

ACA International Continues Setting Precedent Regarding Autodialers: Second and Third Circuits Follow Suit in Adopting a Narrowed Definition

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The Second Circuit, in [King v. Time Warner Cable, Inc.](#), and the Third Circuit, in *Dominguez v. Yahoo!, Inc.*, relied upon the D.C. Circuit's decision in *ACA International v. FCC* in limiting the definition of an autodialer under the Telephone Consumer Protection Act. *Dominguez* found that Yahoo's text message system did not fit the definition of autodialer, while *King* emphasized that only a device that currently has the ability to perform autodialing functions can qualify as an autodialer system.

In a [2015 Declaratory Ruling](#), the Federal Communications Commission broadened the meaning of an autodialer to encompass devices that had "the latent or potential capacity to store or produce telephone numbers using a random or sequential number generator, and to dial those numbers." The D.C. Circuit overruled the FCC's definition in *ACA International*, finding that the definition was unreasonably overbroad and even noting that under FCC's interpretation any smartphone could be considered an autodialer.

In *Dominguez*, the Third Circuit followed the reasoning of *ACA International* and found that the equipment Yahoo used to send text messages—its "Email SMS Service"—did not meet the definition of an autodialer, because Yahoo's service sent messages "only to numbers that had been individually and manually inputted into its system by a user." While the panel acknowledged that the plaintiff was subjected to "great annoyance," receiving tens of thousands of text messages from Yahoo under the system, the court ultimately decided that "the TCPA's prohibition on autodialers is not the proper means of redress" because the previous owner of the plaintiff's cellphone number manually inputted the telephone number into Yahoo's system.

Three days after the Third Circuit issued *Dominguez*, the Second Circuit likewise followed *ACA International* to vacate a lower court's decision that relied on the overturned 2015 FCC Declaratory Ruling. In *King*, the Second Circuit held that the definition of an autodialer includes those devices that "currently have features that enable it to perform the functions of an autodialer – whether or not those features are actually in use during the offending call – [rather than] a device that can perform those functions only if additional features are added." A device with

the *potential* to be an autodialer by virtue of added features or programming does not meet the definition of an autodialer under the TCPA. Only devices that *currently* have the capability to perform autodialing functions qualify as an autodialer system. In deciding *King*, the Second Circuit agreed with the D.C. Circuit that the definition under the FCC Ruling is overbroad. The Second Circuit even dove into the TCPA's legislative history, ultimately concluding that the term "capacity" in the TCPA's definition of a qualifying autodialer should be interpreted to refer to a device's current functions, absent any modifications to the device's hardware or software. Under this definition, devices whose autodialing features could be activated "by the equivalent of the simple flipping of a switch" would be included.

The Second and Third Circuit's decisions demonstrate the significance of *ACA International* to TCPA litigation and how it has helped solidify the now narrowed definition and meaning of autodialer.

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Topics

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