

Background Paper 79-2

JUNK TELEPHONE CALLS

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## I

### INTRODUCTION

For many years, various sales organizations have used the telephone to sell a variety of products and services to potential consumers. Most of these sales calls were made by persons hired to dial numbers listed in telephone directories and deliver live messages when the telephone was answered. In some instances, these live messages were augmented by recorded messages. In other cases, a recorded sales message was turned on as the phone was answered and then the sales person came back to talk to the customer after the tape had stopped.

Recently, new devices known as automated dialing and recorded message players (ADRMP) have been developed and introduced into the marketplace. These devices are designed to dial automatically a series of telephone numbers, either preselected or chosen at random, and play a prerecorded message when the phone is answered.

These new automatic dialing devices have created, according to the Federal Communications Commission, the California Department of Consumer Affairs and many others, a backlash of consumer complaints which call for the outright ban or severe restriction on telephone sales soliciting. Many persons complain that they find it an annoyance to stop whatever they are doing to run to the telephone, only to find that the caller is a machine attempting to present a prerecorded sales message. Some people believe because automatic calling devices can call numbers at random or in sequence, even unlisted telephone numbers provide no protection against unsolicited sales calls. Moreover, it has been claimed that automatic dialing devices may prevent emergency calls from getting through where the type of telephone company central office equipment is used which does not disconnect the receiving party's line until the call's originator hangs up his telephone.

## II.

### FEDERAL AND STATE "JUNK TELEPHONE CALL" LEGISLATION

The concern about telephone solicitation has lead to the introduction of state and federal legislation and the study of possible regulations by the Federal Communications Commission and certain states' public utility regulatory bodies.

Federal legislation considered by the 95th Congress dealing with so-called junk telephone calls include S 2193, sponsored by Senator Wendell R. Anderson, HR 9505, sponsored by Representative Les Aspen and HR 10904 whose sponsor was Representative Charles W. Whalen. None of these measures were enacted into law. The federal measures, all known as the "Telephone Privacy Act," provide for telephone subscribers to advise the telephone company that they do not want to receive unsolicited telephone calls (other than from charities, political parties, pollsters, and literary, scientific and nonprofit organizations) and prohibit anyone from making unsolicited commercial telephone calls to such persons. The bills also prohibit unsolicited commercial telephone calls to any telephone if such calls are made entirely by automatic equipment and have a duration of more than one minute. The bills specify that (1) telephone subscribers not be charged for being listed as not wishing to receive unsolicited telephone calls, (2) the telephone companies' costs of maintaining such a listing be borne by those persons or institutions obtaining the names and telephone numbers of telephone subscribers who do not wish to receive unsolicited commercial calls, and (3) violators be subject to penalties of a \$1,000 fine and imprisonment of 30 days.

Also at the federal level, the Federal Communications Commission issued a Notice of Inquiry in March of 1978 to consider the need for rules to protect the public from "nuisance, annoyance and invasion of privacy resulting from the use of automated dialing devices to present unsolicited recorded messages over the public telephone network." A formal petition filed by the Citizens Communications Center suggested that the FCC rulemaking procedure:

Consider restrictions on the use of automatic dialing devices for presenting unsolicited recorded messages to telephone subscribers;

Designate means by which telephone subscribers can indicate they do not wish to receive such calls, and designate penalties to advertisers who violate subscribers' desire for privacy;

Designate special tariffs for telephone sales campaigns to reflect fully their cost of service;

Require users of automated dialing devices to precede each recorded message with an announcement identifying it as coming from an automated dialing device.

The White House Office of Telecommunications Policy also asked that the FCC proceedings "address all forms of soliciting by phone." The office stated, "Solicitation by phone, regardless of the method, raises serious questions concerning the infringement of individual privacy." The office's concerns are far

reaching indeed, raising the question of whether charitable or political calling by telephone should also be restricted.

The Federal Communication Commission's Carrier Bureau staff briefed the commission on the results of the commission's inquiry relating to "junk telephone calls" in October, 1978. At the briefing, the commission directed the staff to prepare a further notice of inquiry to (1) gather more information on the extent of interstate unsolicited telephone calling; (2) analyze, among other things, the results of state regulatory and legislative programs; (3) elicit comments on possible forms of federal regulation; and (4) consider, in more depth, the constitutional and jurisdictional ramifications of federal actions dealing with the regulation of telephone solicitation.

According to the National Conference of State Legislatures, approximately 25 states have considered legislation relating to telephone soliciting, particularly when automatic dialing devices are used for such soliciting. Five states (Alaska, California, Florida, Maryland, and Wisconsin) have passed junk phone call legislation dealing, at least in part, with automatic dialing devices. As stated by State Senator C. Lawrence Wiser, sponsor of Maryland's law, "We're trying to make the machines illegal before people in the state put a lot of money into them."

Alaska's measure, H.B. 643 (Chapter 17 SLA 78), is direct and to the point. It says, in part, "making a junk telephone call without the prior written consent of the person called is unlawful." Alaska defines a junk telephone call as a "telephone call made for the purpose of advertising through the use of a recorded advertisement."

California's A.B. 2179 (Chapter 877, Statutes of 1978) permits the use of "automatic dialing-announcing devices" only when the person called has previously consented to receive such calls, or, as an alternative, when the device is operated by a person who is required to:

- (a) State the nature of the call and the name, address, and telephone number of the business or organization being represented, if any.
- (b) Inquire whether the person called consents to hear the prerecorded message of the person calling.
- (c) Disconnect the automatic dialing-announcing device from the telephone line upon the termination of the call by either the person calling or the person called.

Companies proposing to use the devices are required, by the new California law, to make written application to the telephone

corporation within whose service area the calls are planned and to the California Public Utilities Commission (PUC).

The California PUC has also provided for the regulation of automatic dialing devices by its Decision No. 89397, which contains provisions similar to A.B. 2179.

Other states' measures include:

1. Florida's S.B. 806 (Chapter 78-178) which specifies, among other things:

No person shall use a telephone or knowingly allow a telephone to be used for the purpose of offering any goods or services for sale or conveying information regarding any goods or services when such use involves an automated system for the selection and dialing of telephone numbers and the playing of a recorded message when a connection is completed to the called number;

2. Maryland's Senate Bill 24 (Chapter 422, Statutes of Maryland 1978) which prohibits the use of an automatic dialing or pushbutton or tone activated address signaling system with a prerecorded message for the sole purpose of soliciting persons to purchase goods or services; and
3. Wisconsin's A.B. 1092 (Chapter 301, Statutes of Wisconsin 1978) which prohibits the intrastate use of electronically, prerecorded messages in telephone solicitation (for the purpose of encouraging a person to purchase property, goods or services) without the consent of the person called.

Penalties specified for violation of the states' laws range from fines of up to \$500 in Wisconsin to injunctive relief in Florida.

The issues involved in considering a "junk telephone call" measure are complex. Certain of the questions which might be asked in reviewing such a proposal might include:

1. What is the proper level of government to regulate junk telephone calls? Many calls originate from outside of Nevada. In these cases some sort of interstate regulation may be necessary.
2. How can the callers' freedom of expression rights be balanced with the telephone subscribers' privacy rights? Legal opinions drafted in Wisconsin and California have indicated that statutes allowing persons to protect themselves against unwanted telephone advertising may be found to be constitutional.

Regarding this question, however, the FCC has asked:

- a. How do unsolicited telephone calls compare with highway billboards, loudspeakers on automobiles, radio and TV ads, newspaper and magazine ads, "junk mail," and door to door salesmen in terms of invasion of privacy?
  - b. Is freedom from unsolicited telephone calls a reasonable expectation of privacy? Does the fact that telephone solicitations require a person to take positive action (answering the telephone) while most other forms of advertising may be received passively, affect one's reasonable expectation of privacy?
  - c. In view of the foregoing, do telephone subscribers have a right of privacy which would protect them from receiving unsolicited telephone calls? If so, does one's ability to hang up this telephone adequately protect any right to privacy?
  - d. Would regulation of unsolicited telephone calls infringe on the First Amendment's free speech guarantee?
  - e. Would regulation of only commercial solicitation, but not nonprofit or political solicitation, constitute an unconstitutional discrimination? Alternatively, is there a constitutional justification for exempting not for profit and political solicitation from regulation?
  - f. For constitutional purposes, is there any significant distinction between automatically dialed and manually dialed calls?
3. How should "unsolicited calls" be defined? Should the term include calls from: Polling or surveying organizations, commercial sales solicitations, political fund raising organizations, charitable fund raising organizations, organizations with which the person is currently doing business, organizations with which the called person has previously done business, organizations which have received the called person's name from a friend or relative, organizations whose advertising may have lead those called to believe that the additional information they requested would be mailed, a labor union letting its new members know that a strike is over, an airline informing its passengers that a flight has been delayed or cancelled?

4. Should unsolicited calls be prohibited from being placed to parties who have stated affirmatively their objection to receiving such calls or should unsolicited calls be allowed to be placed only to parties who have affirmatively consented to receiving such calls?
5. Once telephone subscribers have informed the telephone company of their desire to receive or not to receive unsolicited calls, how is this information to be used? Should a special symbol (such as an asterisk) be placed beside a subscriber's name in the telephone directory? Alternatively, should each telephone company be required to maintain lists of subscribers who have given notice of their desire to receive or not receive unsolicited calls?
6. Should unsolicited calls be required to be preceded by an announcement (1) identifying the caller, (2) stating that it is a prerecorded message (if that is the case), and (3) briefly describing the nature of the call?
7. How would a state law banning unsolicited commercial telephone calls be enforced? The purpose of legislation banning telephone solicitation is to protect people from the inconvenience and annoyance of "nuisance" telephone calls. People wishing to enforce their right to be free from certain nuisance telephone calls, however, may be more inconvenienced and annoyed by the criminal proceedings involved in prosecuting a violator of a statute which makes certain types of telephone solicitation a crime. Furthermore, in certain instances, the only evidence of illegal telephone solicitation might be the complainant's testimony. The evidence must prove to the judge or jury, beyond a reasonable doubt, that a person is guilty of a crime. A complainant who has merely heard someone's voice over a telephone may not be able to identify the person accused of committing the crime of telephone solicitation. The existence of a statute banning advertising and solicitation by telephone may serve to discourage junk telephone calls. Great difficulty, however, may be experienced in trying to penalize people who violate such a statute.
8. Are there technical means of dealing with unwanted telephone solicitation? Is it possible for telephone company central office equipment to identify incoming solicitation calls and then to block the completion of such calls to persons who do not wish to receive them? Can such task be performed by telephones or other equipment on the customer's premises? What alternative techniques are available for such purposes and what are their respective costs?



## SUGGESTED READING

(Available in the Research Library)

"A Revolt Against Junk Calls." Business Week, (February 20, 1978), 32.

"Bell System Position Statement Automated Telephone Solicitation," March 31, 1978.

"Commercial Solicitation Telephone Calls and the First Amendment: A Preliminary Analysis." Memorandum from John Newman, legal counsel, legal services unit to Richard B. Spohn, Director of the California Department of Consumer Affairs. January 3, 1978.

"Comments of the American Telephone and Telegraph Company Before the Federal Communications Commission in the Matter of the Use of Automated Dialing Devices to Present Unsolicited Recorded Messages Over the Public Telephone Network."

Eisenberg, Ron Aaron and Michele Orwin. "And Now, Junk Mail By Telephone." The Washington Post, (August 16, 1977).

Federal Communications Commission Notice of Inquiry in the Matter of Unsolicited Telephone Calls ("Junk Phone Calls"). CC Docket No. 78-100. RM-2955; FCC 78.199, Released March 30, 1978.

"Junk Phone Calls Ring Your Bell? FCC All Ears." The Denver Post, (March 15, 1978).

Kubula, Tendazi. "Strict Limits on Junk Phone Calls Sought." The Los Angeles Times, (January 6, 1978).

Letter from Richard B. Spohn, Director, California Department of Consumer Affairs to Mr. Robert Batinovich, President of the California Public Utilities Commission, (January 4, 1978).

Letter from Richard B. Spohn, Director, California Department of Consumer Affairs to Mr. T. J. Saenger, President, Pacific Telephone and Telegraph Company, (January 4, 1978).

Morris, Hal. "California Curbs Robot Junk Calls." The Christian Science Monitor, (January 18, 1978), 29.

Petition, submitted on behalf of Walter Baer and the Citizens Communication Center, for Issuance of Notice of Inquiry and Notice of Proposed Rulemaking in the Matter of the Use of Automated Dialing Devices to Present Unsolicited Recorded Messages Over the Public Telephone Network.

Porter, Sylvia. "Pending Legislation on Phone Solicitation." The Nevada State Journal, (March 14, 1978).

Public Utilities Commission of the State of California Orders Instituting Investigations Nos. 11 and 12, Issued February 22, 1978, "Investigation on the Commission's Own Motion Into the Use of the Public Utility Telephone Systems by Automatic Dialing Announcing Devices for Solicitation."

Report By State Corporation Commission on Unsolicited Commercial Telephone Calls to the Governor and the General Assembly of Virginia. House Document No. 30. Commonwealth of Virginia, Division of Legislative Services Interstate Exchange Publications. 1978.

"Telephone Machines in Trouble." The Dallas Morning News, (March 7, 1978), 7A.

Testimony of Richard B. Spohn, Director of the California Department of Consumer Affairs, before the California Public Utilities Commission, Regarding Automated Dialing Devices and Commercial Solicitation Telephone Calls.

Bills in Congress -- S 2193, HR 9505 and HR 10904.

Bills in the States --

Chapter 17 SLA 78, Alaska;

A.B. 2179 (Chapter 877, Statutes of 1978) California;

S.B. 806 (Chapter 78-178) Florida;

S.B. 24 (Chapter 422, Statutes of 1978) Maryland;

H.F. 1747, Minnesota;

H.B. 930, H.B. 1578, H.B. 1686 and S.B. 724, Missouri;

S.B. 375, S.B. 1363 and H.B. 2580, Pennsylvania;

H.B. 1248, Texas;

H.B. 1136, Virginia;

A.B. 1092 (Chapter 301, Statutes of 1978) Wisconsin.