CHAPTER 2
LEGAL ISSUES IN PERMISSION MARKETING

INTRODUCTION

For the marketers, forming permission-based policy and monitoring its effective implementation demands pondering into legal and regulatory framework of a country. David Reed says permission marketing has become just a matter of legal compliance by the companies.¹ Customers’ initiatives for fighting against marketing organizations require awareness and knowledge about legal aspects of fair and customer-friendly marketing practices. Privacy concerns are in the centre of violations of consumer rights. Companies such as Microsoft and Netscape had to modify their products when customers showed objections for the companies invading customers’ privacy.

Legal platform and procedures are not uniform in all the counties. Different countries have adopted and corrected marketing and business legislations time to time. Government of India has taken various initiatives and encouraged forums related to consumer empowerment. Singh and Kumar (2008) explore consumers’ awareness level about these initiatives and activeness of the Consumer Court.²

2. 1. Permission marketing world-wide

In the U.K., there are different laws for protecting rights regarding receipts of marketing communications, which the public has not asked for, such as mails, telesales calls, e-mails, pre-recorded calls, faxes etc. The laws are the Data Protection Act - 1998, and the Privacy and Electronic Communications (EC Directive) Regulations - 2003, which replaced the legislation on 11th December 2003.³ The legislation was introduced on 1st May 1999.

¹ Reed David, Permission Impossible?, Marketing Week, 20th July 2006, p 39.
³ www.ico.gov.uk
For mail, the public must be informed by the marketers when the information collected from the public is going to be used for the purpose of Direct Marketing and the information is to be provided to other organizations.

2.2. Telephone Preference Service

People can intimate the marketing organizations or can register their phone number with the Telephone Preference Service (TPS). Telephone Preference Service keeps the database of the phone numbers of those people who don’t want to receive the phone calls that they have not asked for. The organizations are required to check the number from the TPS before making any marketing call. In case the person has intimated the organizations not to make a call, the organization cannot make marketing calls to that person.

Besides e-mails, E-mail marketing is also applicable to picture, voicemail, video and answering phone messages. Only in the case people have no objection to receive pre-recorded messages or fax, organization can send automated calls or send the message by fax. The people who do not want to receive the messages by fax, they can simply register their number to FPS (Fax Preference Service).

In case, still the organizations send the message, the regulations say that the people can ask the marketers to stop sending the messages on the given phone number or email address. This intimation can be sent through post/courier or email so that the proof of intimation remains.

2.3. Complaint

Even after intimating marketers, if they do not stop sending unwanted messages, the complaint can be made to the Information Commissioner’s office. Website www.ico.gov.uk provides a complaint form. The complainer has to furnish following details to the office:

- Complainer’s name and contact details
- The name of the organization to which the complaint to be made
• Marketing communication received
• Attempts to stop the communication

2.4. Penalties

However as per the U.K. law, sending marketing communication is not a criminal offence, though a breach of the law. The law has provision to send an Enforcement Notice, in case the organizations continuously break the law. The organizations have the right to appeal against this notice to the Information Tribunal. It will be taken as a criminal offence if the organization’s appeal fails or the organization doesn’t appeal at all. The organization can levy upon a fine up to £ 5,000 for ignoring the notice.

Telephone Preference Service (TPS), Fax Preference Service (FPS), and Direct Marketing Association (all located at London) are for the benefit of the public in this regard. This TPS is also applicable to the charity organizations and voluntary organization.1 The ‘Opt-out’ request can be sent to the companies if anyone wants to stop receiving marketing messages in form of SMS (Text messages).

In the U.S., Do-Not-Call Registry exists since 1st October 2003. Do-Not-Call Registry is similar to the Telephone Preference Service list of the U.K. There is prescribed fees to be paid by the telemarketers to have the access of the database maintained. The total fee received in the financial year 2005 from 6,794 organizations was around $1,80,99,304. The phone numbers should be renewed every five years. The organization cannot make calls before 8 am or after 9 pm. The caller must give the caller’s name, name of the organization, and contact details of the caller to whom the call is made. This National Do-Not-Call Registry is set up by the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC). The registry is applicable to all telemarketers except certain not-profit organizations. There is no charge for the registration of phone numbers with the registry.2 The U.S. government has also introduced The Telephone Consumer Protection Act (TCPA) of

1 www.tpsonline.org.uk

The law has provision for the public to file lawsuits against the organizations breaking such laws. $ 500 for the damage or actual monetary loss, whichever is greater, is to be compensated to the person. This amount can become thrice if it is proved that the caller intentionally violates the regulations. One can contact State Attorney General’s office or State Consumer Protection office in this matter.

French government implemented the Privacy & Data Protection laws in 1978. After introduction of The European Union Privacy and Electronics Communication Directive, French government proposed to update the Privacy & Data Protection laws. The Senate already accepted this. Regulations were likely to insist to make permission compulsory for data processing. This might affect the e-marketing companies as they would follow by the regulations and reduce quantity of commercial e-mails. It was proposed to make opt-in mandatory for all third party marketing through Loi pour la confiance dans l’économie numérique (The Act on Confidence in the Digital Economy).

2. 5. Regulations in India

On April 23, 2007, Telecom Regulatory Authority of India (TRAI) proposed the public from pestering telephone calls from telemarketers as follows:

1. Operators to be charges up to ₹ 1,000 per call.
2. No Compensation to the phone users for privacy violation.
3. These calls will be known as UCC (Unsolicited Commercial Communication).
4. Creation of NDNC (National Do Not Call) Registry for the database of subscribers not wanting UCC.
5. The guilty telemarketer can be charged with higher tariff.

6. Disconnecting telephone connection of service provider if telemarketers violate the regulation for a third time.

According to TRAI, in India, every year there are more than 10 billion unsolicited calls made. Sometimes, customers’ details are sold by one company to another just for five paisa per customer in India. Banking sector employs majority of telemarketers. This registry will help customers as they can subscribe for now receiving these calls.

In April 2007, TRAI came out with the Telecom Unsolicited Commercial Communication Regulations, 2007.¹ But the authority needed to consult the Ministry of Information Technology and Communication, and the Reserve Bank of India regarding tele-banking and service providers’ issues.

2.6. **NDNC (National Do Not Call) Registry**

The proposal of these guidelines is to differentiate between telemarketers from Other Service Providers (OSPs) such as telebanking, teletrading, call centers etc. service providers. There are around 60,000 telemarketers in India. These guidelines suggest for the registration by the telemarketers and OSPs paying ₹ 1,000 fees and the registration will be valid for 10 years. The DoT (Department of Telecom) has exclusive rights to carry out inspection and even suspend the telemarketer’s registration and license in case of noncompliance with the provisions. The security agencies can demand call data records of any call for a time period.

Coming into effect from June 5 2007, TRAI declared to impose a fine of ₹ 500 on telemarketers for each Unsolicited Commercial Call (UCC) or message. The proposal was made to create National Do Not Call (NDNC) Registry which will have the telephone numbers of those who do not want to receive unsolicited calls. Both - landline and cellular subscribers can register their numbers with telecom service provider not to receive these calls. This NDNC is set up by National Informatics Centre.

¹ The Times of India, Ahmedabad, September 3, 2007.
In the words of TRAI, “The telemarketer will have to register with NDNC Registry to avail the facility of scrubbing their calling list.” The government had informed the telecom providers to get registered with DoT by 31st August 2007 otherwise their service could be discontinued. The central government told the Supreme Court of India on July 27 2007 that the guidelines and regulations would be implemented from September 5 2007 to stop unsolicited calls. Additional Solicitor General P. P. Malhotra said to the court that the regulations for NDNC Registry will be similar to that of implemented in the western countries. Earlier, the Supreme court Justice A. K. Mathur and P. K. Balasubramanium batch said that the regulations are not strict and more positive stringent action is required.

The major drawback of the registry is that it doesn’t include calls from charities, government etc.1 When one telephone line of the violators is discontinued, they can get other telephone line. The TRAI issued a notification in the public interest regarding establishment of NDNC Registry vide Reference No. davp/06202/13/0024/0708.2 The notification said to register with the telecom operator of the phone users. The time limit of 45 days was given to the telemarketers. Even after 45 days if the phone users receive any unwanted call or SMS, the users can file a complaint with their telecom operator.3

By September 9 2007, 14750 telemarketers having around 4,50,000 telephone lines, had applied to various telecom service providers to register with Department of Telecom. On the opening day of NDNC Registry i.e. September 5 2007, more than 5 million people registered with the registry not to receive unsolicited calls. It is around 2.5 % of total 190 million mobile users in India.4

Following organizations issued an advertisement in consumer interest.5

1. Association of Unified telecom Service Providers of India (AUSPI)
2. COAI (Cellular Operator Associating of India )
3. Aircel

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2 The Times of India, Ahmedabad, August 27 2007.
3 www.ndncregistry.gov.in, Accessed on June 11, 2010
4 The Times of India, Ahmedabad, September 10 2007.
5 The Times of India, Ahmedabad, September 17 2007.
4. Airtel  
5. BPL Mobile  
6. BSNL  
7. Connect  
8. MTNL  
9. Hutch (now Vodafone)  
10. Idea  
11. Reliance Mobile  
12. Spice Telecom  
13. Tata Indicom

These advertisements informed the customers to register themselves via SMS, website or calling customer care of their service provider. In response of the regulations by TRAI, RCom (Reliance Communication) decided to set up Mobi-Marketing unit to generate load through mobile advertisements and companies can follow these leads.¹ RCom, the Anil Ambani group company, which is a CDMA service provider, came out with banner ads on its mobile handsets as a solution of DNC (Do Not Call) registration. Here, the mechanism were set to record the number of customers who have clicked on such ads and also how much time they have spent on the ads. This lead was then passed to the advertisers for follow-ups. When tested, this with ING Vysya Bank, it generated around 40,000 leads in 10 days. This company targets the banks, mutual fund companies, credit card companies, general insurance and life insurance companies and such other financial service companies to get them use this platform. In India, the telemarketing industry is said to be of ₹ 1,000 crore.

Less than 19 % households have mobile phones, which have annual income of less than ₹ 90,000. 93 % households own mobile phones whose annual income is more than ₹ 10,00,000. 85 % of mobile owners and 36 % of non-owners have their savings in bank accounts.

¹ “RCom floats mobi-marketing unit to counter TRAI DNC move”, Business Standard, New Delhi, October 3 2007.
Table 1 Annual income of the affluent mobile users

<table>
<thead>
<tr>
<th>Annual income (in ₹)</th>
<th>Households with mobile phones</th>
<th>Households without mobile phones</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt; = 90,000</td>
<td>38.9 %</td>
<td>85.6 %</td>
</tr>
<tr>
<td>90,001 – 2,00,000</td>
<td>39.5 %</td>
<td>12.2 %</td>
</tr>
<tr>
<td>2,00,001 – 5,00,000</td>
<td>15.4 %</td>
<td>1.9 %</td>
</tr>
<tr>
<td>5,00,001 – 10,00,000</td>
<td>5 %</td>
<td>1.2 %</td>
</tr>
<tr>
<td>&gt; 10,00,000</td>
<td>1.1 %</td>
<td>0 %</td>
</tr>
<tr>
<td>Total</td>
<td>100 %</td>
<td>100 %</td>
</tr>
</tbody>
</table>

(Source: “Mobile users are thrice as affluent non-owners”, Business Standard, New Delhi, Oct 4 2007)

Table 2 Consumer durable ownership of the mobile users

<table>
<thead>
<tr>
<th>Ownership of Consumer Durable</th>
<th>Households with mobile phones</th>
<th>Households without mobile phones</th>
</tr>
</thead>
<tbody>
<tr>
<td>Two wheelers</td>
<td>60.3 %</td>
<td>9.6 %</td>
</tr>
<tr>
<td>Four wheelers</td>
<td>14.3 %</td>
<td>1.7 %</td>
</tr>
<tr>
<td>Color TV</td>
<td>82.3 %</td>
<td>21.1 %</td>
</tr>
</tbody>
</table>

(Source: “Mobile users are thrice as affluent non-owners”, Business Standard, New Delhi, Oct 4 2007)

This shows that majority of the households having mobile phones, have annual income between ₹ 90,000 and ₹ 2,00,000. While majority of mobile phone non-owners have less than ₹ 90,000 annual income. So, the former group of households will be main target for the telemarketers. Looking at the consumer durable ownership, the percentage of households owning two wheelers, four wheelers, and color TV is higher in mobile owners with compare to mobile non-owners. Again, the mobile-owner group is preferred by the telemarketers.

After the announcement by TRAI regarding registering with NDNC, 65,21,322 users had registered by 4th October 2007 and 8,000 telemarketers had been given provisional registration which would be used by them to know the phone numbers registered with NDNC registry not to call them. Following chart shows the number of subscribers who have registered with the respective mobile phone service provider.
Table 3 Service providers and number of subscribers

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Service Provider</th>
<th>Registered subscribers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Bharti Airtel</td>
<td>30,97,974</td>
</tr>
<tr>
<td>2</td>
<td>Vodafone</td>
<td>16,19,863</td>
</tr>
<tr>
<td>3</td>
<td>Idea</td>
<td>8,22,387</td>
</tr>
<tr>
<td>4</td>
<td>TTSL</td>
<td>3,32,609</td>
</tr>
<tr>
<td>5</td>
<td>Reliance</td>
<td>2,01,162</td>
</tr>
<tr>
<td>6</td>
<td>BSNL</td>
<td>1,57,489</td>
</tr>
<tr>
<td>7</td>
<td>Spice</td>
<td>1,03,447</td>
</tr>
<tr>
<td>8</td>
<td>BPL</td>
<td>58,706</td>
</tr>
<tr>
<td>9</td>
<td>Aircel</td>
<td>54,959</td>
</tr>
<tr>
<td>10</td>
<td>MTNL</td>
<td>43,996</td>
</tr>
<tr>
<td>11</td>
<td>HFCL</td>
<td>28,730</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>65,21,322</strong></td>
</tr>
</tbody>
</table>

(Source: *Business Standard*, Mumbai, October 5 2007)

2.7. Is NDNC Registry a failure?

The opinion poll conducted in four metros – Delhi, Mumbai, Bangalore, and Kolkata by Synovate India for the Times of India gives following observations:

1. In Delhi, some of those who had registered on NDNC were getting 20 calls a week.
2. In Kolkata, 50% of those who had registered on NDNC said to have been continuously receiving unwanted calls.
3. In Mumbai, about two-third of those registered said to have stopped getting unwanted calls.
4. In Bangalore, 40% of people said not getting the calls.
5. In Delhi, about one-third of the respondents said getting more than ten unwanted calls a week.
6. The poll found the failure of the regulator in creating adequate awareness about the NDNC.
7. More than 25% of the respondents had not heard of NDNC.

The following data describes the percentage of aware population about NDNC Registry, the percentage of registered population, and the percentage of population getting unwanted calls even after registering in the four metros.
Table 4 Population Aware, Registered, and receiving unwanted calls

<table>
<thead>
<tr>
<th></th>
<th>Delhi</th>
<th>Mumbai</th>
<th>Bangalore</th>
<th>Kolkata</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aware</td>
<td>80 %</td>
<td>81 %</td>
<td>37 %</td>
<td>78 %</td>
</tr>
<tr>
<td>Registered</td>
<td>11 %</td>
<td>56 %</td>
<td>00 %</td>
<td>14 %</td>
</tr>
<tr>
<td>Call continue</td>
<td>100 %</td>
<td>63 %</td>
<td>00 %</td>
<td>50 %</td>
</tr>
</tbody>
</table>

(Source: “‘Don’t Call Me’ cries fall on deaf ears”, The Times of India, November 19 2007)

The poll conductor suggests having ‘Call Registry’ instead of Do-Not-Call Registry. The subscribers can choose about which offers or products they want to receive phone calls from the marketers. The telemarketers must be able to call only those who have registered. Around 67,00,000 had registered on NDNC by November 19 2007.

It is being argued that burden of registration should be only on those subscribers who wish to receive telemarketing calls rather than on the subscribers who does not want such calls.¹

In May 2010, TRAI invited comments on success of Do Not Call Registry and whether to set up ‘Do Call Registry’ and having limit on number of calls and SMS.² Views on the following questions were required to be sent to TRAI:

1. What are the primary factors for poor effectiveness of Telecom Unsolicited Commercial Communications Regulations, 2007 (4 of 2007) in its present form? Give your suggestions with justifications. (Para 2.3)

2. Do you feel that there is need to review the existing regulatory regime of Unsolicited Commercial Call (UCC) to make it more effective? What needs to be done to effectively restrict the menace of Unsolicited Commercial Communications (UCC)? (Para 2.3)

3. Do you perceive do call registry to be more effective to control Unsolicited Commercial Communications as compared to present NDNC registry in view of discussions held in Para 2.4 to 2.9? Give your suggestions with justification. (Para 2.10)

² Pahwa Nikhil, TRAI Proposes Do Call Registry; Send Your Suggestions To TRAI By Tomorrow, www.medianama.com, 9th June, 2010.
4. Do you perceive the need to control telecom resources of telemarketers to effectively implement provisions of Unsolicited Commercial Communications and to encourage them to register with DoT? What framework may be adopted to restrict telecom resources of defaulting telemarketers? (Para 2.11.3)

5. Do you agree that maximum number of calls as well as SMS per day from a telephone number (wireless as well as wireline) can be technically controlled to force telemarketers to register with DoT? What other options you see will help to effectively control telemarketers? (Reference Para 2.12.4)

6. Do you envisage that second screening at SMSC as proposed in Para 2.12.3 will effectively control unsolicited SMSs? Give your comments with justification. (Para 2.12.4)

7. What changes do you suggest in existing provisions to control the Unsolicited Commercial Communications effectively? Give your suggestion with justification. (Para 2.13.6)

8. Do you agree that present panel provisions to charge higher tariff from telemarketers are resulting in undue enrichment of service providers? What penalty framework do you propose to effectively control UCC without undue enrichment of service providers? (Para 2.13.7)

9. Do you feel that present UCC complaint booking mechanism is effective? What more can be done to enhance its effectiveness? (Para 2.13.8)

10. Do you feel that there is a need to enact legislation to control the Unsolicited Commercial Calls? Give your suggestion with justification. (Para 2.13.9)

11. Do you agree that definition in Para 2.14.1 correctly define Unsolicited Commercial Communications in Do Call registry environment? Give your suggestions with justification. (Para 2.14.2)

12. Do you feel that proposed framework to register on NDCR will be user friendly and effective? What more can be done to make registration on NDCR more acceptable to customers as well as service providers? (Para 3.7)

13. In your opinion what are the various options which may be adopted for setting up and operating the NDC registry in India? Among these suggested options which options do you feel is the most appropriate for implementation and why? Give your suggestion with justification. (Para 3.8.3)
In Canada, CRTC (Canadian Radio-television and Telecommunications Commission) regulates national level do not call registry. Gagne describes confusion which may arise in case an agent makes a call on behalf of the client, the agent will have to ask about customer’s willingness to be listed on the Do Not Call list of the client, the list of the agent, or the list of both.¹ John Gustavson, Head of the Canadian Marketing Association says that CRTC has not established calling hours.

2.8. Violations of Telecom Regulations

Despite of the provision of imposing a fine of ₹ 500 per unsolicited call or even disconnecting the phone lines of the telemarketers almost 80% of telemarketing firms have not stopped making unwanted calls to the telephone subscribers and thus violate the Telecom Regulation laid by TRAI. Effective from October 12, 2007, it is mandatory for telemarketers to register with NDNC Registry. Out of around 60,000 telemarketing firms in India, only 10,700 firms had registered with NDNC by November 2007. There were around 3,000 applications under process as on 27th November 2007. The TRAI had rejected 7,100 applications. The rejected and unregistered firms had not stopped calling without solicitation. The customers had continuously been sending complaint to TRAI regarding these unwanted calls. The TRAI has also thought of doubling the fine to ₹ 1,000 per unsolicited call and thus making the norms more stringent. The following approximate calculation shows the figure of cold calls by telemarketers in India.

2.9. Privacy and Security issues in Permission Marketing

Customers react differently when marketers invade their privacy to communicate online or offline. Sheehan Kim and Hoy Mariea (1999) studied how consumers respond to privacy online.\(^1\) They correlated customers’ level of concern with the frequency of adopting seven online behaviors. They provided seven actions or behavior choices to the respondents to take, including reading registration for websites, reading unsolicited e-mail, notifying ISP, unsubscribing, and sending highly negative messages to unsolicited e-mail senders. Analysis showed that as concern for privacy increased, respondents provided incomplete information to websites. Respondents notified ISP about unsolicited e-mail, requested for opting out from mail list, sent negative messages, registered for websites requesting information.

Hagel and Rayport (1997) observed that consumers were more concerned about the selfish use of information to create value for the organizations rather desire to keep the information confidential.\(^2\) In 1995, Microsoft disclosed that its Registration Wizard was automatically collecting information on the software running in the customers’ systems, without customers’ permission. It read configurations of the Personal Computer of the customers, when they registered online with Microsoft. Microsoft left this practice after oppositions from the public. ‘Cookie’ technology of Netscape stored information about websites visited and web pages clicked on users’

personal computer. Later, Netscape offered the feature of disabling Cookie function. In both the cases – of Microsoft, and Netscape, consumers opposed strongly when companies started using customers’ information for the business-benefits of the companies and without passing any benefit to the customers. With the right execution, the mobile channel has the potential to benefit both advertisers and consumers.¹

Bessen, Jim (1993) investigated the situations when customer information access is considered to be fair or unfair.² A launch of a product called ‘Lotus Market-Place’ was announced in 1991 by the product developer in America. 30,000 people complained the developer about invasion of their privacy by this product. The developer company withdrew this product. The product was a Compact Disk with household information from the database about American people. Without proper customer information, database will increase the cost to the companies. Mail Preference Service has been established by the direct marketers. Using this service, customers can opt-out receiving direct mail and delisting from mailing list. In US state legislatures, more than 1000 bills have been introduced to regulate telemarketing.

Chapter Bibliography

Books

Journals

**Newspapers**

**Websites**