

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Stage Stores, Inc. Petition for Expedited
Declaratory Ruling Regarding Reassigned
Wireless Telephone Numbers

CG Docket No. 02-278

**COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

CCIA respectfully submits these comments in support of the Petition for Expedited Declaratory Ruling filed by Stage Stores, Inc.¹ CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. Together, CCIA's members employ more than 600,000 people and generate annual revenues in excess of \$465 billion. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries.²

The Petition filed by Stage Stores asks the Commission to clarify the applicability of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA"), to "marketing text message(s) sent to a wireless number for which the caller has received prior express consent but where the wireless number has been reassigned from the consenting consumer to another

¹ *Stage Stores' Petition for Expedited Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers*, CG Docket No. 02-278 (filed June 3, 2014) ("Stage Stores Petition" or "Petition"); *see also Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling filed by Stage Stores, Inc.*, Public Notice, CG Docket No. 02-278, DA 14-974 (rel. July 9, 2014).

² A list of CCIA's members is available online at <http://www.ccianet.org/members>.

person.” (Pet. at 1). CCIA urges the Commission to grant the Stage Stores Petition because businesses and other organizations have no meaningful ability to ensure that the number to which a message or call is made remains in possession of the person from whom prior express consent was obtained. Penalizing businesses that work diligently to obtain user consent before engaging in voice or text communication with the consenting user serves no purpose, creates potential liability for activity beyond a business’s control, discourages member companies from communicating with consenting users, and may, in the end, chill innovation.³

I. The TCPA Directly Impacts Many CCIA Members

CCIA represents Internet, telecommunications, and technology companies who are engaged in the full spectrum of digital activity, providing search, email, chat, social networking, e-commerce, online auctions, entertainment, cloud computing, and data storage, among other products and services. Many CCIA members also operate offline, and frequently interact with their millions of users through voice calls or SMS messaging. For example, member companies may interact with their users via voice call or SMS for purposes of account log-in or password recovery, informational messaging about specific services, provision of online messages via SMS, or, in some cases, marketing communications similar to those highlighted by Petitioner.⁴ For marketing communications, the need for prior *written* express consent of the user is clear, and many CCIA members have endeavored to obtain prior written consent for marketing communications delivered via voice call or SMS.⁵ If TCPA liability may arise from these marketing messages any time a number is recycled—without the sender’s knowledge—CCIA

³ Although these comments refer to “users,” the term should also be read to include “subscribers” and “customers”.

⁴ Member companies may also communicate with their users in ways that do not involve the use of an Automated Telephone Dialing System (“ATDS”), and which would thus not be subject to the TCPA in any event. Communications that do not involve an ATDS are not addressed in these Comments.

⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 ¶ 26, 28 (2012) (the “Robocall Report and Order”).

members and similarly situated companies will be unable to provide marketing messages to their users with any certainty. The TCPA was not intended to make all marketing messages actionable, yet without being able to trust in *user-provided* prior written consent, companies are all but prohibited from sending marketing messages to users despite complying with the TCPA and FCC guidance in all other respects.

Equally important to CCIA's members are informational communications where a previously consenting user has changed their mobile telephone number, communications that could lead to TCPA liability.⁶ The vast majority of CCIA members' communications should accurately be considered "informational," and similar to those specifically referenced by the FCC in its 2012 Robocall Report and Order.⁷ CCIA members provide products and services that are the backbone of the economy and upon which millions of Americans rely. Fundamental to that reliance is the ability of member companies to communicate directly with individual users, where the user has consented, via prerecorded, automated voice or SMS messages. To hold businesses liable under the TCPA for messages sent to users who, to the sender's best information, have previously consented to receiving them, would wholly undermine the FCC's interest in "not want[ing] to discourage purely informational messages" nor create a "disincentive to the provision of services on which consumers have come to rely."⁸

Whether in an informational or marketing context, many CCIA members have been subjected to frivolous litigation under the TCPA. These cases have involved a wide variety of member companies' services, but a general trend has emerged—TCPA litigation is on an

⁶ See also *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 United Healthcare Services, Inc., Petition for Expedited Declaratory Ruling submitted by United Healthcare Services, Inc.*, CG Dkt. No. 02-278 (filed Jan. 16, 2014).

⁷ Robocall Report and Order, 27 FCC 1830 ¶ 28 (finding that obtaining prior express written consent would be an excessive requirement for "certain types of autodialed or prerecorded calls, including debt collection calls, airline notification calls, bank account fraud alerts, school and university notifications, research or survey calls, and wireless usage notifications.").

⁸ *Id.* ¶ 29.

inexorable rise.⁹ Attracted by the availability of statutory damages, divorced from any obligation to show actual harm, putative class actions under the TCPA have multiplied, at times on the basis of a single alleged violation. Even spurious cases have dramatically increased CCIA companies' litigation costs, and businesses must take all potential TCPA claims seriously because of the wholly outsized liability at stake. The expansion of TCPA litigation, coupled with the enormous risk of class action damage awards, has in some cases curbed or altered the way in which member companies interact with their users, even those who have consented to voice or SMS contact. As consumers increasingly transition to a mobile lifestyle, characterized by the vast expansion of mobile telephones, businesses will increasingly need to contact their users on the go and SMS continues to be the favored technology for such communications.¹⁰ Barring action by the FCC, opportunistic TCPA litigation will continue to rise as more users consent to receive communication via voice call or SMS from CCIA members and similarly situated companies.

II. CCIA Members Lack The Ability To Check Whether A Consenting User's Wireless Number Has Been Reassigned

CCIA wholeheartedly agrees with the crux of the Stage Stores Petition: that it is currently impossible—not just operationally, but even theoretically—to verify that a mobile number for which consent has been given remains in possession of the original consenting user. CCIA members simply do not possess information about mobile phone number ownership, nor does any public mobile telephone number directory currently exist. Indeed, no business possesses the

⁹ See, e.g., *Noorpavar v. MySpace, Inc.*, No. 11-cv-00903 (S.D. Cal. Apr. 28, 2011); *Moss v. Twitter*, No. 3:11-cv-00906 (S.D. Cal. Apr. 28, 2011); *Glauser v. Twilio Inc.*, No. 11-cv-02584 (N.D. Cal. Sept. 15, 2011); *Ball v. Square, Inc.*, No. 3:12-cv-06552-SC (N.D. Cal. Dec. 28, 2012); *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, 847 F. Supp. 2d 1253 (S.D. Cal. Mar. 9, 2012); *Emanuel v. L.A. Lakers, Inc.*, No. 12-9936-GW, 2013 U.S. Dist. LEXIS 58842 (C.D. Cal. Apr. 18, 2013); *Nunes v. Twitter*, 3:2014-cv-02843 (N.D. Cal. June 19, 2014); *De Los Santos v. Millward Brown, Inc.*, No. 13-80670, 2014 U.S. Dist. LEXIS 88711 (S.D. Fla. June 30, 2014). See also Becca J. Wahlquist, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages*, U.S. Chamber Institute for Legal Reform (Oct. 2013), available at http://www.instituteforlegalreform.com/uploads/sites/1/Final_TCPA_White_Paper-1.pdf.

¹⁰ See Rima Qureshi, *Ericsson Mobility Report*, Ericsson (June 2014), at 4, available at <http://www.ericsson.com/res/docs/2014/ericsson-mobility-report-june-2014.pdf> (showing North American mobile telephone subscriptions of 365 million in Q1 2014).

capacity to cross-reference the numbers they receive through user consent with an up-to-date list reflecting *all* mobile phone number ownership. Absent clarification as a result of this Petition, however, CCIA members and similarly situated companies may bear liability for failing to know whether a mobile number has been reassigned—information which cannot be known without a comprehensive, up-to-date, public database reflecting mobile phone number ownership. As noted in every petition and comment on this issue, such a database does not exist, nor does CCIA argue that it should. Rather, CCIA merely requests that the Commission acknowledge that companies should not be held liable for their inability to do the impossible.

Leaving aside the practical impossibility of creating such a list, CCIA members' users are free to change their mobile phone number at will and are under no obligation to inform any individual business of a change in number. Consumers provide their contact information, including mobile telephone numbers, to member companies in numerous ways, for myriad purposes. Member companies may maintain a user's mobile phone number in more than one place and in databases that are not easily cross-referenced. Therefore, even if a user were to provide notice of a change in mobile telephone number for one purpose (for example, account recovery), that change would not necessarily trigger a change in a database containing the user's number (and record of consent) for a specific marketing communication. Indeed, conflation of users' contact information within member companies' various offerings could have the unintended consequence of inhibiting a user's ability to manage their own consent to voice or SMS communication.

Without the clarification requested by Petitioner, companies would have to rely on users to update every company (and as noted above, in some instances every service or product offered by a company) to which they provided a mobile telephone number to comprehensively update

their contact information. This is simply untenable. Even if CCIA members were in a position to impose such a requirement on users, imposing TCPA liability in cases of number recycling places the onus on businesses to police users, and makes it impossible to rely on user consent. This conflicts directly with the FCC's user consent rulings, which protect companies from TCPA liability where they clearly obtain written user consent to voice or SMS communications.

The only means by which member companies could attempt to avoid TCPA liability with respect to recycled mobile phone numbers would be to affirmatively contact each consenting user prior to calling or messaging the number on file. Such a "solution" would be impractical, expensive, and ironically may increase companies' risk of TCPA violations through an exponential increase in potentially actionable communications. Nothing in the TCPA suggests that companies must reacquire consent before each communication, nor has the FCC ever determined that companies cannot rely upon user consent once given.

III. Conclusion

For the reasons described above, CCIA respectfully urges the Commission to clarify the application of the TCPA to recycled mobile telephone numbers. Clarifying the TCPA to provide an exception for communications to numbers for which the sender has obtained prior express consent will make it clear to member companies that they need not do the impossible – determine that a user’s mobile number remains the same before sending each message – but rather may rely upon their users to provide consent.

August 8, 2014

Respectfully submitted,

Catherine R. Sloan
VP, Government Relations
Computer & Communications
Industry Association
900 17th Street, NW
Suite 1100
Washington, DC 20006
(202) 783-0070
csloan@ccianet.org