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COMMENT

CONSENT IN THE AGE OF FACEBOOK: APPLYING THE TELEPHONE CONSUMER PROTECTION ACT TO TEXT MESSAGES FROM SOCIAL MEDIA PLATFORMS

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INTRODUCTION

The rapid rise of social media companies poses important questions for society, as legislatures, regulators, and courts try to balance consumer protections with the promotion of innovation and entrepreneurship.¹ Indeed, technology is advancing much faster than the laws and regulations that govern it, creating a disconnect between the expectations of social media users and the practices of the platforms.² One area that exemplifies the growing disconnect is unsolicited communications. Under the Telephone Consumer Protection Act (TCPA), which Congress originally passed in 1991,³ covered entities cannot send messages to a user without the individual's consent.⁴ Today, as almost two-thirds of American adults are joining social media platforms that ask them to provide a mobile number for access,⁵ a crucial question remains: In the

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1. See The Telephone Consumer Protection Act at 25: Effects on Consumers and Business: Hearing Before the S. Comm. on Commerce, Sci. & Transp., 114th Cong. (2016) (statement of Sen. Thune, Chairman, S. Comm. on Commerce, Sci. & Transp.), http://www.commerce.senate.gov/public/index.cfm/hearings?Id=7FDEF85E-BF1F-475C-BE3F-1E011EA5A909&Statement_id=CC6EE0B6-6C2F-4DA5-A277-33ECE979A8E4 [http://perma.cc/KT99-QM5J] [hereinafter Thune Statement] (describing the challenges of guiding “innovative companies” to strike a balance between providing consumers with information and protecting their privacy interests).

2. See *id.* (explaining the “balance forged decades ago” in consumer-protection litigation “may now be missing the mark, and consumers may be missing the benefits of otherwise reasonable and legitimate business practices”).

3. Telephone Consumer Protection Act (TCPA), Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified as amended at 47 U.S.C. § 227 (2012)); see also *infra* Part I (explaining the impetus behind the passage of the TCPA).

4. See *infra* notes 20–23 and accompanying text (providing consent requirements of the TCPA).

5. See Andrew Perrin, Pew Research Ctr., Social Media Usage: 2005–2015, at 2 (2015), http://www.pewinternet.org/files/2015/10/PI_2015-10-08_Social-Networking-Usage-2005-2015_FINAL.pdf [http://perma.cc/L32S-8SSK] (finding sixty-five percent of American adults use social networking sites in 2015, up from seven percent in 2005). Many

social media companies' efforts to increase connectivity, how and when can they contact users?⁶

Recent lawsuits against Facebook—the largest social media company, with over 1.5 billion monthly active users⁷—underscore the urgency in answering this question. This Comment focuses on two of those cases, which are live in 2016: *Brickman v. Facebook*⁸ and *Duguid v. Facebook*.⁹ Together, these cases demonstrate the difficult subissues of determining when contact from social media companies is “telemarketing,” what consent the companies must maintain for nontelemarketing communications, and whether consent travels with recycled numbers.¹⁰ To explore these issues, this Comment provides background on the TCPA in Part I, presents the cases’ arguments in Part II, and in Part III, concludes by advocating for greater clarity in the TCPA’s consent provisions as they relate to the unique enterprises of social media companies. Indeed, without such clarifications, the current system may continue to produce costly litigation, frustrating both consumer expectations and social media companies’ efforts to innovate in a world that increasingly depends on interconnectivity.

I. THE TCPA AND ITS CONSENT PROVISIONS

The lawsuits against Facebook highlight the conflict between the TCPA’s current structure and the unique way in which social media companies have developed. To set up that discussion, this Part first provides background on the TCPA’s development and implementation. It then identifies key questions that arise within the current framework before Part II explores those questions in the current litigation.

sites require users to provide phone numbers. See, e.g., Why Do I Need to Verify My Identity by Providing My Phone Number?, Facebook, <http://www.facebook.com/help/185589921490758> [http://perma.cc/ZBF3-H32C] (last visited Aug. 9, 2016) (explaining the need for a mobile number to verify an account).

6. See, e.g., FAQs, Facebook, <http://investor.fb.com/resources/default.aspx> [http://perma.cc/CWD8-N2QF] (last visited Aug. 9, 2016) (explaining as part of its mission statement that “[p]eople use Facebook to stay connected with friends and family” and “to discover what’s going on in the world”); Company | About, Twitter, <http://about.twitter.com/company> [http://perma.cc/QMV7-URE8] (last visited Aug. 9, 2016) (“Our mission: To give everyone the power to create and share ideas and information instantly, without barriers.”).

7. See Guest, Here’s How Many People Are on Facebook, Instagram, Twitter and Other Big Social Networks, AdWeek Blog Network: SocialTimes (Apr. 4, 2016, 3:40 PM), <http://www.adweek.com/socialtimes/heres-how-many-people-are-on-facebook-instagram-twitter-other-big-social-networks/637205> [http://perma.cc/5XJS-NJYA].

8. No. 3:16-CV-00751-DMR, 2016 WL 612020 (N.D. Cal. Feb. 12, 2016); see also infra note 24 and accompanying text.

9. No. 15-CV-00985-JST, 2016 WL 1169365 (N.D. Cal. Mar. 24, 2016); see also infra note 25 and accompanying text.

10. See infra Part II.

Congress enacted the TCPA in 1991 to address unwanted advertising via telephone and fax.¹¹ The law—a response to advances in technology in the late 1980s—sought to prevent abuses by telemarketing companies, which had begun “aggressively seeking out consumers by the hundreds of thousands.”¹² In its current state, the law prohibits any person or entity from “using any automatic telephone dialing system” to make a call “to any cellular telephone service . . . for which the called party is charged for the call.” A person or entity can only do so with “the prior express consent of the called party” unless the call is made for “emergency purposes.”¹³ It also provides three modes of enforcement: a consumer private right of action, civil lawsuits brought by state attorneys general, and monetary forfeiture penalties assessed by the Federal Communications Commission (FCC).¹⁴ The statute has played an important role in shaping how businesses communicate with consumers. Its lag behind technological developments, however, has led to a flood of class action litigation for intrusive communications.¹⁵

In the twenty-five years since the TCPA’s enactment, courts, legislatures, and regulators have struggled to balance the protection of consumer privacy interests with allowing legitimate businesses to reach out to consumers who want to be contacted.¹⁶ Congress has amended the stat-

11. See Spencer Weber Waller et al., *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 *Loy. Consumer L. Rev.* 343, 347 (2014).

12. *Id.*

13. 47 U.S.C. § 227(b)(1)(A) (2012).

14. See Waller et al., *supra* note 11, at 358.

15. See Thune Statement, *supra* note 1 (“TCPA litigation has also become a booming business. TCPA cases are the second most-filed type of case in federal courts, with 3,710 filed last year alone. That represents a forty-five percent increase over 2014.”); see also Letter from William L. Kovacs, Senior Vice President, Env’t, Tech. & Regulatory Affairs, to Marlene H. Dortch, Sec’y, Fed. Commc’ns Comm’n 2 (Mar. 10, 2014), <http://ecfsapi.fcc.gov/file/7521090227.pdf> [<http://perma.cc/FLF6-5UJT>] (describing the “tsunami of class action TCPA lawsuits”). There may be a pullback in courts’ willingness to hear these cases following the Supreme Court’s recent decision in *Spokeo, Inc. v. Robins*, which emphasized the need for a class action plaintiff suing under the Fair Credit Reporting Act to demonstrate both a concrete and particularized injury; that case’s full impact on the TCPA, however, remains to be seen. See 136 S. Ct. 1540, 1549 (2016) (“Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.”); Daniel Fisher, Life Just Got Harder for Class-Action Lawyers as Court Rejects ‘No-Injury’ Cases, *Forbes* (May 17, 2016, 5:52 PM), <http://www.forbes.com/sites/danielfisher/2016/05/16/life-just-got-harder-for-class-action-lawyers-as-court-rejects-no-injury-cases/#566691fa40ad> (on file with the *Columbia Law Review*) (“[T]he court may have ended the long-profitable business of suing companies over nothing more than statutory damages provided under laws like the anti-robocalling Telephone Consumer Protection Act.”).

16. See Michael O’Rielly, *TCPA: It Is Time to Provide Clarity*, FCC Blog (Mar. 25, 2014, 2:10 PM), <http://www.fcc.gov/news-events/blog/2014/03/25/tcpa-it-time-provide-clarity> [<http://perma.cc/24AT-DU32>] (explaining the “complex” and “unclear” interpretations of the TCPA in response to ways that communicating with consumers has

ute two times, the FCC has issued numerous regulations and rulings, and courts have weighed in on many occasions.¹⁷ Over time, the efforts of these three bodies have expanded the TCPA to new areas, including debt collectors and text messages.¹⁸ Such extensions, however, have raised additional questions, including whether Facebook's use of text messaging to send login notifications to users involves automatic telephone dialing system (ATDS) and, if it does, whether such notifications fall under the TCPA's exceptions for emergencies.¹⁹ This Comment more narrowly focuses on another line of relevant questions: How do the consent requirements apply to Facebook's practices of sending text messages to phone numbers that users supply?

This topic involves several subissues that this Comment will try to answer. First, when do Facebook text messages constitute "telemarketing"? The determination is important because FCC regulations have explained that telemarketing messages require "prior express *written* consent" from users, while unsolicited informational calls only require "prior express consent."²⁰ If the text messages are telemarketing,²¹ then the company must receive consent from users in compliance with FCC regulations: The consent must involve "an agreement, in writing, with the signature of the person being called," informing the person with "clear and conspicuous disclosure" that the agreement allows the entity making the call to deliver telemarketing communications.²² If the communications

changed). FCC Commissioner Michael O'Rielly also characterizes the "balance" Congress originally sought to strike in enacting the TCPA as "between protecting consumers from unwanted communications and enabling legitimate businesses to reach out to consumers that wish to be contacted." Id.

17. See Waller et al., *supra* note 11, at 363.

18. Id; see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14,014, 14,115 (2003) (Report and Order) (extending the regulations to text messages). Additionally, courts have established precedent extending TCPA to text messages, as in *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009).

19. See, e.g., *Duguid v. Facebook, Inc.*, No. 15-CV-00985-JST, 2016 WL 1169365, at *6 (N.D. Cal. Mar. 24, 2016) (raising these issues but dismissing the case based on failure to allege sufficient facts); see also 47 U.S.C. § 227(b)(1)(A) (2012) (providing an exception for calls made for "emergency purposes"). ATDS is not the focus of this Comment, but it is one of the issues that most frequently triggers litigation. See The Telephone Consumer Protection Act at 25: Effects on Consumers and Business: Hearing Before the S. Comm. on Commerce, Sci. & Transp., 114th Cong. 2–3 (2016) (statement of Monica Desai, Partner, Squire Patton Boggs), http://www.commerce.senate.gov/public/_cache/files/11ba8b7f-dea2-4c81-a515-7e312a50f40f/E74117FDEE42CEBCE9832497DF2AB5CB.monica-desai-testimony.pdf [http://perma.cc/QA5L-4TZ2] [hereinafter Desai Statement] (explaining the ATDS as one of the "largest areas of controversy triggering TCPA litigation").

20. 47 C.F.R. § 64.1200(a)(2)–(3) (2015) (emphasis added).

21. See *id.* (explaining telemarketing calls do not include calls from tax-exempt nonprofit organizations and calls that deliver "health care" message[s]).

22. *Id.* § 64.1200(f)(8). The regulations also state the individual must be informed that he or she does not have to sign the agreement. *Id.*

are not telemarketing, they must fit within a framework that on the one hand says “any telephone subscriber who releases his or her telephone number has, in effect, given prior express consent to be called by the entity to which the number was released” but on the other allows consumers some ability to prevent messages by providing “instructions to the contrary.”²³ The next Part discusses two recent cases to demonstrate how these consent provisions have created challenges for Facebook.

II. CONSENT ISSUES FOR FACEBOOK

Taken together, *Brickman v. Facebook* and *Duguid v. Facebook* highlight three important issues regarding the application of the TCPA’s consent provisions to the social media platform’s practices: (1) When do Facebook messages to users constitute telemarketing, such that the company must obtain prior express *written* consent from the recipients? (2) If unwanted messages from Facebook are not telemarketing, what are the requirements for prior express consent? (3) Even if a user provides prior express consent, does that consent allow Facebook to send messages to a new individual who later obtains the number through reassignment? This Part explores these questions as they arise in *Brickman* and *Duguid* before the final Part considers how courts, legislatures, and regulators may address the issues.

By way of background, the two cases target different Facebook practices—*Brickman* focuses on birthday-reminder text messages,²⁴ while *Duguid* addresses login notifications²⁵—but they both follow from a long line of class action lawsuits that have used the TCPA’s private right of

23. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752, 8769, para. 31 (1992) (Report and Order) [hereinafter FCC, 1992 Report and Order]; see also *Baird v. Sabre, Inc.*, 636 F. App’x 715, 716 (9th Cir. 2016) (affirming the vitality of the 1992 Order); *GroupMe, Inc./Skype Commc’ns S.A.R.L.*, 29 FCC Rcd. 3442, 3445 (2014) (declaratory ruling) (finding that the provision of a phone number to an intermediary satisfied the requirements of prior express consent consistent with the 1992 Order). The *GroupMe* ruling has also been applied in *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1123–24 (11th Cir. 2014) (holding that prior express consent can be provided to a creditor through an intermediary). For further discussion of the impact of *Mais* and the Eleventh Circuit’s efforts to define “consent” (albeit not in the social media context), see Greg Dickenson, *Privacy Developments: TCPA Litigation, FTC Privacy Enforcement Actions, and the FTC’s Internet of Things*, 71 Bus. Law. 293, 297–98 (2015) (explaining how the Eleventh Circuit has been active in defining “express consent”).

24. See Complaint at 2, *Brickman v. Facebook, Inc.*, No. 3:16-CV-00751-DMR, 2016 WL 612020 (N.D. Cal. Feb. 12, 2016) [hereinafter *Brickman* Complaint] (explaining class action against Facebook for sending unsolicited text messages about friends’ birthdays).

25. See *Duguid v. Facebook, Inc.*, No. 3:15-CV-00985-JST, 2016 WL 1169365, at *11 (N.D. Cal. Mar. 24, 2016) (raising the issue but dismissing the case based on failure to allege sufficient facts). At the time of this writing, the plaintiff has amended his complaint, Facebook has moved to dismiss, and the plaintiff has responded. See, e.g., Amended Complaint and Demand for Jury Trial at 4–13, *Duguid*, No. 3:15-CV-00985-JST (providing more facts to demonstrate ATDS).

action provision and potential for generous statutory awards to challenge entities' compliance with the TCPA.²⁶ The plaintiff in *Brickman*, who originally filed in February 2016, objects to "Facebook's unsolicited and unauthorized Birthday Announcement Texts," which read: "Today is [Facebook friend's] birthday. Reply to post a wish on his Timeline or reply with 1 to post 'Happy Birthday!'"²⁷ The named plaintiff claims the birthday text messages are a form of telemarketing and thus, Facebook violated the TCPA by not obtaining the plaintiff's prior express *written* consent to receive such messages.²⁸ Even if the messages do not constitute telemarketing, the complaint alleges, Facebook also did not meet the requirements for prior express consent because the plaintiff indicated a *lack* of consent in his account's Notification Settings.²⁹ The plaintiff in *Duguid*, a case that focuses on login notifications instead of telemarketing, argues that he is entitled to recover under the TCPA because Facebook sent him notifications based on the account setting of the number's previous owner—not on the plaintiff's own consent.³⁰ In both cases, especially following *Spokeo v. Robins*,³¹ the allegation that consumers incur charges for the text messages they receive is essential.³²

The *Brickman* case sets up the initial telemarketing question, which is important for determining what kind of consent the platform must receive before sending users text messages. As the complaint alleges, FCC regulations define "telemarketing" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any

26. See Waller et al., *supra* note 11, at 375 (describing private lawsuits to enforce the TCPA).

27. See *Brickman* Complaint, *supra* note 24, at 2 (alteration in original) (internal quotation marks omitted) (quoting Facebook's Birthday Announcement Texts).

28. *Id.* at 7.

29. *Id.*

30. Complaint at 6–7, *Duguid*, No. 3:15-CV-00985-JST [hereinafter *Duguid* Complaint].

31. See *supra* note 15 (explaining the *Spokeo* decision's emphasis on class action plaintiffs needing particularized and concrete injuries).

32. See *Duguid* Complaint, *supra* note 30, at 7 (providing that the plaintiff incurs charges); Memorandum of Law in Opposition to Defendant's Motion to Dismiss Plaintiff's First Amended Complaint at 6–7, *Duguid*, No. 3:15-CV-00985-JST (arguing the plaintiff met *Spokeo* requirements by alleging harm from "used-up and interfered-with telephone services" in addition to bombardments of text messages and invasion of privacy); see also *Brickman* Complaint, *supra* note 24, at 5 (describing text spam as "costly"). But see "Facebook, Inc.'s Notice of Motion and Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Memorandum in Support at 3 n.1, *Brickman v. Facebook, Inc.*, No. 3:16-CV-00751-MMC (N.D. Cal. Feb. 12, 2016) [hereinafter *Brickman* Motion to Dismiss] (questioning the plaintiff's Article III standing because the "plaintiff does not allege that he pays incrementally for each text he receives or that he in fact paid for the birthday message"). Although the motion was written prior to *Spokeo*, it anticipates the likelihood of *Spokeo* placing greater demands on plaintiffs to show an injury, such as payment for text messages. For a description of *Spokeo*, see *supra* note 15.

person.”³³ The plaintiff in *Brickman* argues that the happy-birthday messages “are telemarketing messages because they promote Facebook’s product, encourage users to invest time using Facebook’s social networking service, and urge user interaction with the Facebook platform—activity that Facebook itself has defined as revenue-generating activity.³⁴ Facebook’s motion to dismiss, however, contends, “[a] birthday text comes nowhere close to meeting that definition” because it “is not asking plaintiff to expend any money on anything with this text—it is simply a reminder about his Facebook friend’s birthday.”³⁵

If the text messages constitute telemarketing, then Facebook would need to obtain prior express written consent from users before sending the text messages. Because the FCC regulations require “clear and conspicuous disclosure” of the substance of that consent, Facebook may not be in compliance if it does not explicitly let users who give a phone number know that they will receive text messages about friends’ birthdays.³⁶ To determine if the messages are telemarketing, one needs to reconcile the fact that Facebook’s practices could follow from the definition of “telemarketing” with the reality that Facebook exists to share information between users,³⁷ and one way to do that is by sending texts. A finding that the happy-birthday texts are telemarketing might then require Facebook to receive written consent for almost all of the text messages it sends, with few exceptions.³⁸ Moreover, as Facebook argues, “plaintiff’s theory of telemarketing would render any communication by any business regarding any service ‘telemarketing,’ in directly [sic] contravention of the FCC’s specific definition and common sense.”³⁹ Such a finding, thus, would likely have unintended results for many other businesses trying to contact customers and users who are utilizing modern channels of communication.

The *Brickman* case raises the second question of what “prior express consent” a business must receive when the unwanted communication does not fall in the category of telemarketing. The complaint, which concedes that the birthday texts may not be telemarketing,⁴⁰ explains that Facebook provides a webpage for designating notification preferences. That webpage allows users to indicate a *lack* of consent in several ways:

33. See *Brickman* Complaint, supra note 24, at 6 (internal quotation marks omitted) (quoting 47 C.F.R. § 64.1200(f)(12) (2015)).

34. Id. at 7 (internal quotation marks omitted).

35. *Brickman* Motion to Dismiss, supra note 32, at 15.

36. See 47 C.F.R. § 64.1200(f)(8)(i).

37. See Our Mission, Facebook, <http://newsroom.fb.com/company-info/> [<http://perma.cc/D2RM-LQ3E>] (last visited Aug. 9, 2016) (explaining how Facebook exists to connect people).

38. See *Duguid v. Facebook, Inc.*, No. 15-CV-00985-JST, 2016 WL 1169365, at *6 (N.D. Cal. Mar. 24, 2016) (suggesting login notifications could be such an exception).

39. *Brickman* Motion to Dismiss, supra note 32, at 15.

40. See *Brickman* Complaint, supra note 24, at 7.

They can choose to not “activate” their phones for texting, they can activate but still select “off” for text notifications, and they can expressly opt out of some kinds of text messages.⁴¹ In making his argument, the plaintiff contends that he did not activate text notifications and thus should not have received the birthday messages.⁴² While the 1992 FCC ruling would suggest that any user who provides a phone number consents to receiving text messages, the ruling’s exception for “instructions to the contrary”⁴³ may apply to users’ choices to never allow text messages or to only enable some of such messages on Facebook. However, as Facebook argues, “[a]ffirmative ‘instructions to the contrary’ . . . can hardly be gleaned from plaintiff’s silence, even though Facebook’s default settings are allegedly set to off.”⁴⁴ The question remains: What does the directive “instructions to the contrary” entail?

The third issue that the recent Facebook cases raise is over whose consent the TCPA requires. In the *Duguid* case, one of the central arguments of the lead plaintiff is that he has a recycled number and has never given Facebook consent to reach him with login notifications.⁴⁵ Unlike the *Brickman* complaint, in which the lead plaintiff does not focus on *how* Facebook obtained his number, the *Duguid* complaint alleges that Facebook got the number from an “unknown means” and not the called party.⁴⁶ Because the case was initially dismissed for lack of sufficient allegations about the ATDS claims, the judge has yet to reach the issue of reassigned numbers.⁴⁷ The issue, however, is working its way through the courts in a case against Twitter, which has thus far lost on its motion to dismiss and a cross-motion for summary judgment.⁴⁸ In the decision denying the motion to dismiss, the judge cited a Seventh Circuit case, which rejected the argument that the original owner of a recycled

41. *Id.* at 8–11 (describing three distinct ways to express *lack* of consent).

42. *Id.* at 17.

43. See FCC, 1992 Report and Order, *supra* note 23, at 8769, para. 31 (discussing 1992 Implementing Rules).

44. *Brickman* Motion to Dismiss, *supra* note 32, at 15 (quoting FCC, 1992 Report and Order, *supra* note 23, at 8769, para. 31).

45. *Duguid* Complaint, *supra* note 30, at 6 (“At no time did Plaintiff ever provide his cellular number to Facebook.”).

46. *Id.*

47. At the time of writing, the plaintiff has recently filed an amended complaint, indicating that the question may arise again. See *supra* note 25. The Northern District of California is facing yet another similar lawsuit. See Complaint & Demand for Jury Trial at 4–6, Holt v. Facebook, Inc., No. 16-CV-2266 (N.D. Cal. Apr. 26, 2016) (arguing that Facebook’s mobile marketing to reassigned numbers violates the TCPA).

48. Nunes v. Twitter, Inc., No. 14-CV-02843-VC, 2014 WL 6708465, at *1 (N.D. Cal. Nov. 26, 2014) (denying Twitter’s motion to dismiss); see also Nunes v. Twitter, Inc., No. 14-CV-02843-VC, 2016 WL 3660526, at *1 (N.D. Cal. July 1, 2016) (granting plaintiff’s motion for partial summary judgment and denying Twitter’s cross-motion because Twitter could be found liable for sending unwanted text messages under the TCPA).

number is the “called party” for the purposes of consent.⁴⁹ The spirit of protecting consumers—especially low-income consumers who have to incur extra charges—from unwanted solicitations may support that decision,⁵⁰ but it raises an important question of whose role it is to ensure that individuals who possess a recycled number do not receive unwanted calls.⁵¹

The issues that this Part has presented demonstrate how the innovations in Facebook’s practices are coming up against the text of the TCPA and creating frictions between consumers and social media platforms. The result is often class actions, which at a minimum can award \$500 for each violation of the TCPA and \$1500 when there is a knowing or willful violation.⁵² The following Part recommends how courts, legislatures, and regulators may be able to respond while addressing the needs of consumers and businesses.

III. A CALL FOR CLARITY AND ADAPTATION

The issues surrounding consent above⁵³ provide three narrow—but illuminating—examples of a larger problem: The current TCPA framework leaves many open questions for modern technology companies, making it more difficult to achieve the balance between consumer and business interests that the statute originally sought to strike. The fundamental challenge seems to be that social media networks’ business interests in contacting users to increase connectivity are at odds with a regulatory structure that seeks to limit unsolicited contact, and as those companies grow, the tension between their interests and the TCPA’s provisions invite class action lawsuits.⁵⁴ The social media sites do not yet seem deterred, despite suggestions of stricter enforcement by the FCC and courts.⁵⁵ This Part looks at how the current system would resolve the

49. Nunes, 2014 WL 6708465, at *2 (citing Soppet v. Enhanced Recovery Co., LLC, 679 F.3d 637, 643 (7th Cir. 2012)).

50. See The Telephone Consumer Protection Act at 25: Effects on Consumers and Business: Hearing Before the S. Comm. on Commerce, Sci. & Transp., 114th Cong. 25 (2016) (statement of Margot Saunders, Of Counsel, Nat'l Consumer Law Ctr.), http://www.commerce.senate.gov/public/_cache/files/c80ec902-c005-4121-97b3-b5a12a8b87b8/F301D6B6AE8DDF2E2A761DE9CEF08DB7.margot-saunders-testimony.pdf [<http://perma.cc/ZRJ3-AZZZ>] (“[P]articularly for low-income consumers using prepaid wireless plans, the unwanted texts deplete the limited data they pay for and rely on.”).

51. See Desai Statement, supra note 19, at 2–3 (explaining the reassignment issue as one “of the largest areas of controversy triggering TCPA litigation”).

52. 47 U.S.C. § 227(b)(3) (2012).

53. See supra Part II (discussing issues of defining “telemarketing,” providing consent for nontelemarketing, and contacting reassigned numbers).

54. See Thune Statement, supra note 1 (explaining the tensions leading to increased TCPA litigation).

55. See, e.g., FCC Strengthens Consumer Protections Against Unwanted Calls and Texts, FCC News (June 18, 2015), http://apps.fcc.gov/edocs_public/attachmatch/DOC-333993A1.pdf (on file with the *Columbia Law Review*) (announcing FCC efforts to

three consent issues and then calls for a collaborative effort to redefine the system to ensure such resolutions in the future are more compatible with twenty-first century consumer and business interests.

Right now the system seems to reflect a dichotomy between telemarketing and nontelemarketing⁵⁶ without acknowledging how the two come together in the social media world in a novel way. The hybrid nature appears in contrast to more traditional telemarketing, in which communications are not a core part of the business outside of advertising.⁵⁷ As a result of this dichotomy, the *Brickman* plaintiff's argument could go either way: Facebook earns some money from individuals who engage through the happy-birthday texts, but birthdays are also an important piece of information that the company shares with its users. Given this ambiguity, there is some likelihood a court might find the happy-birthday texts to be telemarketing and thus require Facebook to obtain prior express written consent from users before sending texts.⁵⁸ Accordingly, either there would be an added burden on Facebook, or Facebook would ignore the requirements and costly litigation would ensue. Perhaps the texts are not necessary for Facebook to connect users, but the messages seem to provide the kind of communication that fosters Facebook's community-oriented model. For that reason, a court reaching the merits of *Brickman* should be clear on what constitutes telemarketing for social media companies.

The current TCPA system also does not adequately address what nonwritten consent looks like in an age when individuals frequently provide their cellphone numbers to websites and social media platforms. In the *Brickman* case, the issue may be easier to resolve based on the letter of the law, but it does not necessarily have broad application. The law holds that when an individual gives his or her number to an entity—or now intermediary—the act of giving the number represents consent, unless the individual instructs to the contrary.⁵⁹ Of the three options that the

strengthen protection of consumers); see also Richard Morgan, Facebook's Happy Birthday Messages Really Pissed This Guy Off, N.Y. Post (Feb. 15, 2016), <http://nypost.com/2016/02/15/facebook-happy-birthday-messages-really-pissed-this-guy-off/> [http://perma.cc/3HN6-6ZPN] (suggesting the *Brickman* plaintiff may have success given a previous case). As previously mentioned, the *Spokeo* ruling may suggest a pullback from courts, but at the time of writing, its effects are not certain. See supra note 15 (discussing the *Spokeo* ruling and its potential impact).

56. See supra note 20 and accompanying text (explaining this dichotomy as it relates to consent requirements).

57. See, e.g., Selim Agar, Man Awarded \$14,000 for Receiving Unwanted Faxes, N.Y. Post (Feb. 11, 2016), <http://nypost.com/2016/02/11/man-awarded-14000-for-receiving-unwanted-faxes/> [http://perma.cc/4LXX-TXET] (describing a seemingly more traditional TCPA situation in which a pizza parlor sent faxes to advertise its business).

58. See supra note 22 and accompanying text (providing requirements for prior express written consent).

59. See supra note 23 and accompanying text (explaining the development of consent law).

Brickman plaintiff highlights as allowing Facebook users to demonstrate a lack of consent,⁶⁰ two seem to indicate an expression that the user “did not ‘wish[] to be reached’ at that number.”⁶¹ Activating phones for texting but selecting “off” and opting out of certain text messages seem to be affirmative statements that represent a user’s unwillingness to consent. On the other hand, simply not activating—when that is the default—does not seem like an express lack of consent. As not all social media platforms have these kinds of notification options, either the FCC or courts should provide greater guidance for how to demonstrate nonwritten consent, especially when social media companies use default settings that permit communications.

The third area of uncertainty that the consent-provision issues expose is what to do with channels of communications that can quickly change hands. In today’s world, large portions of the population have cellphones, and many people receive recycled numbers that a previous owner has tied to his or her account. This reality has created what some have deemed a loophole for consumers bringing lawsuits to enforce the TCPA.⁶² *Nunes v. Twitter*, which like *Duguid*, focuses on a recycled number, may exemplify this phenomenon.⁶³ While the Seventh Circuit’s ruling that the consent must come from the “called party”⁶⁴ makes sense in the TCPA’s efforts to stop unwanted calls, the system should incentivize individuals to indicate when they have changed their numbers, and it should encourage companies storing the numbers to respond promptly to requests from owners of recycled numbers. Otherwise, the silence around this area may continue to fuel lawsuits, which have thus far done little to solve the fundamental problem.

While an increase in lawsuits is not in and of itself a reason to rethink the TCPA system⁶⁵—especially in the wake of the Supreme Court’s recent *Spokeo* decision⁶⁶—the increase in time and money going into private enforcement of the statutes has seemingly detracted from Congress’s

60. See supra note 41 and accompanying text (describing the three options).

61. See *Baird v. Sabre, Inc.*, 636 F. App’x 715, 716 (9th Cir. 2016) (alteration in original) (quoting FCC, 1992 Report and Order, supra note 23, at 8769, para. 31).

62. See Eric Troutman, How the FCC Could Totally Shut Down Twitter, Law.com (Apr. 6, 2016), <http://www.law.com/sites/articles/2016/04/06/how-the-fcc-could-totally-shut-down-twitter/?slreturn=20160326232550> [http://perma.cc/5V36-XBTQ] (suggesting the current Twitter case exploits a loophole).

63. Id.; see *Nunes v. Twitter, Inc.*, No. 14-CV-02843-VC, 2016 WL 3660526, at *1 (N.D. Cal. July 1, 2016); see also supra note 48 and accompanying text (explaining the Twitter case).

64. See *Nunes v. Twitter, Inc.*, No. 14-CV-02843-VC, 2014 WL 6708465, at *2 (N.D. Cal. Nov. 26, 2014) (citing *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 643 (7th Cir. 2012)).

65. See, e.g., Waller et al., supra note 11, at 400–01 (arguing litigation can serve as an important deterrent).

66. See supra note 15 (explaining how *Spokeo* may now make it harder for class action plaintiffs filing suits under the TCPA to meet standing requirements).

original intent. The law sought to protect consumers from great abuses in telemarketing, not to help classes of plaintiffs identify loopholes in a world in which communication and business take a different form. The recommendations here rely on a crucial assumption—that the system must adapt to keep up with modern advancements;⁶⁷ the technological developments should not slow down to meet the needs of older structures. Although this Comment has focused largely on litigation, the answer to adaptation does not lie solely with the courts. Mobilizing Congress and regulators to understand modern consumer and business needs—and to act on that understanding—is no easy feat. Yet, as recent developments underscore, this task is crucial to moving a society into the modern era while also maintaining flexibility for whatever lies ahead.

67. For a further discussion of adaptation, see Waller et al., *supra* note 11, at 400–25.