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June 11, 2015

*By ECFS*

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

**Re: Notice of Ex Parte Presentation, CG Docket No. 02-278**

Dear Ms. Dortch:

Abigail Slater, Vice President, Legal and Regulatory, the Internet Association<sup>1</sup>; Hugh Gamble, Senior Director for Government Affairs, Salesforce; William Carty, Director, Public Policy for U.S. & Canada, Twitter; Georgios A. Leris, Associate, Steptoe & Johnson LLP; and the undersigned on June 9 met with Gigi B. Sohn, Counsel to the Chairman, Office of the Chairman; Maria L. Kirby, Legal Advisor, Office of the Chairman; Matthew Collins, Honors Attorney, Office of the General Counsel; Matt Diaz, Office of the Chairman; Chris Laughlin, Office of the Chairman; Crystal Evans, Office of the Chairman; Travis Litman, Legal Advisor, Office of Commissioner Rosenworcel; and Jennifer Thompson, Special Advisor, Office of Commissioner Rosenworcel, and on June 10 met with Chanelle P. Hardy, Chief of Staff and Media Legal Advisor, Office of Commissioner Clyburn.

In the meetings, the Internet Association (“IA”) asked the Commission to confirm that as a threshold matter, any examination of whether a person has violated the Telephone Consumer Protection Act (“TCPA” or “the Act”) must start with the basic question of who is doing the “calling” or “sending” of an unlawful communication.<sup>2</sup> In other words, a “caller” or “sender”

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<sup>1</sup> The Internet Association represents America’s leading Internet companies and their global community of users. Its members include: Airbnb, Amazon, AOL, Auction.com, Coinbase, eBay, Etsy, Expedia, Facebook, FanDuel, Gilt, Google, Groupon, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Sidecar, Snapchat, SurveyMonkey, TripAdvisor, Twitter, Uber Technologies, Inc., Yelp, Yahoo!, and Zynga. *See* Internet Association, <http://internetassociation.org/> (last visited June 11, 2015).

<sup>2</sup> The IA has filed comments in the above-referenced proceeding, in which it supported TextMe, Inc.’s request to clarify that it is the user who makes the call or sends a message using the

must have the necessary volition to fall within the scope of the statute. In considering the element of volition (or causation), the IA asked the Commission to confirm that an Internet platform that facilitates communications among and between its users is not a caller or sender (or the initiator of a call or text) for purposes of the TCPA.<sup>3</sup>

The IA's membership does not include robocallers or entities engaging in the behavior meant to be proscribed by the Act. IA's members typically provide a platform that enables and facilitates their users to communicate among and between a global community in real time without interference, editing, or censorship from the Internet platform. For purposes of the Act, it is the *user* of an Internet platform—not the platform itself—that sends or initiates a call or text to other users of the platform, or even to herself. Because it is the user and not the platform doing the calling, the Internet platform does not have the requisite volition to be considered a caller under the TCPA.

Internet platforms allow even the most modest in society to compete with the most deep-pocketed stakeholders in the marketplaces of ideas and commerce. Any person with a compelling idea, interesting product, or newsworthy information can have an impact unprecedented in scale and effect through platforms such as Twitter, Facebook, eBay, Reddit, Amazon, and many other members of the IA. Internet platforms enable a free and fast exchange of ideas; often allowing users to break news ahead of traditional sources and disseminate information to a global audience instantly. Over the past few years, for example, a global network of users has engaged with Internet platforms to capture news-making events and fuel a robust democratic discourse.<sup>4</sup> In the United States, 74 percent of adults online use social media

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technology she has chosen for purposes of the TCPA. Internet Association, Comments, CG Docket No. 02-278, at 2, 4 (May 7, 2014); *see also* Internet Association, Comments, CG Docket No. 02-278 (Dec. 8, 2014); Internet Association, Comments, CG Docket No. 02-278 (Nov. 21, 2014).

<sup>3</sup> During the meetings, Hugh Gamble of Salesforce also raised Salesforce's support for clarifying the term "capacity" consistent with the IA's comments. *See* Internet Association, Comments, CG Docket No. 02-278 at 6-8 (Nov. 21, 2014).

<sup>4</sup> *See e.g., Iran's Twitter Revolution*, Washington Times (June 16, 2009), <http://www.washingtontimes.com/news/2009/jun/16/irans-twitter-revolution/>; Ellen Barry, *Protests in Moldova Explode, with Help of Twitter*, The New York Times (Apr. 7, 2009), <http://www.nytimes.com/2009/04/08/world/europe/08moldova.html?pagewanted=all>; Peter Beaumont, *The Trust About Twitter, Facebook, and the Uprisings in the Arab World*, The Guardian (Feb. 25, 2011), <http://www.theguardian.com/world/2011/feb/25/twitter-facebook-uprisings-arab-libya>; *#EgyPresElex – How Election Day in #Egypt Was Shared via Social Media*, The Guardian (May 23, 2012), <https://storify.com/guardian/egyptreselex-top-tweets-from-election-day>; Lisa Mason, *Impact of Social Media on Society: 5 Times Social Changed the World*, Social Media Sun, <http://socialmediasun.com/impact-of-social-media-on-society/> (last visited June 11, 2015); Sheldon Himelfarb, *The Impact of Social Media in Egypt*, United States Institute of Peace (Jan. 31, 2011), <http://www.usip.org/publications/the-impact-social-media-in-egypt>.

to get their news, share information, and communicate with others.<sup>5</sup> In short, Internet platforms empower users both in their daily activities and in ongoing dialogue with a global community.

Internet platforms enable users to communicate—by tweet, message, share, post, and like. These platforms provide the underlying technology that enables users to communicate with others. Typically, to send and receive messages through an Internet platform, a user must register with the platform and create a secure account with a user name and password. That user then can create messages and receive them from other users. To send the message, she must press the relevant “button”—*e.g.*, “Tweet”; “Send”; “Share”; “Post”; or “Like.” When her message is sent through the Internet platform, other users of the platform choose from a menu of options that allows them to send the message to a variety of destinations, including in some cases to their SMS text messaging service.<sup>6</sup> Throughout her interaction with the platform, she maintains control of creating and sending her message. Likewise, she maintains control of how she receives messages.<sup>7</sup>

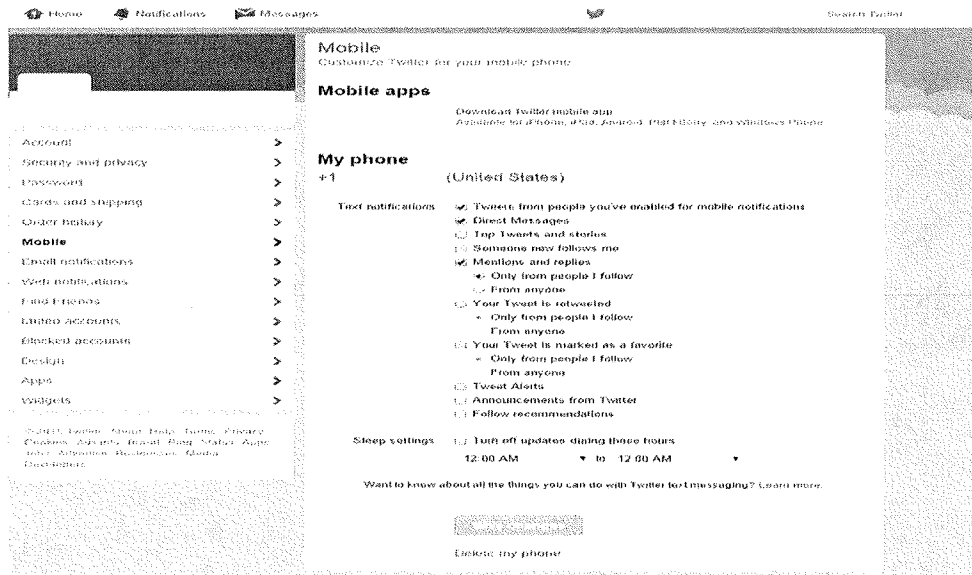
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<sup>5</sup> *Social Networking Fact Sheet*, Pew Research Center, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (last visited June 11, 2015); Monica Anderson and Andrea Caumont, *How Social Media is Reshaping News*, Pew Research Center (Sept. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/09/24/how-social-media-is-reshaping-news/>. Nearly half of all web-using adults reported getting news from Facebook. Amy Mitchell, *State of the News Media 2015*, Pew Research Center (Apr. 29, 2015), <http://www.journalism.org/2015/04/29/state-of-the-news-media-2015/>.

<sup>6</sup> *See, e.g., Mobile and Apps*, Twitter, <https://support.twitter.com/groups/54-mobile-apps> (last visited June 8, 2015) (describing how users can receive notifications on their mobile device either through a mobile application or a text, by logging in Twitter’s website, or by downloading a program on their computer); *see also Notifications*, Facebook, <https://www.facebook.com/help/327994277286267/> (last visited June 11, 2015) (describing how users can receive notifications on their email, mobile device either through a mobile application or a text, or by logging in Facebook’s website).

<sup>7</sup> To be clear, the requisite volition to be considered a sender of a communication simply requires an affirmative user action to send such a communication. It does not require a user to create unique, or any, content within that communication.

### Example: Twitter Mobile Account Settings<sup>8</sup>



The question of volition is critical in analyzing the distinct roles between a technological platform and a user of the platform. Most recently, courts have provided guidance on this question in the context of copyright litigation where a plaintiff has sued a technological platform for direct infringement. In such cases, courts have analyzed the question of who is doing the copying required to trigger potential liability. Consistently, courts have found that it is the user of the technology and not the technology itself that is doing the copying.

For example, the Ninth Circuit recently held that DISH did not infringe Fox's copyrights when DISH subscribers used DISH technology to record Fox's copyrighted programming.<sup>9</sup> In this case, DISH's technology permits a subscriber to record programming by pressing a button on her remote control. After she presses record, DISH provides all the technology that records the programs. The user need only press a button to enable the recording functionality.<sup>10</sup> The Ninth Circuit found that because the subscriber's action was necessary to make the copy, it was the subscriber, not DISH, who made the copy. It held that "the user, then, and not DISH, is 'the most significant and important cause' of the copy" and clarified that "operating a system used to

<sup>8</sup> The example illustrates the many ways a user can tailor how she receives messages, including by choosing to send them to her mobile phone's SMS text messaging service.

<sup>9</sup> *Fox Broad. Co. v. DISH Network LLC*, 747 F.3d 1060 (9th Cir. 2013).

<sup>10</sup> *Id.* at 1064-65.

make copies at the user's command does not mean that the system operator, rather than the user, caused copies to be made."<sup>11</sup>

Similarly, the Second Circuit held that Cablevision's Remote Storage Digital Video Recording technology ("RS-DVR") did not infringe programmers' copyrights because the technology merely enabled the customer to record copyrighted programming for home viewing.<sup>12</sup> The Second Circuit found that the "dispositive question was 'who makes the copies.'"<sup>13</sup> The court held that "the person who actually presses the button to make the recording, supplies the necessary element of volition, not the [entity] who owns the machine" or system that enables the copying.<sup>14</sup> The court analogized Cablevision to a copy shop where customers could use the copy machines to create copies: to be a direct infringer, the defendant or its employees must actually engage in the volitional conduct that constitutes the infringing act—it is not enough to merely supply the means that others use to infringe.<sup>15</sup>

Confirming that it is the user who has the requisite volition to be considered a sender of a communication under TCPA also is consistent with federal Internet policy that distinguishes between conduits and their users. Section 230 of the Communications Decency Act ("CDA"), for example, provides that one of Congress' explicit policies is "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services."<sup>16</sup> To fulfill this objective, the CDA expressly exempts from liability interactive computer services for the content a user publishes on its platform.<sup>17</sup>

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<sup>11</sup> *Id.* (citing *Fox Broad. Co. v. DISH Network, LLC*, 905 F. Supp. 2d 1088, 1102 (C.D. Cal. 2012) (quoting Prosser & Keeton on Torts § 42)).

<sup>12</sup> *Cablevision* at 123. The seminal *Betamax* case held that home recording and viewing using video cassette recorders was a fair use, and courts have subsequently regarded DVR and similar technologies analogous. *Sony Corp. v. Universal Studios Inc.*, 464 U.S. 417 (1984).

<sup>13</sup> *Id.* at 126 (emphasis in original).

<sup>14</sup> *Id.* at 131.

<sup>15</sup> *Id.* at 131-132 ("By selling access to a system that automatically produces copies on command, Cablevision more closely resembles a store proprietor who charges customers to use a photocopier on his premises, and it seems incorrect to say, without more, that such a proprietor 'makes' any copies when his machines are actually operated by his customers.").

<sup>16</sup> 47 U.S.C. § 230(b)(3).

<sup>17</sup> The CDA does not treat interactive computer services as speakers or publishers of content that is created by another person or entity—that interactive computer service is merely a conduit for the content a user published on its platform. 47 U.S.C. § 230(c)(1). The CDA also expressly exempts from liability interactive computer services offering the technical means to restrict access to materials that users consider objectionable. *Id.* § 230(c)(2). In many cases, Section

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For the foregoing reasons, the Commission should confirm that an Internet platform that facilitates communications among and between its users is not a caller or sender (or the initiator of a call or text) for purposes of the TCPA.

Please contact the undersigned if you have any questions.

Sincerely,

/s/

Markham C. Erickson  
Partner  
Steptoe & Johnson LLP

and

*General Counsel*  
Internet Association

cc: Jon Sallet  
Gigi B. Sohn  
Maria L. Kirby  
Matthew Collins  
Matt Diaz  
Chris Laughlin  
Crystal Evans  
Travis Litman  
Jennifer Thompson  
Chanelle P. Hardy

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230 would protect an Internet company from liability under the TCPA. Nevertheless, the FCC should confirm that an Internet platform serving as a facilitator of communications among and between its users is not a sender or caller for purposes of the TCPA.