

# Suing telemarketers for fun & profit: TCPA law and you

ToorCamp '09  
Sai Emrys (saizai)



Get these slides:

[http://s3.amazonaws.com/saizai-public/toor\\_tcpa.pdf](http://s3.amazonaws.com/saizai-public/toor_tcpa.pdf)

# Who am I?

IANAL (& IANYL) \*

Ruby on Rails hacker / consultant / entrepreneur

Language creator (see <http://conlang.org>)

professional massage therapist

UCB BA CogSci; applying to PhD CogNeuro

mirror neurons, empathy, brain/computer interfaces

Interested in secure p2p botnet & db design

Email, LJ, AIM, IRC, Skype, etc: saizai (.com)

etc etc - <http://s3.amazonaws.com/saizai-public/sai%20-%20resume.pdf> if you really care

# \* Disclaimers

**I am not a lawyer. This is not legal advice.**

I am not **your** lawyer. Your situation is different. Do your own research and ask your lawyer.

But:

**This is accurate TTBOMK**

**I have** won money from TCPA violators using this

**I have** run it by my lawyer

Names may been changed to protect me

Based on **CA** & US federal law

# Typical call

“This is an important message regarding your automotive warranty. This is your final courtesy call before your vehicle is reclassified. Press 1 to speak to a warranty specialist or press 2 and your warranty service will expire.”

Press 1: warranty hard sell

Press 2: they call tomorrow

# Why care?

Annoying

Illegal

“Products” prey on stupid people

KOMO News says it's also fraud

I don't know

*Massive* scale

(not many people *that* stupid)

Hunts are fun

# Why's it illegal?

Solicitation to Do Not Call listed # 47 U.S.C. § 227(c)(3)(F)

Recorded solicitation to home or cell phone

47 U.S.C. § 227(b)(1), CA Civil Code §1770 (a)(22)(A)

Didn't state caller name at beginning of call 47 U.S.C. § 227(d)(A)(1)

Didn't give caller address or phone # 47 U.S.C. § 227(d)(A)(2)

Spoofed Caller ID 47 C.F.R. § 64.1601 (4)(e)

Didn't mail copy of Do Not Call policy 47 C.F.R. § 64.1200 (d)(1)

... other stuff too (faxes, etc) – look it up

**Exemptions:** consent, “established business relationship”, emergency, nonprofits, government, work phones

EBR terminates when you say 'fuck off'

# What to do?

## Register w/ Do Not Call list

<http://donotcall.gov> remember to save the confirmation!

won't stop the illegal ones

... but do it anyway (stops the legals, and evidence in court)

## Bitch them out

they'll just hang up

## Complain to FCC

<http://esupport.fcc.gov/complaints.htm>

haven't done anything yet... but might soon?

## Sue

Hurts the spam equation:

$(\# \text{ calls}) * ((\% \text{ idiots}) * (\$ / \text{ idiot}) - (\% \text{ suits}) * (\$\$ / \text{ suit})) - \text{expenses} > 0 ?$

# What does it cost?

TCPA: \$500 “per violation”\* minimum 47 U.S.C. § 227(b)(3)(B), (c)(5)

Up to 3x (\$1500) if violation is “knowing and willing”

CA CLRA: *unlimited* + attorney's fees CA Civil Code §1780 (a), (d)

Attorney's fees = get a lawyer “on contingency” (free)

Statute of limitations: 1 yr CA Business & Professions Code §17200

Both: *plus* injunction and actual damages

# \* “Per violation”?

## V1: \$500 per violation requiring distinct proof

Blockburger v. United States, 284 U.S. 299 (1932)

Ball v. United States, 470 U.S. 856 (1985)

Sanchez v. Overmyer, 891 F.Supp.1253, 1260 (N.D. Ohio 1995)

Lovgren v. Byrne, 787 F.2d 857, 863 (3rd Cir. 1986)

Lary v. Work-Loss Data Institute, 911 So.2d 18, at 20,21 (Ala. Civ. App 2005)

United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 393 (9th Cir.1979)

FAA v. Landy, 705 F.2d 624, 636 (2d Cir. 1983)

## V2: \$500 per call for § 227(c)(5), but per violation for § 227(b)(3)

Charvat v Echostar Satellite, No. 2:07-cv-1000

Charvat v. GVN Michigan, Inc., 531 F.Supp.2d 922, 927-28 (S.D. Ohio 2008)

Charvat v. Colorado Prime, Inc., 1998 WL 634922, \*5 (Ohio Ct.App. Sept. 17, 1998)

Charvat v. Ryan, 168 Ohio App.3d 78, 858 N.E.2d 845, 852-53 (Ohio Ct.App.2006)

Charvat v. ATW, Inc., 127 Ohio App.3d 288, 712 N.E.2d 805, 807 (Ohio Ct.App.1998)

Worsham v. Nationwide Ins. Co., 138 Md.App. 487, 772 A.2d 868, 876 n. 5 (Md.Ct.Spec.App.2001)

Szefczek v. Hillsborough Beacon, 286 N.J.Super. 247, 668 A.2d 1099, 1110, (N.J.Super. Ct. Law Div.1995)

# Whom to sue?

Need company's true name

Agent for service of process can be looked up

Problems:

They hang up if you sound suspicious

They spoof caller ID

They lie

Solution:

Social Engineering™ + Intartubez™

Key info: **real** name, website, **direct** phone #, address

# Got a URL?

<http://onsamehost.com> + <http://whois.net>

<http://theirip> e.g. Plesk contact info

# Got a name?

Google: [state] corporate records search

CA: [http://www.sos.ca.gov/business/corp/corp\\_irc.htm](http://www.sos.ca.gov/business/corp/corp_irc.htm)

Google: [county] fictitious business name search

Alameda: <http://rechart1.acgov.org/search.asp?cabinet=fbn>

# Got a real phone #?

Telco subpoena compliance divisions:

AT&T landline: 800 291 4952 x9

AT&T wireless: 800 635 6840

Alltel / Windstream landline: 888 558 6700 x1

Alltel wireless: 866 820 0430

Verisign / Focal / Level3: 918 547 9618

Socal: 312 895 8978

“Verify” whether they own the #... and if not, whose it is

Subpoena for info

... hypothetically

# Telemarketer structure

Telemarketers per se (“agent”)

expendable, temporary companies

Product shell companies

just different faces of...

Parent product company (“principal”)

actually sells the “product” (e.g. warranty)

does not place calls directly

# Principle of Agency

Principle liable for behavior of agents

You sue both

    Seller can sue agent for indemnification

Better luck with principle, but harder target

Ernest Wilson Huffcut, *The Elements of Business Law*, §126, "Liability of principal to third party"

*In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 13, 10 F.C.C.R. 12391, 12397 (1995)

FCC 00-378, October 23, 2000, footnote 24

*Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844-45, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694, 704 (1984)

*Zeid v. The Image Connection, Ltd.*, No. 01-AC-002885-Z-CV at 9 (Mo. Cir. Ct. 2001)

*Worsham v. Nationwide Ins. Co.*, 772 A.2d 868, 878 (Md. Ct. Sp. App. 2001)

*Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468, 472 (Ga. App. 2000)

*Brentwood Travel*, No. 00AC-13051 at 4-5

*Coleman v. American Blast Fax, Inc.*, No. 00AC-005196 at 2 (Mo. Cir. Ct. Mar. 14, 2001)

# Plan

1. Get documentation together
2. Offer to settle
3. File suit & subpoenas
4. Serve court orders & subpoenas
5. Actually settle
6. Go to court

# Documentation

Do Not Call confirmation (w/ date and phone #)

Call transcripts & time log

Which laws violated for each call

Total cost (\$1500 / violation)

FBN or incorporation records

Contact info for telemarketer, principal, their lawyers, etc

Demand letter

# Blog

Put that documentation online

CEOs really hate having their phone # available

but switchboard.com and whois don't seem to care...

Telemarketers hate people knowing whom to sue

## Warning:

don't lie (libel)

use public sources

expect to have to take it down w/ settlement

# Offer to settle

A.K.A. “Demand letter”

State clearly what happened

Give legal references

Clearly say what it takes to make you go away

More informally: just call

**Mandatory** in CA

Probably won't work

they think you're not serious

# Where to sue?

## CA Small claims court:

\$75 filing fee

No injunctions

\$7500 per case 2/yr/plaintiff, \$2500 after

No lawyers allowed... *in* court

## CA Superior civil court:

\$300 filing fee + many misc fees

Unlimited damages (easily \$50k+)

Much more formal; get a lawyer

# Extra documentation for court

Subpoena results (if any)

Proof of service (> 14 days before day of trial)

Whatever else you got

- Previous settlement contracts

- Mailing records

- Negotiation docs

Will probably be skimmed at best

# File suit

Walk in, fill out the form, pay

File against *both* principal and agent

Get a few blank stamped subpoenas

    Serve whoever you want info from – including defendants

Pay process server to serve it (~\$60-120 per)

Mail court signed proof of service

Wait

A) They call

b) You see 'em in court

# Actually settle

Bargain – just like a used car

start big (\$1500 per violation per call + costs)

Careful of the language

'disparage': very ambiguous

future calls not included

don't take down your blog (just specific posts)

requirement not to call you again

only settle one party's liability

still sue the other guys for the rest

*Both* get it notarized

Dismiss suit with prejudice

... or not

Small claims:

Show up *early*

Be polite and clear

Bring copies for the judge (include legal cites)

Get it back in the mail

Explain your calculation (and why it's *minimum*)

Superior court:

Get your lawyer to do it right. Srsly.

# Questions?

Shameless plug:

## **Meditation for Hackers**

Techniques, principles, variants, demo, etc

Bonus: Scientology immunization

**Saturday 3-5pm Track 1**