Platform Provider Paradox: Text Platform Provider Twilio May Be Directly Liable for TCPA Violations by Its Clients

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Just a week ago I reported on *Ricky Franklin v. Upland Software, Inc.*, Case No. 1-18-cv-00236, 2019 WL 433650 (W.D. Tx Feb. 1, 2019) in which a magistrate judge in Texas held that a text message platform authorizing users to send messages to client lists could not possibly be directly liable for illegal texts sent by their clients. As a mere conduit, *Franklin* held, the provider was not liable for the illegal acts of those taking advantage of its service.

*Franklin* represents the majority rule—at least the rule existing before *Hurley v. Messer*, Case No. 3:16-9949, 2018 U.S. Dist. Lexis 171588 (D. W.V. Oct. 4, 2018) where a district court held that a platform provider might be held directly liable for illegal calls placed by its client where the Defendant had the right of control and knowledge of the illegal conduct.

although text messages were sent by provider’s client and not directly by Twilio. As the Court reasons, the FCC clarified that “text broadcasters can be liable for TCPA violations” based on an analysis of the “totality of the facts and circumstances surrounding the placing of a particular call.” *Bauman* at *8. As part of the totality of the circumstances test, a decisionmaker considers: 1) who took the steps necessary to physically place the call; and 2) whether another person or entity was so involved in placing the call as to be deemed to have initiated it, considering the goals and purposes of the TCPA, as well as whether a text broadcaster knowingly allowed its client(s) to use that platform for unlawful purposes. *Id.* Applying this standard, the Court refused to dismiss Twilio at the pleadings stage because the complaint alleged “Twilio took steps necessary to send the automated text messages” and because Twilio knowingly allowed its client to use their platform for automated text messages and actively helped its client to bypass spam filters.

It is, of course, impossible to accord *Franklin* with *Hurley* and *Bauman*. As with so much else in TCPAWord, therefore, platform provider liability remains unclear and folks like Twilio must suffer whiplash every time a new decision comes down. Taking a look at the broadest potential theory of liability, a platform provider is *directly* liable as a sender—this is not a vicarious liability theory folks– anytime a Plaintiff can plead and prove that the provider had the right and ability to control the transmission coupled with a knowledge of illegal conduct by its clients. Ugh.

*Bauman* may offer a murky and dangerously expansive theory upon which to impose direct liability for sending illegal messages but...welcome to TCPAWord.

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