No. 21-35746

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID BORDEN,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiff-Appellant,

v.

EFINANCIAL, LLC

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:19-cv-01430
The Honorable James L. Robart, District Court Judge

MOTION FOR LEAVE TO FILE BRIEF OF THE PROFESSIONAL ASSOCIATION OF CUSTOMER ENGAGEMENT AS *AMICUS CURAIE* IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMATION

The Professional Association for Customer Engagement ("PACE") respectfully moves under Federal Rule of Appellate Procedure 29(a)(2) for leave to file a brief as *amicus curia* in support of Defendant-Appellee eFinancial, LLC.

This case involves, among other items, determining the definitional scope of an automatic telephone dialing system ("ATDS") under the Telephone Consumer Protection Act ("TCPA") following the Supreme Court's ruling in *Facebook v.*

Duguid. PACE is the only trade association wholly dedicated to the advancement of companies in the telemarketing and call center industry, and therefore has an articulable and discernable interest in this case. Furthermore, PACE seeks to clarify an amicus brief it originally submitted in *Facebook v. Duguid*, which is being misconstrued and taken out of context by Plaintiff-Appellant Borden in the present case.

PACE's proposed brief is desirable because it narrowly addresses issues before the Court in the present litigation. In particular Plaintiff-Appellant Borden argues that he was contacted using an ATDS in violation of the TCPA, and advocates for an expanding interpretation of footnote 7 contained in the Supreme Court's ruling in *Facebook v. Duguid*. Correspondingly, PACE's brief seeks to clarify that a "random or sequential number generator" under the TCPA is properly interpreted as generating telephone numbers, which would defeat Plaintiff-Appellant's ATDS claim, and to properly explain the scope and rationale of footnote 7. PACE's proposed brief is, therefore, highly relevant to the present litigation and potentially dispositive of the issues before this Court.

For the foregoing reasons, the motion should be granted.

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February 9, 2022

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on February 9, 2022, this Motion was e-filed through the CM/ECF System of the U.S. Court of Appeals for the Ninth Circuit. I certify that all participants in the case are registered CM/ECF users and that the service will be accomplished by the CM/ECF System.

Date: February 9, 2022

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* the Professional Association of Customer Engagement states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

Founded in 1983, the Professional Association for Customer Engagement ("PACE") is a non-profit trade association dedicated to the advancement of companies that engage customers in a compliant manner using a variety of channels, including telephonically. For over 35 years, PACE has tracked technology, market trends, and legal/regulatory developments relevant to the customer engagement industry. It has members operating across the country and internationally. PACE's members include not only for-profit enterprises but also charities and professional fundraisers.

Additionally, PACE originally submitted an amicus brief in *Facebook v. Duguid* in support of Facebook's position. PACE is now submitting an amicus brief in this case to clarify its position, and because its own brief from *Facebook v. Duguid* is being misconstrued and taken out of context by Plaintiff Borden.

STATEMENT OF ISSUES

Whether the district court correctly held that Plaintiff-Appellant David Borden has failed to plausibly allege that the text message he received from Defendant-Appellee eFinancial, LLC were sent using an "automatic telephone dialing system" as defined by 47 U.S.C. § 227(a)(1), which is a necessary element

of Plaintiff's Telephone Consumer Protection Act ("TCPA") claim, and where Borden has alleged that he provided his telephone number to eFinancial but argues that eFinancial used a sequential number generator to store telephone numbers and produce telephone numbers by picking the order in which the telephone numbers were texted from eFinancial's database. PACE is submitting this *amicus* brief to help the Court better interpret the Supreme Court's *Facebook v. Duguid* opinion with respect to the meaning of the words "number generator," and the significance of footnote 7 to the foregoing issue.

SUMMARY OF ARGUMENT

The Telephone Consumer Protection Act ("TCPA") defines an "automatic telephone dialing system" ("ATDS" or "autodialer") as equipment with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator" and to dial those numbers. The essence of the issue before the Supreme Court in *Facebook v. Duguid,* 141 S. Ct. 1163, 209 L. Ed. 272 (2021), was one of statutory interpretation, which was largely resolved by the application of grammatical canons of construction. The fundamental question in *Facebook* was whether the random or sequential number generation requirement applied to both of the words "store" and "produce," or instead only applied to the word "produce." The Supreme Court framed the question presented as resolving a conflict among the

Courts of Appeal "as whether an autodialer must have the capacity to generate random or sequential *phone* numbers." *Facebook v. Duguid*, 141 S. Ct. at 1168 (emphasis added). The Supreme Court answered this question unequivocally in the first paragraph of its opinion: "We conclude that the clause modifies both, specifying how the equipment must either 'store' or 'produce' telephone numbers." *Id.* at 1167.

PACE submits this *amicus* brief ("present PACE *amicus* brief") to help the Court better interpret two issues pertinent to the ATDS definition. First, the interpretation of "number generator" is properly interpreted as a "*telephone*" number generator, as the *Facebook* opinion acknowledges that the numbers generated are telephone numbers that are to be dialed. Second, the purpose of footnote 7 of the *Facebook* opinion was to provide evidence that number generators could store numbers, contrary to Duguid's argument that a number generator can only "produce" and not "store" numbers.

ARGUMENT

I. Introduction

Facebook answered a very specific question related to the interpretation of the TCPA's statutory definition of an autodialer. The Court adopted a narrow interpretation that held the words "using a random or sequential number generator"

modifies both "store or produce."

The Supreme Court rejected the prior broad interpretation of cases like *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2019) that held the random or sequential number generator requirement only modified "produce." The Court did not accept the conclusion that all equipment that stored and dialed a telephone number was an autodialer, as this would cast too wide of a net and encompass conventional smartphones. *Facebook v. Duguid*, 141 S. Ct. at 1171-72. *Facebook* made explicitly clear that the equipment had to actually use either a random or sequential number generator to be an autodialer. *Id.* at 1167.

Although plaintiffs, like Borden, have tried to incorrectly broaden the scope of the autodialer definition focus post-*Duguid*, these efforts are misguided because they contradict the text of the statute and misinterpret the Court's opinion and ignore the context of the Court's reasoning in footnote 7. First, these attempts fail because the phrase "random or sequential number generator" should be interpreted as generating *telephone* numbers that are dialed. Second, they fail because plaintiffs like Borden misinterpret a sentence in footnote 7 of the *Facebook* opinion. In reality, in footnote 7, the Court cited PACE's *Facebook amicus* brief as evidence contradicting Duguid's assertion that number generators technically could not store numbers, and thus Duguid's premise for broadly interpreting the autodialer

definition was based on an incorrect technical understanding.

As a result the Court's interpretations in *Facebook*, the statutory definition of an ATDS or autodialer does not encompass smartphones nor common household telephones. However, adopting an incorrectly broad interpretation of these terms results in smartphones and household telephones falling with the scope of an autodialer. That is an unacceptable outcome that the Supreme Court expressly intended to avoid in *Facebook.*

II. Interpreting the Statute

Section 227(a)(1) of the TCPA defines an autodialer as:

"equipment which has the capacity—

"(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

"(B) to dial such numbers."

A. A "Random or Sequential Number Generator" Is Properly Interpreted as Generating Telephone Numbers.

Given that *Facebook* clearly mandates that equipment must use a random or sequential number generator to store or produce a number, the next issue involves the term "random or sequential number generator." Does this encompass equipment that merely generates any type of random or sequential number, or is it only limited to generating a telephone number?

Context matters

The Court in *Facebook* was guided by the context of the TCPA. *Facebook* stated that the TCPA was designed to address certain unique risks associated with indiscriminate dialing. "These prohibitions target a unique type of telemarketing equipment that risks dialing emergency lines randomly or tying up all the sequentially numbered lines at a single entity." *Facebook,* 141 S. Ct. at 1171. It followed that statement with the famous "chainsaws" and "scalpel" analogy: "Expanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers would take a chainsaw to these nuances problems when Congress meant to use a scalpel." *Id*.

The Court was interpreting risks associated with using a "random number generator" and "sequential number generator" as referring to dialing the *telephone numbers* being generated. "This case concerns 'automatic telephone dialing systems' (hereafter autodialers), which revolutionized telemarketing by allowing companies to dial random or sequential blocks of telephone numbers automatically." *Facebook,* 141 S. Ct. at 1167. The Court was focusing on the specific risks of dialing random or sequential telephone numbers. Obviously, the risk of randomly dialing an emergency line using a random number generator implies the random number

generator is creating the telephone number that is being dialed. Similarly, the risk of tying up a sequence of telephone lines using a sequential number generator implies it is generating blocks of sequential telephone numbers that are being dialed.

Other portions of the *Facebook* Opinion support this conclusion. For example:

> Congress expressly found that the use of random or sequential number generator technology caused unique problems for business, emergency, and cellular lines. See *supra,* at 2. Unsurprisingly, then, the autodialer definition Congress employed includes only devices that use such technology, and the auto-dialer prohibitions target calls made to such lines.
> *Facebook,* 141 S. Ct. at 1172.

Thus, the plain implication is that the Court construed a "random or sequential number generator" as generating telephone numbers being dialed, not merely any number. For example, it is not possible to dial a four-digit telephone number, regardless of whether it was randomly generated or not, since it cannot be a telephone number. Dialing a telephone number requires that it must be a seven or ten-digit number that adheres to the North American Numbering Plan structure.[1]

[1] Plaintiff Borden may argue that modern phone equipment is capable of dialing an identifying number with fewer than seven or ten digits in order to effectuate a call. However, even in modern systems, dialing an identifying number with fewer than seven or ten digits merely facilitates the call taking place and the telephone number is ultimately the number dialed.

B. The Scope and Reasoning of Footnote 7.

Footnote 7 addressed Duguid's allegation that the word "store" in the TCPA autodialer definition would be superfluous if the Court adopted Facebook's reasoning. Duguid argued that because number generators technically can only produce numbers, the word "store" was superfluous. So, based on this technical reasoning, Duguid proposed a broad interpretation to ostensibly avoid that function (store) becoming superfluous. Footnote 7 addressed this argument stating: "Duguid argues that such a device would necessarily 'produce' numbers using the same generator technology, meaning 'store or' in §227(a)(1)(A) is superfluous. 'It is no superfluity,' however, for Congress to include both functions in the autodialer definition so as to clarify the domain of prohibited devices." *Facebook,* 141 S. Ct. at 1172. The Court then continues in footnote 7 with an example as to why the "store" function is not, in fact, superfluous:

> For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time. See Brief for Professional Association for Customer Engagement et al. as *Amici Curiae* 19.
> *Id*.

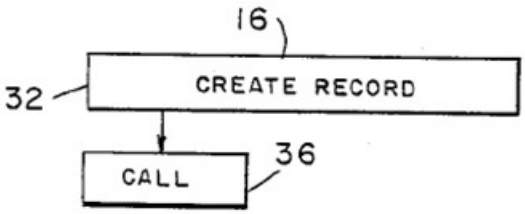
The Court discusses U.S. Patent 4,741,028 that issued prior to the passage of the TCPA. That patent was discussed in PACE's *Facebook amicus* brief and illustrates how a dialer could incorporate a number generator to store a number for

dialing at a later time. Specifically, in that patent, a random number generator was used to select a number from a list, and then store the number in a file for dialing at a later time.

Consequently, it is apparent that the Court was addressing how a number generator could be used to store a number. The Court demonstrated why it was not superfluous for the statute to recite "store" in the phrase "store or produce." The premise that number generators technically could not store a number was incorrect and citing PACE's *Facebook amicus* brief provides evidence that undercuts one of Duguid's fundamental arguments supporting his rejected interpretation.

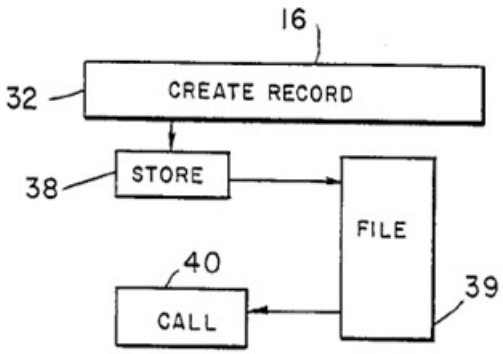
PACE's *Facebook amicus* brief directly focused on the issue of showing how number generators could store a number. The Summary section of PACE's *Facebook amicus* brief stated that the broad interpretation from the Ninth Circuit in *Marks* and others was predicated on an incorrect understanding of technology, i.e., number generators could not store numbers. (ER-25.) The Summary section of PACE's *Facebook amicus* brief indicated that dialers incorporated number generators in various ways and that were used to process the numbers "either for immediate dialing or to be stored for subsequent dialing." (ER-26.) Thus, the Summary section concludes by stating "[w]ith this understanding, it becomes clear that the ATDS definition does not contain surplusage." (ER-26.)

PACE's *Facebook amicus* brief illustrates how a number generator could be used to store a number by using U.S. Patent 4,741,028 (also known as the "028 Patent") as an example. That patent disclosed how a number generator could produce the number for either 1) immediate dialing, or 2) store the number in a file to be dialed later. PACE's *Facebook amicus* brief illustrated the former function (immediately dialing of the number) by recreating FIG. 2 from U.S. Patent 4,741,028.



Essentially, after the number generator determined the number (which could occur in various ways), the number was incorporated into a call record that was immediately called (i.e., dialed).

PACE's *Facebook amicus* brief also illustrated how the same patent disclosed an alternative to immediate dialing. After the number was determined and incorporated into a record, the record was stored in a file for later dialing, as shown in FIG. 3 from that patent.



If the goal of the TCPA was to prevent indiscriminate dialing of sequentially generated or randomly generated telephone numbers, then the statute would have to prohibit both the immediate dialing of such numbers after their generation, as well as the subsequent dialing of such numbers after they were stored in a file. It would utterly frustrate the purpose of the TCPA if the autodialer prohibition could be avoided by simply generating indiscriminate telephone numbers, storing them in a file, and then later dialing those numbers from the file.

Thus, the Court's citation to PACE's *Facebook amicus* brief supports the Court's finding that there is no surplusage when adopting the narrow interpretation of the autodialer definition.

Further, because number generators could produce as well as store numbers, the goal of preventing indiscriminate dialing is met by defining the autodialer in the narrow manner as stated.

Focusing on just one sentence from footnote 7 can lead to a distorted

conclusion. ("For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list".) Borden concludes that the Court was stating that merely using a random number generator for selecting numbers from a list would cause the equipment to fall within the scope of the autodialer definition. But doing so ignores the context of the sentence and that the purpose of the footnote was to illustrate how a number generator could store a generated telephone number. Further, when considering the immediately following sentence (i.e., that references the number generator storing the number) along with citation to PACE's *Facebook amicus* brief addressing the issue of storing numbers, it is clear that the Court was illustrating how a random number generator could be involved in storing a randomly or sequentially generated telephone number for subsequent dialing. Thus, footnote 7 references PACE's *Facebook amicus* brief for purposes of rebutting Duguid's incorrect technical argument that number generators in a dialer could not store a number. Footnote 7 does not and cannot change *Facebook's* core holding that a system must use a random or sequential phone number generator to qualify as an ATDS.

Furthermore, in the wake of *Facebook,* courts have overwhelmingly rejected plaintiffs' arguments regarding the impact of Footnote 7. For example, in *Timms v. USAA Fed. Sav. Bank,* the court rejected an expansive reading of Footnote 7 and

held that the phrase "preproduced list" necessarily referred to a list that had itself been "sequentially generated and stored."[2] Similarly, in *Hufnus v. DoNotPay, Inc.*, the court reasoned that the TCPA's definition of autodialer post-*Facebook* meant platforms that allowed callers to "dial random or sequential blocks of numbers automatically," and not systems that randomly or sequentially dial numbers from a list itself created in a non-random, non-sequential way.[3] In *Meier v. Allied Interstate LLC,* this Court also rejected an expansive reading of Footnote 7 noting it was "not

[2] *Timms v. USAA Fed. Sav. Bank*, 2021 U.S. Dist. LEXIS 108083 at * 14-17 (D. South Car. June 9, 2021) ("Plaintiff takes footnote 7 out of context…. This court believes the Supreme Court's statement—that an "autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list" and "then store those numbers to be dialed at a later time"—refers to the process as explained by PACE on page 19 of its amicus brief. And, as a result, the "preproduced list," is one that is "sequentially generated and stored.").

[3] *Hufnus v. DoNotPay, Inc.*, 2021 U.S. Dist. LEXIS 118325 (N.D. Cal. June 24, 2021) ("The Supreme Court explained in *Duguid* that the TCPA's definition of autodialer concerns devices that allow companies 'to dial random or sequential blocks of telephone numbers automatically,' not systems, such as DoNotPay's, that randomly or sequentially dial numbers from a list that was itself created in a non-random, non-sequential way. 141 S. Ct. at 1167. The Supreme Court also explicitly stated that its opinion in *Duguid* was intended 'to resolve a conflict among the Courts of Appeals' about the types of devices that qualify as autodialers….").

central the Court's analysis of the equipment at issue in *Duguid*.[4] The list of courts reaching the same conclusion continues to grow.[5]

[4] *Meier v. Allied Interstate LLC,* No. 20-55286, 2022 U.S. App. LEXIS 1413 at *3 (9th Cir. January 19, 2022) (Holding a system "does not qualify as an ATDS merely because it stores pre-produced lists of telephone numbers in the order in which they are uploaded.").

[5] *See e.g.*, *Cross v. State Farm Mut. Auto. Ins. Co.*, No. 1:20-CV-01047, 2022 WL 193016, at *24-25 (W.D. Ark. Jan. 20, 2022) (internal citations omitted) (noting that "many district courts have relied on *Duguid* to hold that a platform which produces a set of phone numbers from an established, non-random database of phone numbers, or specifically targets numbers in that non-random database, does not qualify as an ATDS under TCPA," and adopting the same position; *Raphael Aus. V. Alorica Inc.*, 2021 U.S. Dist. LEXIS 240677 (C.D. Cal. Dec. 16, 2021) (holding equipment that dials from a curated list does not fall within the definition of an ATDS, even if the equipment uses a random and sequential number generator to determine which of the phone numbers from that list will be called next.); *Tehrani v. Joie De Vivre Hosp., LLC*, Case No. 19-cv-08168, 2021 U.S. Dist. LEXIS 165392, at *16 (N.D. Cal. Aug. 31, 2021) ("[The PACE]brief makes clear that the 'preproduced list' was not some kind of pre-existing list but rather a list of phone numbers that was generated by a number generator."); *Grome v. USAAA Sav. Bank*, Case No. 4:19-CV-3080, 2021 U.S. Dist. LEXIS 164255, at *13 (D. Neb. Aug. 31, 2021) ("[Plaintiff] takes the footnote out of context: it follows a sentence which explains that an autodialer could include "devices that used a random number generator to store numbers to be called later (as opposed to using a number generator for immediate dialing). The parties agree that is not what the Aspect UIP was programmed to do."); *Franco v. Alorica Inc.*, Case No. 2:20-CV-05035-DOC-(KESx), 2021 U.S. Dist. LEXIS 164438, at *7 (C.D. Cal. July 27, 2021) ("When a defendant randomly makes calls from a curated list, it is not randomly or sequentially *generating* phone numbers. Therefore, under the Supreme Court's definition of an ATDS announced in *Facebook*—equipment that 'uses a random or sequential number *generator'*—that defendant is not using an ATDS and cannot be liable under § 227 of the TCPA."); *Barry v. Ally Fin., Inc.*, Case No. 20-12378, 2021 U.S. Dist. LEXIS 129573, at *19 (E.D. Mich. July 13, 2021) ("Plaintiff takes Footnote 7 out of context…. There has been no allegation that the preexisting 'stored' list of phone

The Court Sought to Avoid A Broad Interpretation of the Autodialer Definition That Encompasses Consumer Smartphones

The Supreme Court avoided broad autodialer interpretations that would encompass smartphones. Applying this principle supports the conclusion that the Court construed a "sequential number generator" as generating sequential telephone numbers. It was not understood to encompass any number that was sequentially generated.

Adopting a broad interpretation of "sequential number generator" that encompasses any number leads to an even broader outcome than what the Supreme Court sought to avoid. Broadly interpreting this term would encompass virtually all conventional digital consumer telephones (wireline, cordless, and smartphones). A

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numbers in this case were 'sequentially generated and stored.' Rather, Plaintiff pleads that the phone numbers called are specifically identified in connection with an account."); *Watts v. Emergency Twenty Four, Inc.*, Case No. 20-cv-1820, 2021 U.S. Dist. LEXIS 115053, at *8-9 (N.D. Ill. June 21, 2021) (granting dismissal because "the alleged facts suggest that instead of randomly or sequentially generating Watts's number, EMERgency24's equipment stored Watts's number in a database and dialed that stored number because he was an employee at a business that used EMERgency24's alarm notification system). In contrast to these opinions, one court cited *Facebook* FN 7 to hold that a system is an ATDS if it randomly or sequentially determines the order in which to call numbers from a prepopulated list, even if the prepopulated list itself was not randomly or sequentially generated. The court, however, provided no rationale for its broader interpretation of FN 7 and did not reject or even address the overwhelming body of case law rejecting this interpretation. *See McEwen v. NRA of Am.*, No. 2:20-cv-00153-LEW, 2021 U.S. Dist. LEXIS 242273, at *13 (D. Me. Dec. 20, 2021).

brief technology primer is required to understand why such an outcome results and should be avoided.

A Brief Technology Primer on Telephone Dialing Modes for Originating Calls

Almost all consumer wireline telephones are capable of initiating calls in two dialing modes: dial-pulse dialing and touch-tone dialing. Dial-pulse dialing initiates a series of "clicks" (called dial pulses) to dial each dialed digit. Each click or dial-pulse corresponds to opening and closing a switch connecting the telephone line. These are the same dial-pulses encountered on (the now antiquated) rotary-style telephones. In the 1960s, touch-tone phones were introduced. Touch-tone phones introduced a new dialing method that, unlike modern digital phones and smartphones, involved sending a series of tones when a button or key was pressed. These tones are called "dual tone multiple frequency" ("DTMF") tones and each tone corresponds to a digit.

Controlling the timing of how these digits are sent – whether dial-pulse or touch-tone – is critical when making a phone call. There are telephony standards that define the timing requirements for sending dial-pulses and touch-tones. For example, when outpulsing a digit, if a user dials the first five digits of a telephone number and waits too long, e.g., 20 seconds, to dial the sixth digit, a "reorder" tone will be played to the caller because the caller waited too long to dial the next digit.

If the inter-switch time period is exceeded, the switch will consider the call attempt to have been abandoned. Thus, there is a maximum inter-digit timing defined between digits. On the other hand, outpulsing a "1" using a dial-pulse and immediately following it by outpulsing a "5" could be interpreted as outpulsing a "6". Thus, there is a minimum inter-digit timing requirement enforced by the central office switch to distinguish between digits.

There are also separate minimum and maximum inter-digit and duration timing requirements applicable to touch-tone dialing. For example, pressing a key on a touch-tone telephone for a fraction of a second may generate a tone that is too short to be properly recognized. Similarly, holding a key on a touch-tone telephone for too long will result in the call attempt being abandoned.

In the case of dial-pulse dialing, the timing of these dial-pulses indicating a digit was originally controlled by using a spring in a rotary telephone that controlled a mechanical switch connected to a faceplate. The faceplate was rotated by the user and the spring caused the faceplate to rotate back to the starting position after a digit was dialed. Inter-digit timing was accomplished by the time it took to reposition the user's finger in the corresponding hole.

In the digital telephones this mechanical process is mimicked by an electrical switch that is opened and closed with precisely controlled timing, which causes the

clicks to be heard. To control this timing, electronic telephones use a digital counter. A digital counter (or simply a "counter") is a digital circuit that presents a number as an output, and that number may count the occurrence of various events, such as a clock signal that periodically cycles. Thus, the output value is incremented in response to detecting the event. The counting of clock cycles allows precise control of the timing when the switch is opened and closed. This technique of counting the frequency of a clock signal to measure time is frequently employed in consumer devices, such as wrist watches and household clocks. For example, wristwatches may count the frequency of a high-frequency quartz electronic oscillator to determine the precise duration of a second. Digital household clocks may count the cycles of the alternating household line voltage to determine a second. Because household AC line voltage oscillates at 60 cycles per second, counting 60 cycles equates to one second; counting 30 cycles corresponds to one-half of a second, etc.

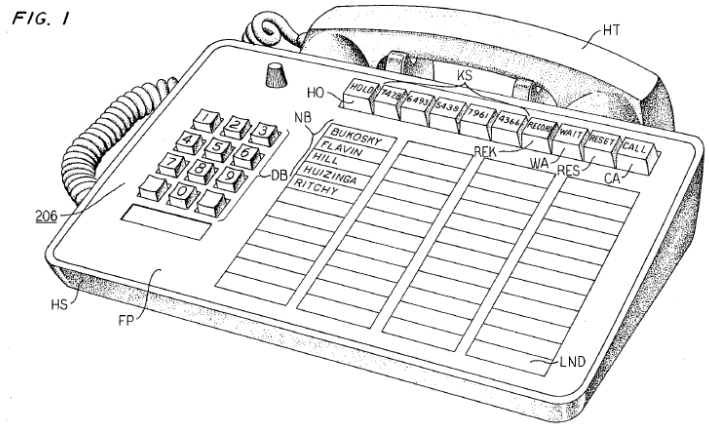
The counting of clock cycles to control the timing of dialing telephone numbers in digital electronic telephone devices is well documented. An Appendix is provided identifying various patents that predate the TCPA by decades, which used counters to control the digits being dialed. (Appendix attached as Exhibit A.) Counters were also used to control how many digits were to be dialed. For example, dialing a local telephone number involves outpulsing seven digits whereas long

distance numbers involve outpulsing ten digits (or eleven digits, if counting the "1" used for indicating long-distance calls). Thus, a counter was used to identify how many digits were involved.

Those seeking a broad definition of an autodialer will invariably argue that a sequential number generator could generate any type of number. This would result in a counter found in a consumer telephone being considered a "sequential number generator." For example, if this Court were to accept Plaintiff's position that randomly or sequentially generating an identification number is sufficient to trigger the prohibition against autodialers, future plaintiffs could argue that the sequential generation of "counter" numbers used by touch-tone phones also triggers the autodialer prohibition. This would result in an ATDS definition even broader than the interpretation rejected in *Facebook*. However, a "counter" is fundamentally a different function than what Congress had in mind when it spoke of a "sequential number generator" and their comparative operation, construction, and use, are different.[6]

[6] A sequential number generator creates a set of numbers defined by a lower and upper range, and an incremented amount. See, e.g., https://www.reformattext.com/sequential-number-generator.htm. A counter typically detects an event, and present a numerical value. It is reset before use, so that a known value is used as a starting value. See, e.g., https://en.wikipedia.org/wiki/Counter_(digital).

Adopting this broad interpretation of "sequential number generator" would encompass every instance of using a counter to generate the dialed digits for a telephone call. This would result in virtually all conventional household telephones using digital electronics falling within the definition of an autodialer. This would also encompass virtually all business telephones, including the business telephone set described in Figure 1 of U.S. Patent 3,670,111, shown below:



The Appendix shows how such a phone described in this patent explicitly incorporated various counters to control the production of digits when dialing a telephone number. Other patents in the Appendix illustrate the use of such technology in telephones as well, i.e., using counters to produce the dialed digits. Thus, common residential telephones would fall within the scope of an "autodialer" if a court were to adopt a broad interpretation of "sequential number generator."

The Supreme Court rejected a broad interpretation of an autodialer in

Facebook that would result in encompassing commonly used smartphones. Applying a broad interpretation of "sequential number generator" would be *even broader* and encompass not only smart phones as the Supreme Court worried,[7] but also conventional electronic household and business telephones from the last 50+ years.

Conclusion

Plaintiff Borden misinterprets the amicus brief in *Facebook* submitted by the very same party submitting this brief. An accurate read of the *Facebook* and PACE's amicus brief make clear that Congress addressed the nuanced problem of indiscriminately dialing wireless numbers, emergency telephone lines, and multiple sequentially numbered telephone lines by using a scalpel, and not a chainsaw. The term "random or sequential number generator" should be properly construed as generating sequential telephone numbers that are dialed. Additionally, form a technological perspective and in PACE's opinion, adopting the perspective advocated by Borden would result in an untenably broad interpretation of an ATDS that is even more sweeping than the definition at issue in *Facebook*.

Further, footnote 7 of *Facebook* describes using a random number generator

[7] Smartphones employ computer processors to control the timing of various internal functions and thus mimic the processes used by the wired telephones discussed above.

to select a number and should not be construed as the Court defining an autodialer. Rather, the Court was rebutting the assertion that number generators cannot technically store a number. Adopting the interpretations proposed herein is consistent with *Facebook* and the problems the TCPA was intended to address; and further avoids an interpretation that encompasses all common telephone and smartphones used by consumers.

DATED: February 9, 2022

Respectfully submitted,

/s/ Michele Shuster

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STATEMENT OF RELATED CASE

Pursuant to Ninth Circuit Tule 28-2.6, *Amicus Curiae* notifies the Court of a related case which is captioned *Brickman v. Facebook, Inc.*, Appeals No. 21-16785 (9th Cir. Oct. 26, 2021) on Appeal from California Northern District, Docket No. 3:16-CV-00751-WHO (Filed Feb. 12, 2016). This case raises closely related issues to those raised here. In *Brickman v. Facebook Inc.*, at issue is whether Defendant-Appellee Facebook sent Plaintiff-Appellant Brickman a "happy birthday" text announcement without consent in violation of the Telephone Consumer Protection Act ("TCPA"), and whether the text announcement qualified as informational in nature. Brickman alleges, in part, that the text announcements were sent using an automatic telephone dialing system ("ATDS"). Accordingly, *Brickman v. Facebook, Inc.* presents similar issues to the present case insofar as both involve interpretations of what constitutes an ATDS under the TCPA following the Supreme Court's ruling in *Facebook v. Duguid*.

CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

This brief contains 6,334 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a cross-appeal brief and complies with the word limit of Cir. R. 28.1-1.

[**x**] is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3)

[ ] is for a death penalty case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

[ ] it is a joint brief submitted by separately represented parties:

[ ] a party or parties are filing a single brief in response to multiple briefs; or

[ ]a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Date: February 9, 2022

Mac Murray & Shuster, LLP

/s Michele Shuster
Michele A. Shuster (Ohio Bar No. 62500)

Attorney for Amicus Curiae
Professional Association for Customer Engagement

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on February 9, 2022, this Brief was e-filed through the CM/ECF System of the U.S. Court of Appeals for the Ninth Circuit. I certify that all participants in the case are registered CM/ECF users and that the service will be accomplished by the CM/ECF System.

Date: February 9, 2022

Mac Murray & Shuster, LLP

/s Michele Shuster
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APPENDIX A

Background and Purpose

"Counters" are circuits or functions that are commonly encountered in digital systems, such as computers and digitally controlled devices. Counters can be used for a wide variety of purposes and thus there are various types and names associated therewith. In each case, the counter typically presents an output, which is a binary representation of a number, and that number can represent different things. A counter will typically count to a limit, and then 'resets' back to zero. For example, a "decade counter" will count 0-9 and then reset to 0. Other counters will count-down, e.g., counting from 9 to 0, and then resetting to 9. A counter could be used to identify, for example, which digit of a telephone number is currently being outpulsed.

Counters are frequently coupled with a periodic signal (variously known as a "clock", "oscillator", "impulse generator", "pulse generator", etc.) to measure a time period. Household digital clocks, for example, measure time by counting each occurrence that a household AC voltage changes. Since household voltage alternates at 60 cycles per second, counting 60 cycles measures precisely 1 second. Counting 30 cycles measures ½ second, etc.

This appendix identifies three patents that illustrate the use of counters in a digitally controlled telephone for providing the dialed number when originating a

call. In order to dial a telephone number, it was necessary (in some instances) to know beforehand whether the number dialed was a 7 digit number associated with a local call, a 10 digit intra-state call, or a 11 digit long distance call. Thus, some of the examples illustrate the use of a counter corresponding to the number of digits in the telephone number. Each digit to be dialed would correspond to a number of dial-pulses. Thus, dialing the number "7" would cause 7 dial-pulses to be originated by the telephone. Additional time was required between numbers so that the dial-pulses for each number were separately identifiable.

A complete description nor understanding of the relevant circuity in the identified patents is not necessary, nor provided, to establish two main points:

a) Counters are an integral part of the functionality for generating digits in a telephone.

b) Clocks are used provide periodic signals to the counters, which are counted to establish a time period used to generate the dial pulses associated with the dialed digits.

In each case, identification is provided of the function of the counters and clock signals in controlling the timing for sending dial-pulse and touch-tone signals when originating calls. This technology has been incorporated in conventional residential electronic telephones for the last 50+ years.

EXAMPLE 1

A copy is shown below of the first page of U.S. Patent 3,670,111, entitled "*Repertory Dialer Telephone Set With Register Storage Of The Digits*", issued on June 13, 1972.

United States Patent
Bukosky et al.

[15] **3,670,111**
[45] **June 13, 1972**

[54] **REPERTORY DIALER TELEPHONE SET WITH REGISTER STORAGE OF THE DIGITS**

[72] Inventors: **Allen A. Bukosky; Michael A. Flavin,** both of Indianapolis, Ind.; **Donald G. Hill,** Boulder, Colo.; **Donald D. Huizinga,** Indianapolis; **James F. Ritchey,** Carmel, both of Ind.

[73] Assignee: **Bell Telephone Laboratories, Incorporated,** Murray Hill, Berkeley Heights, N.J.

[22] Filed: **Dec. 2, 1969**

[21] Appl. No.: **881,515**

[52] **U.S. Cl.** ..... **179/90 B,** 179/90 BD
[51] **Int. Cl.** **H04m 1/45**
[58] **Field of Search** ..... 179/90 B, 90 BB, 90 BD, 90 AD

[56] **References Cited**

UNITED STATES PATENTS

3,511,933	5/1970	Holmes	179/90 B
3,482,058	12/1969	Guennou	179/90 BB
3,364,314	1/1968	Huizinga	179/90 B
3,342,943	9/1967	Aumuller	179/90 B
3,243,517	3/1966	Miller	179/90 BB
3,428,758	2/1969	Hall	179/90 BB
3,601,552	8/1971	Barnaby	179/90 B
3,588,362	6/1971	Kass	179/90 B
3,555,201	1/1971	Kuehnle	179/90 BD
3,280,269	10/1966	Brown	179/90 BB

FOREIGN PATENTS OR APPLICATIONS

1,036,467	5/1962	Great Britain	179/90 B
1,093,184	10/1964	Great Britain	179/90 B
1,110,606	6/1964	Great Britain	179/90 B

Primary Examiner—William C. Cooper
Assistant Examiner—Tom D'Amico
Attorney—R. J. Guenther and Edwin B. Cave

[57] **ABSTRACT**

In an electronic type repertory dialer telephone set, direct station selection for recording or automatically dialing out is provided by a name button switch array, each button accessing an associated shift register memory. A clock pulser and counter circuit initiates an automatic call sequence in response to the electronic detection of dial tone after a particular memory has been designated.

3 Claims, 9 Drawing Figures

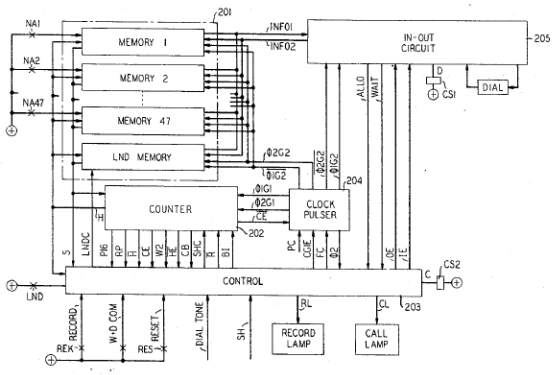
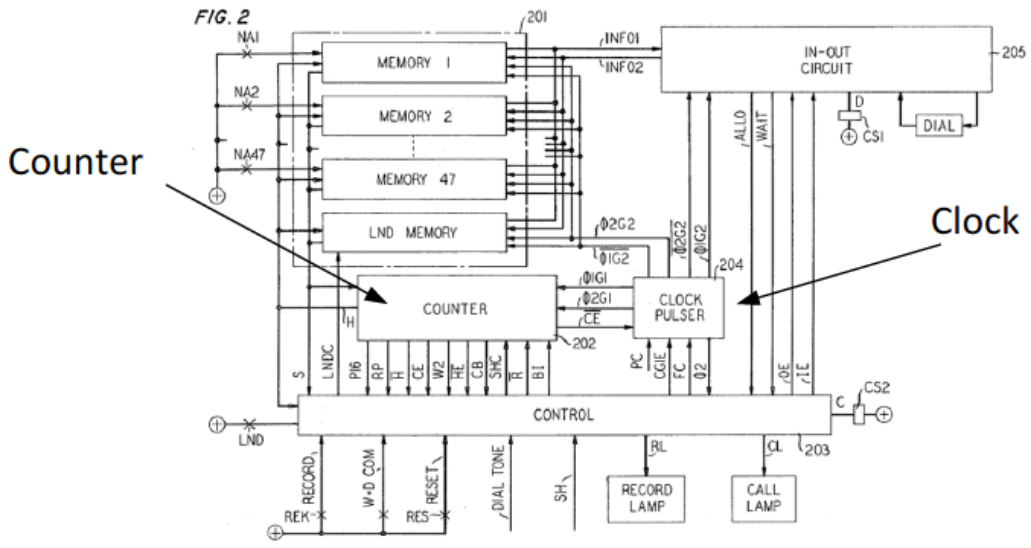


Fig. 2 of the '111 patent clearly discloses the counter receiving clock pulses from the clock function (the clock pulser), identified below:



The Abstract section of the '111 patent specification discloses that the counter is involved in initiating the automatic call sequence involving the dialed digits.

- In an electronic type repertory dialer telephone set, direct station selection for recording or automatically dialing out is provided by a name button switch array, each button accessing an associated shift register memory. **A clock pulser and counter circuit initiates an automatic call sequence** in response to the electronic detection of dial tone after a particular memory has been designated. ('111 Patent, Abstract, emphasis added.)

In addition, other portions of the'111 patent specification disclose the role of the clock and counter is to initiate dialing by sending the dialed digits to the "in-out circuit" 205:

- The counter chip 202 includes a four-bit shift register and a 16-bit shift register SR31 and SR30 respectively as shown in FIG. 6, together with several logic gates. **Clock pulses are counted on this chip** by the two shift registers and information is put out as a result of the count which is employed to control the logic cycle. The four-bit shift register, which is wired to enable it to count up to eight and to produce an output signal for every four counts, operates on a bit-by-bit basis. During **the first four counts or clock pulses, four binary bits constituting one decimal digit** are shifted from the memory to the shift register SR80 in the in-out circuit 205. During the next four pulses, **this digit is read out of SR80 in parallel to operate the dial 206.** (Patent 3,670,111, column 4, lines 60-72, emphasis added.)

EXAMPLE 2

A copy is shown below of the first page of U.S. Patent 3,718,771, entitled "*Automatic telephone calling apparatus utilizing digital logic devices*", issued on February 27, 1973.

United States Patent [19]
Bank

[11] **3,718,771**
[45] **Feb. 27, 1973**

[54] **AUTOMATIC TELEPHONE CALLING APPARATUS UTILIZING DIGITAL LOGIC DEVICES**

[75] Inventor: **Gilbert Bank**, Highland Park, N.J.
[73] Assignee: **National Midco Industries**, Levittown, Pa.

[22] Filed: **July 7, 1970**
[21] Appl. No.: **52,934**

[52] **U.S. Cl.**.....**179/90 R**, 179/90 B
[51] **Int. Cl.**.....**H04m 1/44**
[58] **Field of Search**...170/90 BD, 90 B, 90 R, 90 CS, 170/90 AD, 18 BA; 340/359, 365; 307/226, 220

[56] **References Cited**

UNITED STATES PATENTS

3,341,666	9/1967	Wallace	179/90 BD
3,441,685	4/1969	Wallace	179/90 B
3,422,229	1/1969	Wallace	179/90 B
3,555,201	1/1971	Kuehnle	179/90 B
3,515,815	6/1970	Baynard	179/90 B
3,553,387	1/1971	Wells	179/90 CS
3,588,362	6/1971	Kass	179/90 BD

FOREIGN PATENTS OR APPLICATIONS

1,148,135	7/1966	Great Britain	179/90 B
248,323	3/1960	Australia	179/90 B
1,110,606	6/1964	Great Britain	179/90 B
1,093,184	10/1964	Great Britain	179/90 B
1,036,467	5/1962	Great Britain	179/90 B

Primary Examiner—Ralph D. Blakeslee
Assistant Examiner—Thomas D'Amico
Attorney—Lerner, David & Littenberg

[57] **ABSTRACT**

An automatic telephone calling apparatus is disclosed in which a first counter counts dial pulses and a second counter counts the digits of a telephone number. A cross-wiring field permits the detection of coincidence between one of the outputs of each counter and one of the outputs of the other counter. When a coincidence is detected, the dial pulse counter is stopped at the desired number of dial pulses. An interdigital timer is then activated to time out a preselected interdigital interval. Thereafter, the dial pulse counter again begins to count dial pulses and again terminates when the particular count cross wired in the cross-wiring field is reached.

3 Claims, 5 Drawing Figures

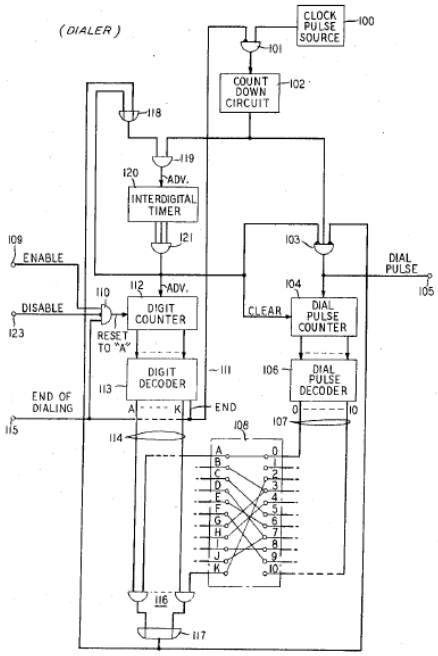
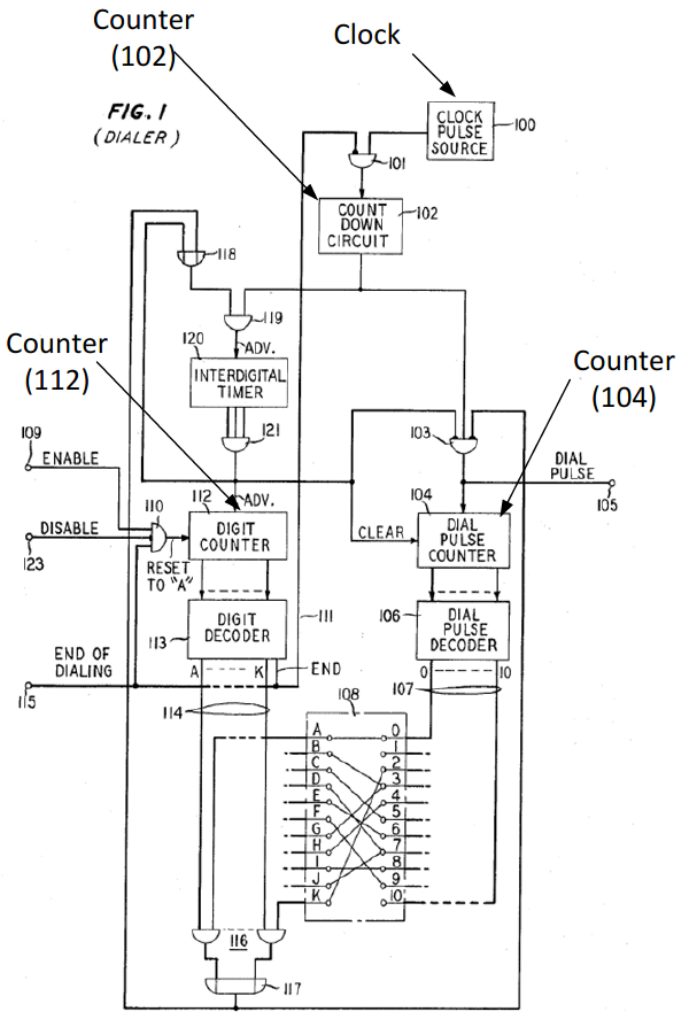


Fig. 1 of the '771 patent clearly discloses several counters. One counter (102) receives clock signals from the clock to produce a "slower" clock signal (i.e., at a lower frequency, which corresponds to the dial pulse intervals.) Another counter (112) is a digit counter, which counts the number of digits to be dialed. The third counter (104) is a counter that counts the number of pulses (originating from counter 102) to be provided to indicate a particular digit.



The '771 patent specification discloses that two separate counters are used - a digit counter and a dial pulse counter are used in producing the output for a telephone number digit.

- The **first counter is used to count dial pulses** while the **second counter is used to count the digits of a telephone numbe**r. Each counter is provided with a decoder at its output terminals. These decoders provide signals on one out of a plurality of output leads in response to the value of the input number. These decoder outputs are cross wired to coincidence gates so as to **produce an output for each telephone number digit** when the number of dial pulses reaches a preselected value. Following **each sequence of dial pulses, the dial pulse counter is halted and an interdigital timer is energized to time the interval between dial digits. Following this interval, the dial pulse counter is cleared, the digit counter is advanced by one, and the dial pulse counter is then reenabled to count the next sequence of dial pulses**. ('771 patent, column 1, lines 41-57, emphasis added.)

The role of the counter 102 is describe to countdown the clock source (100) to produce a slower signal, which corresponds to the telephone dialing pulse interval, which is 10 Hz. (This is 10 cycles per second.)

- In any event, the **frequency of source 100 and the countdown ratio of circuit 102 are chosen to provide standard telephone dialing pulses** at the output of circuit 102, e.g., 50 per cent duty cycle, 10 Hz square waves, or any other waveform requirements imposed by the telephone system.

The output of **countdown circuit 102 is applied through inhibit gate 103 to dial pulse counter 104. The output of gate 103 is also supplied to terminal 105 as dial pulses for transmission on the telephone line**. ('771 patent, column 2, lines 35-44, emphasis added.)

EXAMPLE 3

A copy is shown below of the first page of U.S. Patent 3,787,639, Entitled "*Pushbutton Electronic Pulsing Dial,"* issued on January 22, 1974.

United States Patent [19]
Battrick

[11] **3,787,639**
[45] **Jan. 22, 1974**

[54] **PUSHBUTTON ELECTRONIC PULSING DIAL**

[75] Inventor: **Peter Edward Battrick**, Ottawa, Ontario, Canada

[73] Assignee: **Northern Electric Company Limited**, Montreal, Quebec, Canada

[22] Filed: **Nov. 16, 1972**

[21] Appl. No.: **307,064**

[52] **U.S. Cl.** ..... **179/90 K**
[51] **Int. Cl.** **H04m 1/30**
[58] **Field of Search** ..... 179/90 B, 90 BB, 90 K

[56] **References Cited**
UNITED STATES PATENTS

3,601,552 8/1971 Barnaby et al. ..... 179/90 B

Primary Examiner—Kathleen H. Claffy
Assistant Examiner—G. Brigance
Attorney, Agent, or Firm—John E. Mowle

[57] **ABSTRACT**

An electronic pushbutton dial, which generates dial pulse type signals on a telephone line in response to a digit selected on a pushbutton pad, for signalling step-by-step switching offices. The digit selected is coded and stored in a non-destructive read-write memory and is subsequently loaded into a presettable counter. A pulse generator is arranged to generate and feed dial-pulse-timing signals simultaneously into the presettable counter and to a solid state switch which is in series with the telephone line. The digit selected is transmitted to the central office by interrupting the telephone line current at the dial-pulse-timing signal rate until the count in the presettable counter reaches a predetermined value. The interdigit interval is generated by loading a fixed number into the presettable counter and feeding dial-pulse-timing signals into the presettable counter, while disabling the solid state switch, until the count in the presettable counter again reaches said predetermined value.

14 Claims, 6 Drawing Figures

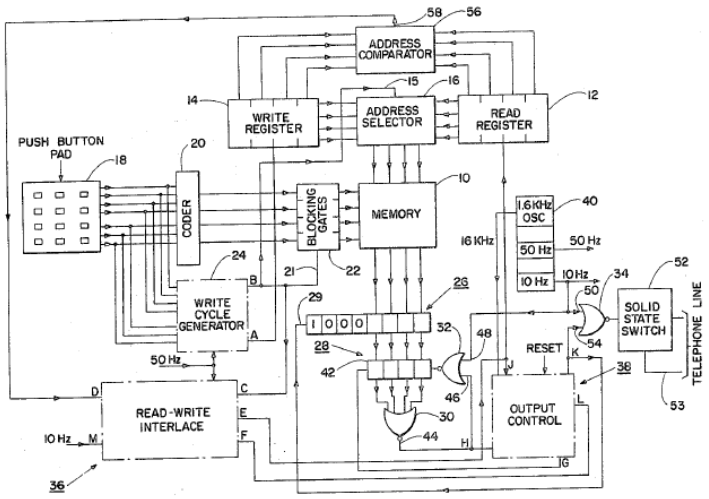


Figure 1 of the ‘639 patent discloses a clock, which generates various frequencies, including oscillations (called Hertz or “Hz”) at 1.6 KHz, 50 Hz, and 10 Hz. The 10 Hz signal is provided to a counter circuit (42).

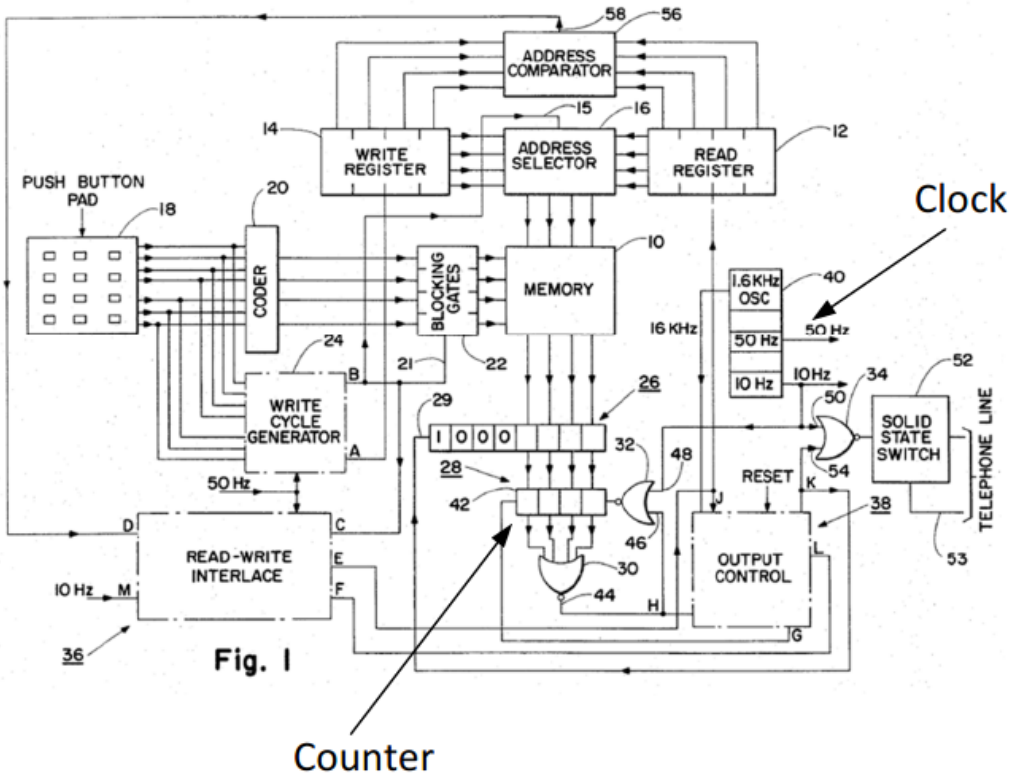


Fig. 1

The ‘639 patent specification discloses that telephone number digits are generated using a pulse generator (a.k.a. clock) providing signals to a counter, which is used for providing the dial-pulse signals to the telephone line.

- An electronic pushbutton dial, which generates dial pulse type signals on a telephone line in response to a digit selected on a pushbutton pad, for signaling step-by-step switching offices. The digit selected is coded and stored in a non-

destructive readwrite memory and is subsequently loaded into a presettable counter. **A pulse generator is arranged to generate and feed dialpulse-timing signals simultaneously into the presettable counter and to a solid state switch which is in series with the telephone line**. The digit selected is transmitted to the central office by interrupting the telephone line current at **the dial-pulse-timing signal rate until the count in the presettable counter reaches a predetermined value.** The interdigit interval is generated by loading a fixed number into the presettable counter and feeding dial-pulse-timing signals into the presettable counter, while disabling the solid state switch, until the count in the presettable counter again reaches said predetermined value. ('639 patent, Abstract, emphasis added.)

- The input terminal 46 of the first dual input NOR gate 32, which is connected to the outer terminal 44 of the four input NOR gate 30 also drops to its logical 0 state and in so doing **allows dial-pulse-timing signals to pass from the 10 Hz pulse generator into the presettable counter 28.** As the **dial-pulse-timing signals enter the presettable counter 28** a logical 0 level or second enable signal appears at output terminal K of the output control block 38 to enable said one input 54 of the second dual input NOR gate 34 and allow **said dial-pulse timing signals to trigger the solid state switch 52**. ('639 Patent, col 6, lines 57-67, emphasis added.)

- **After the presettable counter 28 has counted a total of dial-pulse-timing signals equivalent to the numerical value of the digit to be transmitted along the telephone line,** all four stages of the presettable counter 28 reach their logical 0 state and, as a result, the output terminal 44 of the four input

> NOR gate 30 rises to its logical 1 state. As soon as the output of the four input NOR gate 30 rises to its logical 1 state, which signifies the end of the first enable signal, further dial-pulse-timing signals are blocked from the presettable counter by the first dual input NOR gate 32, and the interdigit interval begins. ('639 Patent, col. 7, lines 1-11, emphasis added.)
