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Center for Consumer Law  
& Economic Justice



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Via Electronic Submission to: <https://www.fcc.gov/ecfs/filings>

Mr. Ajit Pai  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

**Re: Petition for Expedited Declaratory Ruling by NorthStar Alarm Services, LLC [CG Docket No. 02-278]**

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**Comments of the Consumer Advocacy & Protection Society of the UC Berkeley School of Law and the UC Berkeley Center for Consumer Law & Economic Justice**

Dear Mr. Pai:

The Consumer Advocacy and Protection Society (“CAPS”),<sup>1</sup> a student-run organization dedicated to the promotion of consumer law and consumer protection at Berkeley Law, and the UC Berkeley Center for Consumer Law & Economic Justice (“the Center”) appreciate the opportunity to comment on the petition for an expedited declaratory ruling relating to how the Telephone Consumer Protection Act (“TCPA” or “the Act”) applies to the use of soundboard or avatar technology. Many of us have worked as clinical students or volunteers in the East Bay

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<sup>1</sup> Consumer Advoc. & Protection Soc’y (CAPS) – Berkeley Law’s Consumer Hub (last visited Mar. 13, 2019), <https://consumer.berkeley.edu/>.

Community Law Center’s Consumer Rights Workshop<sup>2</sup> and/or Consumer Justice Clinic,<sup>3</sup> which are legal clinics of the UC Berkeley School of Law that provide legal services to low-income consumers, including consumers who have received telemarketing calls using soundboard technology. Others have participated as *amici curiae* in litigation involving soundboard technology and the Federal Trade Commission.<sup>4</sup> We believe our experience working directly with consumers, and our research into the use of soundboard technology – as well as our personal experiences with telemarketing calls – provide valuable insight into how the Federal Communications Commission (“FCC”) should rule on the issue of soundboard technology under the TCPA.

### **Introduction**

We are deeply concerned about the implications of unfettered use of soundboard technology and strongly support a ruling that the use of the technology should be prohibited under the TCPA. First, the Act prohibits the use of an “artificial or prerecorded *voice*” – not (as petitioner NorthStar would have it) “messages.”<sup>5</sup> Second, soundboard technology, from a technical standpoint, relies exclusively on artificial or prerecorded voice – and therefore falls squarely within the Act’s prohibition. Third, the use of soundboard technology does not come within any exemption to the restrictions of the Act. For these reasons, the FCC should rule that the TCPA prohibits the use of soundboard technology.

#### **1. The TCPA prohibits the use of artificial or prerecorded voice.**

The broad language of the TCPA outlaws the use of artificial or prerecorded voice. There is no exception for snippets. The TCPA provides: “It shall be unlawful . . . to make any [telephone

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<sup>2</sup> *Consumer Rights Workshop*, Consumer Advoc. & Protection Soc’y (CAPS) – Berkeley Law’s Consumer Hub (last visited Mar. 13, 2018), <https://consumer.berkeley.edu/crw/>.

<sup>3</sup> *Consumer Justice & General Clinic*, E. Bay Cmty. L. Ctr. (last visited Mar. 13, 2018), <https://ebclc.org/about/the-work/economic-security-opportunity/consumer-justice/>.

<sup>4</sup> See *Soundboard Ass’n v. FTC (“Soundboard II”)*, 888 F.3d 1261 (D.C. Cir. 2018).

<sup>5</sup> 47 U.S.C. § 227 (2018) (emphasis added).

solicitation] call . . . using . . . an artificial or prerecorded *voice*.”<sup>6</sup> In other words, the TCPA is not concerned with whether an unsolicited marketing telephone call contains one long message (e.g., robocalls) or involves several short messages that a live operator can pick and choose on a real-time basis (e.g., soundboard technology). What matters within the context of the TCPA is whether a telephone solicitation uses an artificial or prerecorded *voice*. If it does, the expansive language of the TCPA deems such a solicitation unlawful.

By conjuring a phrase that exists nowhere in the TCPA, NorthStar seeks to carve out an exception from the statute’s ban on automated calls. But the statutory language is clear: the TCPA does not prohibit “prerecorded *messages*” as Northstar asserts<sup>7</sup>; rather, it prohibits “artificial or prerecorded *voice*.”<sup>8</sup> NorthStar cannot, of course, create new statutory language to conform to its idea of what the law should permit. The TCPA is a broad law that clearly prohibits the general use of “artificial or prerecorded voice.” The proper question to have asked the FCC is whether the employment of soundboard technology constitutes the use of artificial or prerecorded voice that the TCPA prohibits. NorthStar’s mischaracterization of the statutory language and its failure to correctly frame the question suggest that the company is all too aware of the answer to that question: “Yes, the use of soundboard technology violates the TCPA.”

## **2. Soundboard technology relies on artificial or prerecorded voice.**

To ask the (correct) question is to answer it. From a technical standpoint, soundboard technology operates exclusively by using an artificial or prerecorded voice to mimic a naturally

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<sup>6</sup> 47 U.S.C. § 227(b)(1); *see also* 47 U.S.C. § 227(a)(4) (“The term ‘telephone solicitation’ means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person”).

<sup>7</sup> Petition for Expedited Declaratory Ruling filed by NorthStar Alarm Services, LLC at iii (filed Jan. 2, 2019), <https://ecfsapi.fcc.gov/file/10103290733918/NorthStar%20FCC%20Petition.pdf> (hereinafter “Petition”) (emphasis added).

<sup>8</sup> 47 U.S.C. § 227(b)(1) (emphasis added).

speaking individual.<sup>9</sup> Therefore, its use is banned by the TCPA. NorthStar argues that the TCPA does not prohibit messages transmitted via soundboard technology because soundboard messages, unlike automated messages (i.e., robocalls), are interactive. This is a serious mischaracterization. In practice, soundboard operators are unable to have a meaningful conversation with the consumer unless they interject their own speech into the exchange. In other words, soundboard messages, by themselves, do not and cannot make interactive conversations. *Time* editor Michael Scherer's (MS) interaction with "Samantha West" (SW) is illustrative of the limits of the technology:

SW: "I'm calling about an online request you once made about health insurance coverage. We work with all major companies and compare -- "

MS: "Hey, are you a robot?"

SW: (Laugh.) "What?! NO! I am a real person. Maybe we have a bad connection. I'm sorry about that."

MS: "That's crazy. I mean, you sound so much like a robot."

SW: "I am a real person. Maybe we have a bad connection. I'm sorry about that."

MS: "Will you tell me you're not a robot? Just say, 'I'm not a robot.' Please?"

SW: "I am a real person."

MS: "I mean I believe you. But will you just say, 'I'm not a robot.'? It'll make me feel better to hear you say it."

SW: (Laugh.) "There is a live person here."

MS: "I know there is. It would just make me feel so much better to hear you say, 'I am not a robot.'"

SW: "Yes, I'm a real person."

MS: "Right, but will you say, 'I'm not a robot'?"

SW: (Long pause.) (Laugh.) "Enrollment center. Are you there?"<sup>10</sup>

When asked to say, "I'm not a robot," Samantha West, a persona created by soundboard technology, was unable to say it because there was no prerecorded voice file for "I'm not a robot."

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<sup>9</sup> See *Soundboard Ass'n v. FTC* ("Soundboard I"), 251 F. Supp. 3d 55, 58 (D.D.C. 2017).

<sup>10</sup> Zeke Miller & Denver Nicks, *Meet the Robot Telemarketer Who Denies She's A Robot*, TIME (Dec. 10, 2013), <http://newsfeed.time.com/2013/12/10/meet-the-robot-telemarketer-who-denies-shes-a-robot/>. See also John Oliver, *Robocalls*, Last Week Tonight (Mar. 10, 2019), [https://www.youtube.com/watch?v=FO0iG\\_PO6M](https://www.youtube.com/watch?v=FO0iG_PO6M) (including this exchange).

As this conversation shows, soundboard messages are limited (i.e., cannot go beyond prerecorded voice files) and disingenuous.<sup>11</sup>

NorthStar is aware of such limitations: “And, in situations where a consumer asks a question for which there is no audio-clip response . . . soundboard agents . . . will . . . interject . . . or select an audio clip response to explain that he or she [has been] using [prerecorded] audio clips to communicate.”<sup>12</sup> Additionally, NorthStar assures that each voice file in the “library of available audio clips” is constantly “revised.”<sup>13</sup> These points actually support the notion that the use of soundboard technology, by itself, cannot achieve the level of interactivity that NorthStar alleges. First, when a consumer hears the operator’s true voice or the prerecorded voice file that reveals that she has been speaking with the operator through soundboard technology, she will realize that she has been misled by the operator to believe that she was talking with a real person. At that point, the conversation will obviously cease to be “completely natural” (if it ever was).<sup>14</sup> Second, that these voice files are being constantly updated implies that there are questions that soundboard technology is incapable of answering. In other words, when the consumer asks a question for which there is no recorded response, the operator will have to either interject with her own speech or inform the consumer that she has been speaking with prerecorded messages. As pointed out above, the conversation will then cease to be genuine and natural. As such, soundboard technology cannot emulate normal, natural conversations.

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<sup>11</sup> It is notable that this telemarketing company had several variations of “I am a real person” or “There is a live person here.” This practice clearly shows that the company anticipated that consumers would suspect the authenticity of its telemarketing calls. It also shows that the company knew that its calls were unnatural.

<sup>12</sup> *Petition* at 4. It is noteworthy that NorthStar has intentionally labeled these voice files “audio clips.” NorthStar clearly wants to avoid using the term “voice,” which appears in the statutory language of the TCPA, so as to disassociate the nature of these files from the “artificial or prerecorded voice” the statute prohibits. 47 U.S.C. § 227(b)(1).

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 4.

Further, soundboard technology is intended to be used – and operators do use it – on a one-to-many, rather than one-to-one, basis. NorthStar portrays the technology as limited to “real time[] and two-way” interactions and asserts that this “one-on-one” feature distinguishes the technology from automated messages, which the TCPA prohibits.<sup>15</sup> But this claim is a clear mischaracterization of the way in which soundboards are actually used; in practice, companies use soundboard technology for the very purpose of making one-to-many unsolicited marketing calls. Indeed, companies have neither the intent nor any incentive whatsoever to use this technology on a one-to-one basis. A recent case illuminates these points very clearly:

In a February 2016 meeting, “representatives of [a telemarketing trade group] acknowledged that soundboard technology is frequently utilized in a matter to allow *one live agent to handle multiple calls simultaneously.*” A trade group representative also told FTC staff “that if the FTC enforced a requirement that one agent could only manage one call at a time, no call center would use soundboard technology because it would not be cost effective—i.e., the capital expenditure in implementing soundboard ... only made business sense if a call center could increase the volume of calls its agents could handle.”<sup>16</sup>

*Atlantic* Reporter Alexis Madrigal’s email interview with an experienced Filipino call-center manager likewise highlights that companies use soundboard technology to make one-to-many marketing calls:

In an email, [the interviewee] ticked off the reasons for using voice technology. 1. Accent . . . 2. Quality . . . 3. Productivity - it improves [the operators’] productivity by more than 100 percent [*sic*]. Since reps do not need to speak and just press buttons, *they can handle 2-3 PCs at the same time.*<sup>17</sup>

As illustrated above, soundboard technology cannot emulate interactive, one-on-one conversations. Rather, it is merely a technologically advanced form of the telephone solicitation

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<sup>15</sup> *Id.* at ii; see 47 U.S.C. § 227(b)(1).

<sup>16</sup> *Soundboard II*, 888 F.3d at 1265 (emphasis added).

<sup>17</sup> Alexis C. Madrigal, *Almost Human: The Surreal, Cyborg Future of Telemarketing*, THE ATLANTIC (Dec. 20, 2013), <https://www.theatlantic.com/technology/archive/2013/12/almost-human-the-surreal-cyborg-future-of-telemarketing/282537/> (emphasis added).

that the TCPA was enacted to prohibit. The Commission should therefore declare that the use of the technology is unlawful under the Act.

**3. There is no cause to exempt the use of soundboard technology from the restrictions of the TCPA.**

The use of soundboard technology falls squarely within the practices barred by the TCPA. The technology does not qualify for any of the exemptions contemplated by that statute.

Congress anticipated the technological advancement of the telemarketing industry and intended that the Act prevent future invasion of privacy by the industry. NorthStar argues that the TCPA does not apply to soundboard technology because the technology did not exist in 1991 and therefore Congress could not have contemplated it. On the contrary, Congress *did* foresee and appreciated the emergence of more advanced and more intrusive alternatives for automated messages. To illustrate: Congress empathized with the concern raised by Robert Bulmash, the president and founder of Private Citizens, Inc., that “within 7 to 10 years, we are going to be receiving more junk phone calls than personal calls.”<sup>18</sup> Senator Pressler noted that Bulmash’s comments “summarize[d] the problem [with unsolicited marketing telephone calls] very, very well.”<sup>19</sup> It is clear that Congress envisioned a future where the telemarketing industry would evolve so as to intrude even further on people’s privacy. Furthermore, it is clear from the very enactment of the TCPA that Congress wanted the Act to protect consumers, present and future, from further invasion by telephone solicitations.

Congress made exemptions under the TCPA to protect legitimate business marketing calls; the calls made via soundboard technology do not merit these protections. NorthStar portrays

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<sup>18</sup> *S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 1410, the Telephone Advertising Consumer Protection Act; and S. 857, Equal Billing for Long Distance Charges: Hearing Before the Subcomm. on Commc’ns of the S. Comm. on Commerce, Sci., & Transp.*, 102d Cong. 1, 23 (1991) (hereinafter, “*Subcomm. on Commc’ns Hrg.*”).

<sup>19</sup> *Id.*

soundboard technology as something that Congress would have wanted to exempt from the TCPA because it is a technological innovation that can benefit commerce.<sup>20</sup> However, the types of commercial calls that Congress wanted to protect were those made by “the local insurance salesman, a very sincere guy who makes five calls a day to people in his community trying to get leads for selling insurance locally.”<sup>21</sup> It is clear that Congress’s intent was to protect those who were genuinely interested in establishing rapport and building continuing relationships with their clients. Companies that use soundboard technology, on the other hand, hire operators in other countries and who do not have any incentive for building lasting relationships with the people on the other end of the call. Otherwise, the industry would not have a 140-percent turnover rate, nor would the technology create a sense of “detachment” among the operators.<sup>22</sup> In other words, the actual users of soundboard technology do not amount to the kind of “personal salesman” that Congress had in mind when contemplating exemptions from TCPA.<sup>23</sup>

NorthStar’s representation of the warning by Alfred Sikes, the then-Chairman of the FCC, against a “sweeping Federal legislation” that would stymie “innovation” paints a misleadingly incomplete picture.<sup>24</sup> The particular statement to which NorthStar refers reads as follows: “There is thus a risk that a practical, although unintended, consequence of [TCPA] might be to curtail innovation, or to *eliminate legitimate telemarketing operations.*”<sup>25</sup> In addition to protecting innovation, Chairman Sikes, like Senator Pressler, clearly had in mind to protect “sincere” salespeople who conduct legitimate telemarketing operations, not those who hide behind a technology that relies on “artificial or prerecorded voice.”<sup>26</sup>

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<sup>20</sup> *Petition* at 10-11.

<sup>21</sup> *Subcomm. on Commc’ns Hrg.* at 25.

<sup>22</sup> See Madrigal, *supra* note 4.

<sup>23</sup> *Subcomm. on Commc’ns Hrg.* at 5.

<sup>24</sup> *Id.* at 54.

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> *Id.* at 25; 47 U.S.C. § 227(b)(1).



Furthermore, NorthStar misses the inapplicability of the premise upon which Chairman Sikes made his statement to the issue at hand: “If *all* uses of a given class of equipment are publicly detrimental, a statutory prohibition on its use might be warranted.”<sup>27</sup> With respect to the TCPA, Congress was not concerned with “all uses”; rather, it was concerned only with “unsolicited telemarketing calls.”<sup>28</sup> It is for that reason that an exemption was made for “a call made for emergency purposes or made with the prior express consent of the called party.”<sup>29</sup> Because the marketing calls made and conducted via soundboard technology do not fall under these exemptions, use of the technology should be barred by the Commission as constituting “artificial or prerecorded voice” prohibited under TCPA.

### **Conclusion**

The FCC has both the authority and the mandate to protect consumers as the primary telecommunications regulator in the United States.<sup>30</sup> Soundboard technology, by definition, employs “artificial or prerecorded voice” to bombard consumers with telemarketing phone calls. Its use therefore violates the express language of the TCPA. We ask that the FCC confirm what the statute makes clear: that the use of soundboard technology in telemarketing is prohibited by law.

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<sup>27</sup> *Id.* at 54 (emphasis added).

<sup>28</sup> *Id.* at 45.

<sup>29</sup> 47 U.S.C. 227(b)(1)(A).

<sup>30</sup> *What We Do*, Fed. Comm’n Comm’n (last visited Mar. 12, 2019), <https://www.fcc.gov/about-fcc/what-we-do>.



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