

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)
)
Junk Fax Protection Act of 2005) CG Docket No. 05-338

**COMMENTS OF ROBERT H. BRAVER
IN RESPONSE TO JOSEPH T. RYERSON & SON, INC.’S
PETITION FOR DECLARATORY RULING**

INTRODUCTION

I am writing today in response to the Commission’s request for comments on Joseph T. Ryerson & Son’s (“Ryerson”) Petition for Declaratory Ruling regarding facsimile transmissions that, “initiate in digital form and are received in digital form.” Ryerson seeks an opinion from the Commission to find that such facsimile transmissions are analogous to email messages and therefore not subject to the TCPA or the Commission’s rules which generally prohibit unsolicited fax advertisements (“junk faxes”) and impose identification and opt-out requirements for fax advertisements sent with the consent of the recipient.

I am not acquainted with Ryerson, the civil litigation plaintiff referred to in the Petition before the Commission today, or any of their attorneys; nor do I have any prior knowledge about these parties other than what I have read in Ryerson’s Petition and a brief perusal of the civil case docket. I do not have any opinion as to the merits of the underlying civil case. My concern lies with the relief Ryerson seeks in its Petition, which I believe would be disastrous.

In 1997, as an owner of a successful small (30-employee) software company, I became frustrated with the proliferation of junk faxes sent to my business as well as junk faxes and telemarketing calls targeting my home telephone service, all in violation of the TCPA. Having recently become aware of the TCPA, I was incensed when, after contacting the junk fax senders and telemarketers, it was apparent that most were well aware of the TCPA and the Commission’s regulations, but persisted anyway. Because I had the time and resources, I began to exercise my rights under the TCPA to seek statutory damages and injunctive relief against violators.

While I was overall very successful, I quickly found that many defendants would attempt to crush and intimidate plaintiffs, and twist and distort the language of the statute and regulations in an effort to confuse a court.

Therefore, as a preliminary matter, I would urge the Commission to be cautious as to any language in its subsequent order, however innocuous, that can be used by an entity whose business model includes TCPA violations¹ to defend against such violations.

¹ I am speaking generally, and not specifically as to the Petitioner.

RYERSON’S VAGUE DESCRIPTION OF THE RELEVANT EVENTS IS TROUBLING

While I have pursued TCPA and CAN-SPAM violations in the past, I have a sense of fairness and justice. For example, I personally would not pursue a claim solely on the basis of a relatively minor technical violation against a business or entity that I had an established relationship with and given consent to contact me. Nor do I support class action lawsuits against naïve mom-and-pop pizza places who made a one-time mistake of getting suckered in to purchasing a “fax blast” of their menus to area businesses.

I believe it is important that a business acting in good faith that finds that it has been unjustly caught up in an alleged regulatory violation have the opportunity to petition for redress. However, I believe along with that comes the obligation for candor, especially when the relief sought must be balanced against greatly undermining legal rights and protections that are very important to me and millions of other businesses and individuals.

Ryerson’s counsel, understandably attempting to show their client’s actions in the most favorable light possible, provides a vague description of its particular circumstances that has resulted in a putative class action lawsuit.

Ryerson describes their bulk fax transmission vendor’s portal as, “a Web-based platform that looks like many email user interfaces,” stating that a Ryerson employee, “uploaded a digital version of the file.” For these reasons, combined with the fact that the potential class representative happened to use a fax-to-email service to ultimately receive the Ryerson advertisement, Ryerson concludes that “the transmission [to the plaintiff] was exactly like an email.”

Notably absent is any statement that the message was addressed to an email address or a denial that the message was addressed to a fax telephone number. It is clear to me that Ryerson intended to send advertisements by *facsimile* – not email – and that is exactly what they did using a web interface that is typical for a fax broadcast service provider.

Ironically, if the same message were sent via email, the lack of opt-out notice (and a working opt-out mechanism) would be a CAN-SPAM Act violation², and Ryerson would not have the benefit of a retroactive waiver because the opt-out provisions have been part of the CAN-SPAM Act and implementing FTC regulations from the beginning. To the extent that messages may have been sent to recipients for which Ryerson did not have a then-current preexisting business relationship, the lack of a conspicuous notice that the message is an advertisement or solicitation would also violate CAN-SPAM³.

RYERSON FAILS TO PROPOSE A DEFINITION OF A FACSIMILE TRANSMISSION THAT IS “INITIATED” OR “SENT” IN “DIGITAL FORM”

While Ryerson proposes the Commission issue a sweeping order that would in large part eviscerate the TCPA’s protections against faxed advertisements, it fails to define exactly what constitutes a fax that is “initiated” or “sent” in “digital form.”

Any kind of marketing material that would be sent as a facsimile image, unless composed by hand, will be created in a word processor or some other digital application. Whether such image is printed out and

² 15 USC § 7704(a)(5)

³ *Id.*

scanned by a conventional fax machine or sent as a digital file to a service provider, multifunction printer/fax with companion software, or any other kind of fax server, is a distinction without a difference. The image is still ultimately converted to *analog* audio frequency tones⁴ for transmission over the PSTN. Therefore, it seems apparent that no faxes are “sent” in digital form.

As to whether a fax is “initiated” in “digital form, Ryerson’s proposal is still unclear. To illustrate, taking Ryerson’s description of the fax transmission in its Petition as an example, what if Ryerson’s employee printed the advertisement on paper and then re-scanned the page into a digital image file prior to being uploaded to its third-party broadcaster’s web portal? Would the fax no longer be considered to have been “initiated” in “digital form,” or is it merely sufficient that it was composed on a PC in a word processing application as opposed to being hand written?

More to the point, Ryerson fails to make any showing as to how this (or any other permutation that can be imagined) changes the inherently analog nature of a facsimile transmission or how it makes a difference to the recipient.

EXISTING REGULATIONS AND FCC ORDERS ADDRESS FAX SERVERS AS TO BOTH THE ORIGINATING AND RECEIVING ENDS

Ryerson’s statement that the relief it seeks is consistent with the Commission’s order in the Westfax petition is disingenuous. In fact, the reasoning and conclusion of the Commission in the Westfax order is directly on point here.

As stated in the Commission’s order in the Westfax matter, the 2003 TCPA order⁵ made it clear that, “the TCPA makes it unlawful for any person to use any telephone facsimile machine, computer or other device to *send* an unsolicited advertisement to a telephone facsimile machine.”⁶ (Underlined emphasis added, italicized emphasis in the original.)

The Westfax order went on to conclude that faxes *received* by a fax server, which are typically converted to email and sent to the recipient, are nonetheless facsimile transmissions subject to the TCPA and Commission rules. Nothing in the Ryerson petition negates the reasoning and conclusion of the Westfax order, which by all appearances is directly applicable here.

Ryerson’s assertion that the Westfax order does not contemplate faxes that originate “digitally,” or that there is something unique and novel about Ryerson’s uploading an image to a service provider to perform their bulk fax advertising transmissions, strains credulity. The implication is that broadcast fax advertisements that are blasted to hundreds, thousands, or millions of recipients have heretofore been performed by employees dutifully hand-writing analog advertising messages and manually feeding them into old-fashioned analog fax machines.

Put simply, Ryerson’s entire premise doesn’t pass the giggle test.

⁴ See, e.g., <https://en.wikipedia.org/wiki/Fax>

⁵ 18 FCC Rcd at 14132-33

⁶ Westfax Order at ¶10

**A FACSIMILE TRANSMISSION DOES NOT BECOME ANALAGOUS TO EMAIL
BY VIRTUTE OF BEING SENT FROM AND RECEIVED BY A FAX SERVER**

Certainly, the transmission of an advertisement sent *strictly as an email message* is not a facsimile and does not fall under the TCPA. But a facsimile transmission converted to email by a fax server is nothing like an email. From the recipient's perspective, it makes no difference what kind of equipment was used to send it.

As a side-business left over from my software company days, I continue to provide Internet services including email to a number of clients, including two hospitals, an electric cooperative, several non-profits, as well as a number professionals and individuals.

Dealing with unsolicited and unwanted email marketing messages (commonly referred to as "spam") is a major concern which I am keenly aware of. For every legitimate email that my servers accept on behalf of a client, approximately 200 spam messages are rejected outright based on the reputation of the sending IP address, or are directed to the recipient's spam folder after employing resource-intensive filtering based on the message content. If I did not have mechanisms in place to effectively block and filter such messages, my service would be useless to my customers. No comparable filtering or blocking mechanisms exist for facsimile transmissions.

Unwanted advertisements sent strictly as email messages involve different technological remedies and policy issues than facsimile transmissions, and are subject to the CAN-SPAM Act and state laws. While unsolicited email advertisements are not in and of themselves prohibited by law, they *are* prohibited by most service providers' policies. Individual senders who violate these policies often quickly find their service suspended or terminated. Service providers are incentivized to enforce this widely codified social contract because if they are lax, they will find that emails received from IP addresses belonging to them will be listed on widely used block lists and therefore rejected by a significant portion of email servers worldwide, or at the very least sent directly to their customers' "junk mail" folder.

What the CAN-SPAM Act and state laws involving fraudulent email practices do is address the tactics often employed by spammers who attempt to circumvent the self-protecting nature of the Internet by spoofing addresses or employing other tactics to hide where they originate from or otherwise evade blocking and filters⁷.

Ryerson's argument that their use of a broadcast fax service provider or otherwise originated their advertisements "digitally" somehow negates the harms addressed by the TCPA and Commission rules is wholly without merit, and these harms have already been addressed in prior Commission orders and more recently by the Westfax order. Regardless of whether a fax was composed on a PC and uploaded in digital form to a service provider or hand written (or printed out) and manually fed into an old-fashioned fax machine, the result to the recipient is the same; the underlying transport mechanism still involves an

⁷ I personally have used my state's fraudulent email laws and the CAN-SPAM Act to pursue violators. In one such case, I obtained a substantial money judgment and injunction in federal court against a well-known violator, and had the privilege of testifying on behalf of the government at his sentencing hearing when he subsequently faced criminal charges and was eventually sent to prison.

encoded graphic image sent through the Public Switched Telephone Network, and is very different from an email.

Unlike messages that are strictly sent as emails, facsimile transmissions still involve the finite bandwidth of a telephone line (whether an analog POTS line or a digital channel). Such messages which are converted to an email via the recipients' service provider (or by the recipients' own fax server) effectively bypass the sophisticated and effective email spam filtering that is widely employed. As a result, each message requires the time and attention of the recipient to view and evaluate whether it is a legitimate message or an unsolicited and unwanted advertisement.

The old-fashioned thermal paper fax machine in my home has long since been replaced by a popular brand of multi-function network-connected laser printer with scanning and fax capabilities. One of the features of this machine is the ability to not automatically print faxes as they are received, but to instead make them available over my local network to my PC running a companion application where they can be viewed.

While I have a great deal of power to filter or outright block junk email senders, I have no available technical means to block nuisance junk fax messages. Certainly, I have the ability to completely avoid the cost of paper and toner from junk faxes. But even if I were to choose to not automatically print received faxes, my machine still "rings" when I receive a call on my fax line, my PC application alerts me to the receipt of a new message, and each fax message I receive must be manually opened and viewed just to see what it is, and my time is significantly more valuable than the paper and toner.

The TCPA, the Commission rules, and the threat of class action litigation is what protects me (and everyone else) from being inundated with junk faxes, regardless of how we choose to receive our faxes.

If the Commission were to effectively reverse its position in the Westfax order by finding that broadcast advertising faxes (almost certainly sent in a manner similar to Ryerson's example), which happen to be delivered as eFaxes or to a fax server, do not fall under the TCPA's protections, the floodgates would open for marketing messages that would arrive in recipients' mailboxes (or modern machines such as mine).

For these reasons, I strongly urge the Commission to deny the relief requested in Ryerson's Petition.

I thank the Commission for the opportunity to comment on this matter.

Respectfully submitted,

s/Robert Braver

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