATORS

### a. Brief History of Digital Logic and Technology

An understanding of the technology of random or sequential number generators and how numbers are stored and produced is necessary to understand the context of the statutory language. Thus, it is

appropriate to have a basic understanding of that technology.

In the 1970's and 80's, the development of integrated circuits ("ICs") led to improvements in various products, including devices that originated telephone calls. ICs were developed that performed various common, low level functions. At that time, ICs contained anywhere from a few transistors to thousands of transistors, depending on the complexity of the functionality performed. One of the simpler forms of ICs involved configuring transistors to form basic logical operations. These basic operations included "AND" and "OR" comparisons of binary signals. For example, an output signal could indicate whether input Signal A was present "OR" input Signal B was present. The transistors were configured to perform a set of basic functions called "logic gates." The logic gates were diagrammatically represented in images such as shown below:



These logic gates, in turn, could be combined to form a "flip-flop", a basic memory cell, shown diagrammatically below:[11]

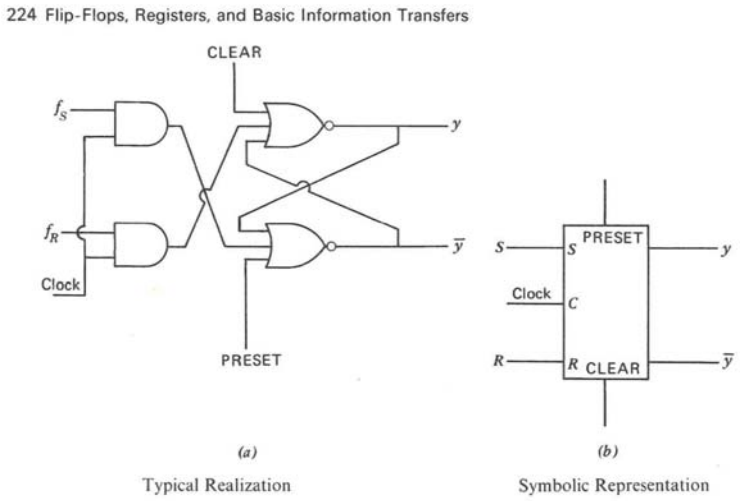



Figure 8-7. A *S-R* clocked flip-flop with PRESET and CLEAR.

The flip-flop is the smallest memory cell in a digital system. As stated in a 1981 digital electronics textbook:

> The smallest unit of information a digital system can store is a binary digit, a bit, which has a logic value of 0 or 1. A bit of data is stored in an electronic device called a flip-flop or a 1 bit register. A flip-flop is a type of general memory cell and, as such, has two stable states in which it can remain indefinitely – as long as it operating power is not

---

[11] DIGITAL NETWORKS AND COMPUTER SYSTEMS, Taylor Booth, Wiley and Sons, 1978, page 224.

> interrupted – and inputs which all its state to be changed by external signals.[12]

At this point, a fundamental principle is gleaned related to modern digital computers – the very existence of a number in a digital device requires that the number to be stored in a memory of some form. Stated another way, *if a digital circuit produces a number, the number must be stored in memory in some manner. Without storing the number, the number does not exist.* Thus, at a low level, "producing" a number requires "storing" it at a low level.

At this lowest level, this memory could be a flip-flop storing a single bit (i.e., a 1 bit register), which is undeniably a type of memory. But, storing a number either a 0 or 1 is limiting. A number of flip-flops could be arranged to store a larger number. When such arrangements are found internal to a microprocessor chip, this memory may be called a "register." Registers are used to hold a single numerical value. For example, the output number displayed on a calculator may be a number stored in a register.

It is possible to create larger memory arrays external to a microprocessor that are able to store many numbers. Such memory in a computing system was originally referred to as "primary memory" in academic circles; today, it is more commonly referred to as "RAM" (random access memory). Copying a number from a register in the computer microprocessor to the primary memory is also referred to as "storing." Other

---

[12] MICROPROCESSORS AND PROGRAMMED LOGIC, Kenneth Short, Prentice Hall, 1981, page 28.

forms of non-electronic storage media are used, formally called "secondary memory" and this is typically embodied in magnetic storage media or more commonly referred to as "disc storage." Copying a number from RAM to disc is also referred to as "storing" the number.

**b. Sequential Number Generators**

As it name implies, a sequential number generator generates a sequence of numbers. This is also commonly referred to as a "counter."[13] In the context of dialing telephone numbers, a sequential number generator or counter could be used to generate a sequence of telephone numbers. In one dialer application, a user could define a particular area code (e.g., 202) and an central office code (418), and then use a sequential number generator to start dialing the last four digits (called the 'line number') of "0000" and ending with "9999."[14] Thus, the entire range of ten-thousand telephone numbers from 202-418-0000 to 202-418-9999 could be dialed.[15]

Prior to the passage of the TCPA, one popular family of small scale integration ICs available for use in digital dialers was known as the "7400" family of

---

[13] "Counter - …In electronics, a circuit that counts pulses and generates an output at a specified Time." THE COMPUTER GLOSSARY, 6th edition, Alan Freedman, AMACOM, 1993.

[14] See, e.g., Telephone Sequential Number Dialer With Number Incrementing, U.S. Patent 4,188,510.

[15] This central exchange code is used by the FCC.

transistor-transistor logic ("TTL") ICs.[16] This family performed various functions including counters or sequential number generation for various applications.[17] The specification sheets for these ICs actually show how the individual flip-flops and logic gates are logically configured to construct the counters. Another representation of a counter from a digital electronics textbook is shown below that counts 0-7.[18] The outputs of the flip-flops store the number for the duration needed, until it is updated with the new number. The point of illustrating the circuit below is that it incorporates the aforementioned logic gates and flip-flops, and thus it inherently stores the numbers it produces.

---

[16] See, e.g., https://en.wikipedia.org/wiki/7400-series_integrated_circuits.

[17] See, e.g., http://www.ti.com/lit/ds/symlink/sn74ls92.pdf. Although this is a more recent specification sheet (dated 2018), the same functionality was available in the 1970's timeframe. See, e.g., http://www.smcelectronics.com/DOWNLOADS/1976-TTL%20DATABOOK.PDF

[18] DIGITAL NETWORKS AND COMPUTER SYSTEMS, Taylor Booth, 2nd Edition, John Wily and Sons, 1978, page. 278.

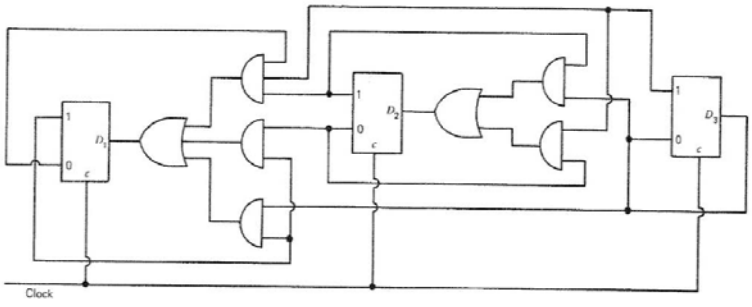



Figure 9-9. Realization of modulo 8 counter using *D* flip-flops.

### c. Random Number Generators

Random numbers are important in analyzing and experimenting in various scientific fields. The development of truly random numbers is much more difficult than it appears, and extensive tomes have been written about generating random numbers.[19] In the area of computer science, the term "pseudo random numbers" is frequently used to refer to generating numbers that are "pretty good" at being random.

In the context of using digital electronics for dialing telephone numbers, a random number would be typically generated using a microprocessor executing a software program. Specialized ICs for performing this

---

[19] See, e.g., http://www.informit.com/articles/article.aspx?p=2221790. See, e.g., von Neumann J., "Various techniques used in connection with random digits," in A.S. Householder, G.E. Forsythe, and H.H. Germond, eds., *Monte Carlo Method*, National Bureau of Standards Applied Mathematics Series, 12 (Washington, D.C.: U.S. Government Printing Office, 1951): 36-38, available for download at https://dornsifecms.usc.edu/assets/sites/520/docs/VonNeumann-ams12p36-38.pdf .

function were generally not available. Further, such microprocessors were becoming readily available in the 1980's timeframe. One academic paper from 1977 addresses how a microprocessor could be programmed with an algorithm to produce random numbers.[20]

As mentioned earlier, microprocessors incorporated internal memory storing the computational results, such as a random number. These memory locations are called "registers" and it is commonly recognized that these too, are a form of memory. ("One of the major uses of the flip-flops is to form registers which are used to store information during some portion of an information processing task."[21]) Because a microprocessor generates the random number based on a software program, the same software program could also copy (or "store") that number into other forms of memory, such as primary memory (RAM) or secondary memory (disc storage).

The above digression into digital electronics is intended to demonstrate that prior to the TCPA, the basic building blocks of digital technology (flip-flops)

---

[20] A Random Number Generator for Microprocessors, Microprocessors in Simulation, R. Mueller, D. George, and G. Johnson, Microprocessors in Simulation, Emulative Systems Company, April 1977. Available for download at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.862.531&rep=rep1&type=pdf

[21] DIGITAL NETWORKS AND COMPUTER SYSTEMS, Taylor Booth, 2nd Edition, John Wily and Sons, 1978, page. 232. See also, MICROPROCESSORS AND PROGRAMMED LOGIC, Kenneth Short, Prentice Hall, 1981, page 112 showing various registers in the 8085A microprocessor system.

were well known for use in sequential number generators and in microprocessors that would store sequential and random numbers respectively. It is inherent that digital circuitry used to produce either a sequential number or a random number must at a basic, low level, store that number in some fashion. Thus, it is incorrect to assert that such number generators did not store numbers.

**d. Digital Dialing Technologies Prior to Passage of the TCPA**

However, the above does not support that such digital technology was used in dialers. For this purpose, a convenient source of technology specific information is maintained by the United States Patent and Trademark Office ("USPTO") in the form of patents. Patents illustrate not only the functions accomplished, but frequently detail how technology is used to implement those functions.

The use of a sequential number generator for initiating calls was well known prior to the passage of the TCPA in 1991, as evidenced by U.S. Patent 4,188,510, entitled "Telephone Sequential Number Dialer with Number Incrementing," filed in 1978.[22] Without digressing into its specific operation, attention is drawn to FIG. 4, which represents "a functional block schematic diagram of circuitry for generating dial pulses to dial a telephone number."[23]

---

[22] https://patentimages.storage.googleapis.com/24/d3/aa/275bab6d835b7a/US4188510.pdf

[23] U.S. Patent 4,188,510, col. 3, lines 27-29.

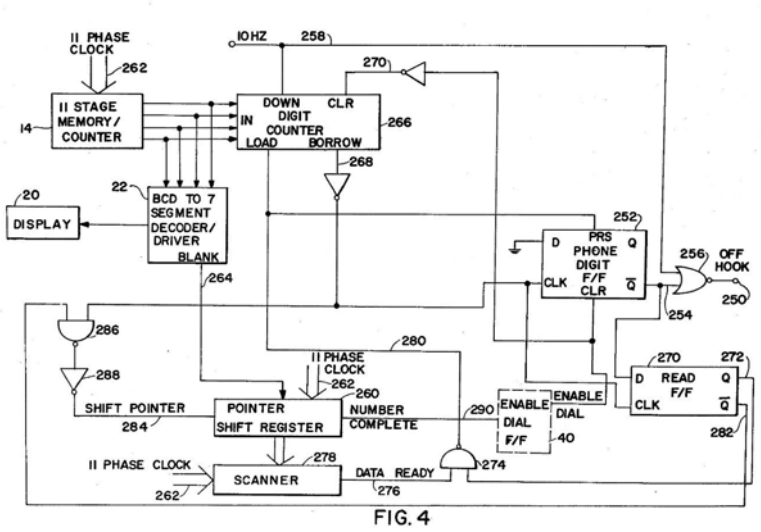


FIG. 4

Even without understanding how this circuit functions, it can be observed that it includes a "digit counter" 266, various flip-flops ("F/F") 270, 252, and logic gates 286, 274. In other words, this demonstrates that technology for sequentially dialing telephone numbers used the aforementioned digital circuitry and stored the numbers produced.

Another patent detailing a system for indiscriminate dialing is U.S. Patent 3,943,289[24], entitled "Automatic Telephone Caller," filed in 1974, 17 years prior to the passage of the TCPA. Random number generators were also well known, as described in U.S. Patent 4,922,520, entitled "Automatic

[24] https://patentimages.storage.googleapis.com/37/2b/7c/20625e71e8090f/US3943289.pdf

Telephone Polling System," filed in 1989.[25] A quick examination of the various figures associated with these patents also shows that the dialers incorporated various logic gates and flip-flops, and so that they also stored the random/sequential numbers they produced for dialing.

The above patents illustrate that the technology used for generating and storing random or sequential numbers at that time actually was used to dial the numbers. This by itself should discredit any assumption that random or sequential numbers generators cannot be used to store information used for dialing.

**e. There is Another Form of "Storing" Numbers by a Sequential or Random Number Generator**

It seems unlikely that Congress was thinking of such a low level of technical detail involving flip-flop registers when it drafted the TCPA statutory language for "storing" and "producing" numbers using a random or sequential number generator. It seems more plausible that Congress was considering a higher form of "storing" numbers – storing numbers in a file. Congress was cognizant that certain telemarketers were using databased or lists (i.e., files) for dialing in their operations.[26]

---

[25] U.S. Patent 4,599,493, filed in 1984, disclosed a system for what is essentially predictive dialing.

[26] See, e.g., House of Representatives Report 102-317,Report from the Committee on Energy and Commerce on the Telephone

As noted earlier, copying a number to primary memory or secondary memory is also a form of "storing." To illustrate this distinction between "storing" numbers in a file and "producing" telephone numbers to be dialed, reference is made to U.S. Patent 4,741,028, ("'028 Patent") entitled "Method of Randomizing Telephone Numbers," filed in 1986, a copy of which is provided as an appendix. This patent effectively illustrates the concepts of random number generation, sequential number processing, and most importantly, a concept of "storing" that is distinct from "producing" numbers that are dialed.

A high level summary/background of this patent is helpful. The TCPA identified one problem with sequential dialing, which was that this process could "tie up" multiple telephone lines going to a single location because the line was not released when the caller disconnected.[27] The '028 patent addresses this problem when dialing all 10,000 telephone numbers in a telephone exchange in sequence.[28] The '028 patent first dials random numbers selected in that range of 10,000 numbers. Thus, if the area/telephone exchange was, e.g., 202-418-XXXX, the system would use a random number generator to select the last four digits (XXXX) (a.k.a. "line number") to be dialed.

---

Advertising Consumer Rights Act, discussing use of databases in automated systems, page 7.

[27] See, e.g., Senate Report 102-178, p. 10 discussing the "disconnection problem."

[28] '029 Patent, col. 1, lines 15-30.

If numbers are randomly generated and dialed, then there is a potential problem of duplicating calls to the same number, which was to be avoided. (After all, the same number could be randomly selected twice or more.) The '028 patent recognizes that the first number selected would not have been previously dialed, so it could be dialed without any possibility of duplicating a call to the same party. But, then the second number randomly generated has a very slight chance of duplicating the first number; likely the second number would also not have been previously dialed. It is obvious as more numbers are randomly generated, (i.e., generating a few hundred random numbers), that eventually a random number would be generated that would duplicate a prior number used to make a call. To avoid dialing the same number twice, the system would store or flag in a table each random number generated, and then check each new random number generated to see if it duplicates a prior number produced. If a new randomly generated number was previously stored or flagged, it could be discarded. If a new randomly generated number was not previously stored or flagged, then it could be stored or flagged to avoid future duplicates. In this way, generating duplicate random numbers for dialing could be avoided.

To summarize the concept, a table of 10,000 numbers could be created in memory, and each time a random number was produced, the corresponding table entry (a "record") is updated/checked. If that table entry had been previously flagged, then the current number is a duplicate. If that number entry was not previously flagged as having been generated, then the number can be used. Flagging a table entry indicates it

was produced. In this manner, each random number produced could be checked so that duplicates could be avoided.

While initially generated random numbers are unlikely to be duplicated, it becomes apparent that as more and more numbers are generated and flagged, more duplicate numbers will be encountered. While this scheme avoids dialing a duplicate number, the dialing of non-duplicate numbers becomes slower and slower. At some point, if 9000 numbers were randomly generated, it becomes more and more difficult to randomly generate the remaining (non-previously dialed) numbers.[29] More specifically, if 9995 numbers have been selected, what are the odds that the next generated number will be one of these five unused numbers?[30] The '028 patent identifies that at a certain point, it would be more effective to review the list of entries in the table that have not been previously flagged, and then fill in those numbers in the table in sequence.[31] That way, all 10,000 numbers in the telephone exchange could be guaranteed to be dialed without duplicating calls to the same number.

The above effectively demonstrates how telephone numbers can be randomly generated and stored for dialing. However, the teachable moment of the '028 patent involves Figures 2 and 3. These figures provide insight as to two fundamental modes of dialer

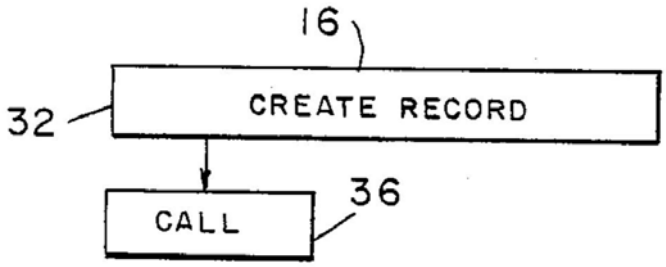
---

[29] See, e.g., U.S. Patent 4,741,028, col. 1, lines 40-56.

[30] The odds would be 5/10,000.

[31] See, e.g., U.S. Patent 4,741,028, col. 5, lines 29-35.

operation with respect to processing the numbers generated. In FIG. 2, the process involves generating a 'record' (i.e., a number to be called) and then immediately dialing the number after it is created.




Specifically, the "records created in Steps 16 and 32 are concurrently used in a DTMF tone generator to place a call."[32] In essence, after each number is generated, the number is used to make a call, i.e., it is dialed.[33]

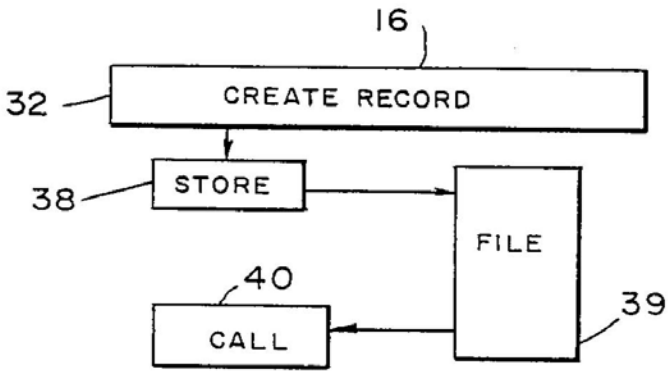
The other way in which the system could function is shown in FIG. 3. The text describes this as "Alternatively, as shown in FIG. 3, the records created in steps 16 and 32 may be added 38 to file 39 and subsequently called 40."[34]

---

[32] Patent 4,741,028, col. 5, lines 29-31.

[33] DTMF is "dual tone multiple frequency", commonly known as "touchtones."

[34] Id., col. 5, lines 31-33.




One skilled in the art would interpret the process 38 ("STORE") as copying the number from one memory storage (a register) to another memory storage (primary or secondary memory).

So, to recap, FIG. 2 refers to generating (or producing) a number, which is stored in a register at a low level, and then used to immediately originate a call. FIG. 3 refers to creating a number, which is copied into another memory (i.e., stored in a file) with other numbers for longer term storage. After the file is completed, the file is then used to originate calls.

Thus, the '029 patent demonstrates that it was well known to use a random number generator to:

- produce a random telephone number, which is then dialed, or
- produce a random telephone number, which is stored in a file, and then dialed.

In the first case, the process could be repeated as many times as needed. A number is generated and dialed and

repeated until a target goal is reached (e.g., all 10,000 numbers were dialed). In this manner, the generated number, although stored in a register, would not be stored in a file, e.g., along with a collection of other numbers. In the second case, the generated numbers could be moved from a register to a file and stored with other generated numbers. Then the dialing of the numbers in the file is performed.

It becomes apparent that either method results in calls to all the numbers in the telephone exchange. From the perspective of regulating sequential calling, there is little different between:

1) producing a number and dialing it (and repeating this), or

2) producing a plurality of numbers, storing them in a file and then dialing the numbers.

If the purpose of the TCPA was to prohibit indiscriminate dialing for telemarketing calls, then both approaches should be prohibited. It would be ineffective for Congress to craft a statute that prohibited process #1, but allowed process #2, or *vice versa*. It would be obvious that a prohibition should encompass both common implementations. Congress addressed this by defining the scope of the ATDS to encompass either implementation.

In light of the above practices, the TCPA statutory definition of an ATDS would be stated as encompassing equipment having 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.

This statutory language, interpreted by its plain meaning, would encompass equipment that operates as defined by FIG. 2 of the '029 Patent, where the number is produced by a random (or sequential) number generator and dialed, or operates as defined by FIG. 3 of the '029 Patent, where the number is stored in a file by a random (or sequential) number generator and then dialed.

In light of this, it is incorrect to conclude that the language is ambiguous because "a number generator is not a storage device; a device could not use 'a random or sequential number generator' to store telephone numbers."[35] The statutory language is not ambiguous. Rather, the TCPA language of an ATDS, is deliberately and perfectly adapted to address the dialing technologies of the time. Once the technology is understood, it becomes apparent the language is not ambiguous, but deliberate, purposeful, and appropriate.

---

[35] *Marks*, p. 19.

## IV. THE 9TH CIRCUIT INTERPRETATION OF THE STATUTORY ATDS DEFINITION IS PROBLEMATIC

The 9th Circuit has two distinct holdings, which are referred to as the "first definition" and "second definition." The difference emphasized below.

1. Accordingly, we read § 227(a)(1) to provide that the term automatic telephone dialing system means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers.[36]

2. Because we read § 227(a)(1) to provide that the term "automatic telephone dialing system" means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers **automatically (even if the system must be turned on or triggered by a person)....**[37]

This raises a fundamental issue regarding whether "automatically" is included in the 9th Circuit's definition of an ATDS, and, if so, what does that term mean. The definition appears overly broad if the term "automatically" is not included. On the other hand,

---

[36] *Marks*, p. 23.

[37] *Marks*, p. 24.

reading "automatically" introduces an ambiguous word and concept into the statutory language that is not stated in the original statutory language.[38]

The plain reading of the original statute definition prohibited dialing random or sequential numbers regardless of whether this was done manually or automatically, and this is consistent with its purpose of prohibiting indiscriminate dialing. It would seem facially deficient if the statute was interpreted to, e.g., prohibit automatic dialing of random or sequential numbers, but allow manual dialing of random or sequential numbers.

**a. The First Definition Is Overly Broad**

The first function in the first definition ("store numbers to be called") resides in virtually every modern landline and wireless phone device, as they typically include features as speed calling, last number redial, or repeat dialing by storing the number. This requires storing numbers that are to be called. The 9th Circuit did not appear to be cognizant of the concepts disclosed *supra* regarding storing numbers in registers, primary memory, etc., so it is difficult to attribute some additional meaning to the court's use of "storing," such as storing in a file. Very few modern telephone devices do not store numbers in some form. One example of a telephone device which does not store numbers to be called is the rotary dial (e.g., Bell System Model 500

---

[38] Recall that the court denigrated Mark's proposal as reading additional words into the statute. *Marks*, p. 19. Is "automatically" the word referenced by the court?

telephone set, circa 1950's), which did not incorporate digital electronics.

The second function, "dial those numbers," is found in virtually every consumer phone device. Very few manufacturers produce phones that do not allow dialing of a telephone number.[39] It would be a contradiction to have a phone that stores numbers but does not dial them. The purpose of storing numbers is to facilitate dialing (e.g., a speed dialing list).

The requirement to process a plurality of numbers, with respect to storing and dialing, is also extremely common. There is no implication that the definition requires storing or dialing within any time period or in a particular sequential order. Thus, storing and dialing one number, and then another number, would meet the definition. Thus, it seems that the first definition encompasses virtually all modern phone devices. This is too broad, and would encompass virtually all mobile phones.

**b. The Second Definition Is Ambiguous**

Assuming that "automatically" somehow limits how the numbers are dialed, this term could be interpreted to mean that some form of direct causal human intervention is required to effect the dialing of the stored number.

There is no regulatory definition in the TCPA context of "dialing" that Noble Systems is aware of, let

---

[39] There some special applications of phones configured to only receive calls. See, e.g., https://www.alzstore.com/phone-without-dial-pad-p/0077.htm.

alone "automatic." The Commission could seek input as to the scope of that term ("dialing") as it would apply to the ATDS definition. Dial pulse dialing (available as the primary consumer option up to the 1950s, but still available today), required digit-by-digit entry by the human user, typically via a rotary dial phone. Similarly, dual-tone multiple frequency (a.k.a. "touchtone" phones) also require digit-by-digit entry by the human, typically via a push-button phone. These technologies resulted in sequential digits being signaled out from the phone to the phone switch.

Modern VoIP and wireless phones typically utilize a form of "en-bloc" signaling from the phone device to the switch, where all the telephone digits are sent in one message. A common form of interaction is illustrated with a cellular phone. The user may select each digit individually, but nothing is sent until the user presses a "send" button. Then, the phone sends a message with all the digits that the user entered. The switch receiving the call request with the digits cannot differentiate between the user having manually selected all the digits versus the user pressing a speed dial (or redial) function. It is unclear whether "automatically" is intended to limit any one of these particular forms of dialing.

**i. The Timing of Human Intervention is Unclear**

In the above examples, it is implied that the user is causing a call to be establishing in real time for that user. But, the word "automatically" does not necessarily imply such limitations. A fundamental question is how soon relative to the human

intervention (i.e., entering digits) is the call required to be established? There are various "clicker" applications[40] for use in contact centers, which allow an agent to enter a number of call setup requests, which can be queued for future calls. For example, an agent could enter 1000 mouse clicks on Monday which are stored in memory, and cause 1000 calls to some unspecified number to originate later that day, or on another day, or as when needed for the agent. Would these be deemed "automatic" or not? Do the calls have to be set up immediately? Within an hour? Or with the same day?

**ii. Does the Human Input Require Identification of the Number To be Dialed?**

Historically, when a caller dialed a number, the user had to know and then indicate the number to dial. Today, with smartphones, when a caller initiates a call, the caller may not readily know the digits being dialed, but may only know the name of the person the call is directed to. For example, a user dialing from a contact list may select an entry ("spouse at work"), but not readily know the number itself. Granted, the user could look up the number in the phone's directory, but too often with smart phones, the user forgets the number, and merely selects a name to be dialed. In a contact center, an agent may select a "dial now" function key and may not know the number. An agent may select a name on a screen without knowing the number to be

---

[40] So called because a user "clicks" a computer mouse as input to request a call.

dialed. The computer/phone device automatically maps the contact's name to the number stored, and uses that number. How does this fall within the scope of "automatic"?

Now, consider a more extreme example. An agent is presented with a document having 1000 account numbers and telephone numbers. Likely, they can only see 30-50 accounts at a time on their computer screen. But, the agent may select all the accounts in the document with a single function key, and that indicates to the dialer that all the numbers should be dialed. That input essentially indicates the first number in the list is to be dialed, and after completion, the second number is dialed, etc. The input does not indicate the number to be dialed, but rather a computer program determines that number. Is this allowed? If not, then how is it distinguish from the concept of mapping a contact name to a number? Does it matter if one input maps to multiple numbers? If so, then would having the agent enter a 1000 separate clicks (call setup requests) address this deficiency? If an agent enters a click, thereby causing a call to be established without knowing either the number or the name of the person the call, how is this different from asking a computer to select and dial a number?

#### iii. Does the Call Dialed by a User Have to be the Same Call Connected to that User?

Most often, individual users of a phone device originate calls for themselves. In a contact center, this could be different. Could Agent A originate a call on behalf of Agent B? Could Agent A manually dial a

number resulting in a call being established, which is then transferred or otherwise connected to Agent B, who is presently available? There various contact center architectures where one agent provides inputs used to originate calls at a later time which are then connected to other agents.

This configuration could be further modified by using the aforementioned timing requirements. Specifically, can Agent A dial a number today, which is used to establish a call tomorrow for Agent B? Does the determination of whether this involves an ATDS depend on whether Agent A manually dialed the digits or performed some type of "clicker" input? Or another case: can Agent A submit a request for some number in a list (without know specifically the name or number selected) to be dialed in the future and have that call connected to Agent B, whenever Agent B is available?

The scope of the term "automatically" is subject to interpretation, and is likely to result in extensive litigation to define its metes and bounds. The scope of how proximate human intervention is required to accomplish call origination would have to be defined in excruciating detail to provide guidance to call originators. It can be expected that technology will likely find crevices in the regulatory interpretation to eke out further efficiencies, raising future questions requiring litigation as to whether the newest technological innovation falls with the "automatic" dialing limitation.

Noble contends that chasing a technological restriction in a statutory definition of an ATDS to achieve a policy goal is unlikely to be effective. The

TCPA has not been effective in stopping illegal "robocalls" (as defined as calls playing pre-recorded messages). A called party receiving a call, where an agent is connected to the caller and speaking to the called party, is not concerned how that called was dialed. An individual receiving an unsolicited telemarketing call where a recorded announcement is played is not concerned how the call was dialed – they are aggravated by the purpose of the call and the recorded announcement. An unwanted telemarketing call that is received is unwanted, regardless of how that call was dialed. A scam call is unwanted, not because it is dialed automatically, but because it is a scam call.

Adopting "automatically" or "human intervention" is not supported in the statutory language, and introduces further ambiguity and promises to lead to years of further litigation to clarify the metes and bounds of such an interpretation. Further, because the statutory language is clear, and purposefully directed to address dialer technology, there is no basis for introducing these further limitations.

## V. *ACA INT'L* DID NOT ADDRESS WHETHER THE STATUTORY ATDS DEFINITION WAS AMBIGUOUS

The *Marks* decision cites portions of the *ACA Int'l* as supporting its position that the statutory language of an ATDS is ambiguous. That portion is replicated below:

> After struggling with the statutory language ourselves, we conclude that it is not susceptible

> to a straightforward interpretation based on the plain language alone. Rather, the statutory text is ambiguous on its face. The D.C. Circuit apparently agreed, stating that "[i]t might be permissible" for the FCC to adopt an interpretation that a device had to generate random or sequential numbers in order to be an ATDS, or that a device could be an ATDS if it was limited to dialing numbers from a stored list. *ACA Int'l*, 885 F.3d at 702–03. We therefore turn to other aids in statutory interpretation.[41]

The *Marks* court (along with others) has misinterpreted the context of the *ACA Int'l* and the logic applied. Firstly, the context of what the court in *ACA Int'l* stated is provided below:

> So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers). It might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order. (*ACA Int'l* slip op. at 27.)

The court in *ACA Int'l* had to determine whether the FCC's 2015 Order was arbitrary or capricious. If so,

---

[41] *Marks*, at p. 20, internal footnotes omitted.

then the Order would be set aside. One way to show an order is arbitrary is to show conflicting mandates in that order. The court in *ACA Int'l* was essentially stating that the Commission could define an ATDS one way, or another way, but not both ways at the same time in the order.

To illustrate this with a whimsical example, consider an agency regulation that interprets a statute's language by stating: a) widget cannot be present, but then states, b) a widget is required to be present. Without knowing the details of what a widget is, without knowing the statutory language, and without knowing whether the statute requires a widget to be present or not, a determination can be made that the regulation is arbitrary, because the agency "cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order."[42]

The court in *ACA Int'l* did not have to evaluate the correct functionality of an ATDS in order to reach the conclusion that the Commission's 2015 Order was arbitrary. The court merely noted that the Commission cannot espouse competing interpretations in the same order; doing so renders the order arbitrary or capricious. Returning to the whimsical widget example, a court could find that perhaps the statute does requires a widget to be present, or perhaps the statute requires the widget to be absent, but the statute cannot be interpreted as requiring both.

---

[42] *Marks*, p. 13.

Thus, the statements by the court in *ACA Int'l* should not be interpreted as an evaluation that the statutory language in the TCPA was ambiguous. *ACA Int'l* did not address the issue of whether the statute was ambiguous and the Commission should not be swayed by the 9th Circuit logic that *ACA Int'l* supported the finding that the statutory definition is ambiguous.

## VI. A CORRECTED VIEW OF THE RECORD OF THE COMMISSION'S AUTHORITY TO ADAPT TO NEW TECHNOLOGIES

The 9th Circuit provided dicta related the Commission's authority under the TCPA to adapt to technology changes. This statement has been used as an implied authorization that the Commission can adapt the TCPA language to evolving technology. The court stated:

> Further, the FCC thought that it was clear "that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies." *Id. [Referring to the 2003 Order]* Accordingly, the FCC concluded that an interpretation of the statutory definition of ATDS which excluded new technology that could automatically dial thousands of numbers merely because it "relies on a given set of numbers would lead to an unintended result" and fail to effectuate the purpose of the statutory requirement. *Id.*[43]

The Commission's 2003 Order stated that "Congress anticipated that the FCC, under its TCPA rulemaking

---

[43] Marks, p. 11.

authority, might need to consider changes in technologies" and supported this assertion by citing two sources of authorities in the footnote:

> *See* 137 Cong. Rec. S18784 (1991) (statement of Sen. Hollings) ("The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies."). *See also Southern Co. v. FCC*, 293 F.3d 1338, 1346 (11th Cir. 2002) ("While the FCC is correct that the principle of nondiscrimination is the primary purpose of the 1996 Telecommunications Act, we must construe statutes in such a way to 'give effect, if possible, to every clause and word of a statute'.") (*quoting Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted)).[44]

First of all, the statement of Senator Hollings (a copy of which is attached) begins by emphasizing a provision in the proposed TCPA statue allowing the Commission to exempt certain technologies:

> Therefore, this bill includes a provision that allows those who use automated or prerecorded voice systems to apply to the FCC for an exemption from this prohibition. The bill gives the FCC the authority to exempt from these restrictions calls that are not made for a commercial purpose and categories of calls that the FCC finds do not invade privacy rights. If the FCC determines that such an exemption is

---

[44] FCC 2003 Order, footnote 436.

> warranted based on the record it develops, the FCC may grant such an exemption, subject to whatever conditions it determines to be appropriate.

Senator Hollings provides an example of such an innovative, yet-to-be-offered service:

> Some telephone companies are beginning to offer a voice messaging service which delivers personal messages to one or more persons. A person calling from a pay telephone at an airport, for instance, may call and leave a recorded message to be delivered later if the called line is busy or no one answers the call. Some debt collection agencies also use automated or prerecorded messages to notify consumers of outstanding bills. The FCC should consider whether these types of prerecorded calls should be exempted and under what conditions such an exemption should be granted either as a noncommercial call or as a category of calls that does not invade the privacy rights of consumers.

Senator Hollings did not want such innovative services to be squelched from being offered to the public because they ran afoul of the TCPA. To avoid depriving the public of new technologies and services, Senator Hollings ensured that the TCPA allowed the FCC to exempt such new technologies. Thus, Senator Hollings stated:

> The FCC is given the authority to exempt certain types of calls, and the FCC is not limited to

> considering existing technologies. The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies.

To recap, Senator Hollings wanted to ensure that certain futuristic services could be exempted by the Commission if deemed appropriate. The provision that granted this authority to the FCC is found in the TCPA, Section (b)(1)(B) and (2)(B) which allows the FCC to exempt certain calls that play an artificial or prerecorded voice message to residential telephone lines. Senator Hollings was not granting any authority based on the statutory language to the Commission to evolve their regulatory authority based to encompass future technologies.

The citation to *Southern Co. v. FCC* (quoting *Williams v. Taylor*) merely supports that interpretation of a statute is "give effect, if possible, to every clause and word of a statute." Applying this does not in any way indicate the Commission has authority to modify the ATDS definition, but instead must apply the words in the statute.

There is no basis whatsoever to conclude that Congress intended, nor that the TCPA authorizes, the Commission to adapt or extend the statutory language of an ATDS in anticipation of the development of new technologies. The only authority granted to the Commission was to exempt new technologies. Using these citations as authorization to evolve the scope of the TCPA is, at least, a creative interpretation. A more accurate interpretation is that there was no intention to authorize the Commission to expand the scope of the TCPA to encompass new technologies.

This mischaracterization was identified in 2006 by *ACA International's Supplemental Submission to Petition for an Expedited Clarification and Declaratory Ruling.*[45] The Commission should acknowledge that the TCPA statute does not give it the authority to modify the TCPA statute, and that the definition of the ATDS is not ambiguous. The Commission is respectfully request to clarify the record of the above misconception, so that future briefs and rulings do not refer to this misrepresentation.

## VII. CONCLUSION

The statutory language of the definition of an ATDS is not ambiguous. The scope of the ATDS definition explicitly addresses known dialer technology at that time that would indiscriminately call numbers that were both produced and/or stored in a file and then dialed. It is incorrect to presume that the statutory language is ambiguous because random or sequential number generators in digital devices could not store a number. Such devices were known in the art to store numbers, either in conjunction with their generation or in conjunction when copying the number to a file. In either case, the number would be dialed.

Without showing that the statutory language is ambiguous, the Commission should limit any forthcoming regulations to implementing the plain language of the statute. This means that equipment considered an ATDS must have the functions of 1) a random or sequential number generator to generate a

---

[45] Filed April 26, 2006, page 13, footnote 25.

telephone number and 2) the ability to dial that number. No further functions or requirements should be incorporated into the definition as there is no statutory basis for doing so.

Respectfully submitted on October 16, 2018

/Karl Koster/
Karl Koster,
Chief IP and Regulatory Counsel
Noble Systems Corporation
1200 Ashwood Parkway
Atlanta, GA 30338 (404) 851-1331 (x1397)