

What is a Prerecorded Call under the TCPA?: New FCC Petition Asks for Clarity that Live Agent Calls During Which Recorded Messages Do Not Qualify

Article By:

Eric J. Troutman

As we reported just last week, a court found for the first time that a wait queue message—i.e. a “please hold for an important message” notification—[qualified as a prerecorded call under the TCPA](#). This has been a theory unsuccessfully expressed by the Plaintiff’s bar ever since *Vance v. Bureau of Collection Recovery LLC*, Case No. 10-cv-06324 (N.D. Ill. March 11, 2011) but it never previously gained any traction until last week.

While wait-queue messages are in the spotlight currently, this same phenomenon occurs, for instance, where a company plays a “this call may be recorded for quality assurance” notifier at the start of an agent driven call, and in a host of other similar circumstances. But can the mere use of a recorded message in the course of an otherwise live call really trigger TCPA prerecorded call restrictions?

Although the FCC has not directly ruled on the subject to date, numerous references within previous FCC rulings suggest that a call must be entirely prerecorded—and lack human interactivity—in order to qualify as a prerecorded call for purposes of the TCPA. Moreover, the Ninth Circuit’s decision in *Moser v FCC* from 1995 clearly suggested that the use of a “tape recorded message” by a live agent would not trigger the TCPA. Nonetheless—and consistent with the TCPA’s shape-shifting nature—district courts have recently suggested that *any* use of a prerecorded voice in a phone call does trigger the TCPA’s heightened delivery restrictions.

Well a new petition to the FCC—just filed today and available here [FCC Petition](#)—asks the agency to clarify the issue and declare otherwise. The petition was filed on behalf of a soundboard platform operator—a company that empowers live agents with an assortment of messages that can be played to consumers to provide accurate and easy-to-understand information. As the petition explains, “this technology is desirable from a consumer perspective because it allows a called party to interact with an individual whose live voice, instructions and information are easy to understand. The technology is desirable from a business perspective because it assures human agents will not go ‘off script’ with improper, inaccurate, or incomplete assertions. It also aids compliance with the FCC’s telemarketing rules because businesses can assure that agents make the proper and required disclosures.”

Notably soundboard technology offers a high degree of interactivity with consumers. As the petition

explains: “Soundboard technology involves a live operator on every call, available to interact with the called party from inception as necessary. There is no uninterrupted prerecorded message which the called party is forced to listen to or hang up, without any ability to convey that the call is unwanted.”

Ultimately, then, what the petition seeks is a ruling to the ultimate metaphysical question—what is a prerecorded call for TCPA purposes? As the Petition sets out, the FCC’s previous rulings have consistently suggested that the TCPA’s restrictions on prerecorded voice calls reference calls that are entirely prerecorded and static; not messages that are played at the outset of otherwise live calls or the sort of free-flowing exchange of information empowered by the avatar technology at issue in the petition.

One particularly compelling ask in the petition—if soundboard calls do qualify under the TCPA then the FCC should roll back liability for the soundboard platform provider petitioner who had relied on the FTC’s previous statements concluding that the technology did not trigger TSR coverage for prerecorded calls. The FTC’s TSR requirements live alongside the TCPA and have often been harmonized with the FCC’s TCPA rules. It is odd to think that callers might be sued under the TCPA for using technology that the FTC had previously stated was not the use of a “prerecorded call,” but that is exactly what is happening out there. Although the FTC later revised its position, it did so solely on a prospective basis only and gave callers six months to comply. Yet some TCPA Plaintiffs continue to argue that users of that technology are liable *retroactively* –i.e. for making calls even during the timeframe that the FTC had said such calls do not qualify under the TSR– which is why the petition seeks a retroactive waiver of liability.

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