

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Junk Fax Prevention Act

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Petition of Joseph T. Ryerson & Son, Inc. for
Declaratory Ruling

CG Docket No. 05-338

CG Docket No. 02-278

**Comments of Robert Biggerstaff on the Petition of Joseph T. Ryerson & Son, Inc. for
Declaratory Ruling**

The facts underlying Ryerson’s Petition¹ are simple: Petitioner Joseph T. Ryerson & Son, Inc., apparently opened an account with a fax broadcaster, then uploaded a list of fax number and an advertisement to the fax broadcaster via the fax broadcaster’s website portal, and directed the fax broadcaster to send that advertisement to those fax numbers.

Please remind yourself of those facts periodically when considering this Petition. Ryerson believes this fact pattern should be exempt from the TCPA for anyone whose fax from Ryerson was sent to a fax machine operated by a e-fax type service so that the fax was converted to a file after it was received, and sent to the user as an attachment to an e-mail. Such a position is simply absurd.

As a threshold matter, all faxes begin as digital data. Every single one. A page of text or images a person wants to send as a fax, is first converted to digital 0's and 1's

¹ Petition of Joseph T. Ryerson & Son, Inc. for Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (filed Nov. 3, 2015) (“Petition”).

representing a reduced resolution bitmap image of that page. So any “digital” versus “analog” distinction is without merit. Petitioner’s claim that “[t]he focus of the Westfax Order was exclusively on conversion of faxes to digital image files or PDFs *upon receipt*... Neither the Westfax Petition nor the Westfax Order addressed how the analysis might be different if the message was both incepted and received digitally”² is irrelevant since all faxes are “incepted” digitally.³

Second, the pathway is equally irrelevant. No one can dispute that every desktop fax machine you can buy at a local office supply store can be plugged into a “regular” phone line and can print. How they are *actually* connected at any particular time is irrelevant to their “capacity.”

Third, under the TCPA, only the receiving device has to have the “capacity” to use a “regular” telephone line and to print a fax. The sending device can be anything within “facsimile machine, computer, or other device.” The sending device has no requirement that it have “capacity” to use a “regular” telephone line, ergo whatever type of line was used for sending is irrelevant. As such, the method of “inception” cannot be relevant.

Finally, every fax machine, whether it be a desktop fax machine, fax server, or computer with fax software, has the “capacity” to use a regular telephone line and to print the contents of the fax transmission. I say this as a degreed engineer and certified computer forensic examiner who has worked in telecommunications and telephony for over 30 years. Every fax receiving device that can receive a fax, has the capacity to print. This also demonstrates that what type of telephone line is actually used for any particular

² Petition at 4 (emphasis in original).

³ I disagree with the characterization that this was the “focus” of the Westfax petition.

fax transmission is irrelevant, because the TCPA and Commission rules apply based on the equipment's *capacity*, not what subset of that capacity that was actively used in any particular fax transmission.⁴

Ultimately, what the Petition seeks is at odds with the Commission's prior Order, which held:

Finally, because a sender of a facsimile message has no way to determine whether it is being sent to a number associated with a stand-alone fax machine or to one associated with a personal computer or fax server, it would make little sense to apply different rules based on the device that ultimately received it.⁵

Since e-fax systems simply use fax servers, the question presented in the Petition has already been answered by prior orders that made clear faxes sent to fax servers are covered by the TCPA.

The touchstone to ask is what did the sender actually do? This is the same paradigm used in other TCPA contexts. For example, when someone composes a message to "555-123-4567@verizon.net" the sender intends a message to show up as a text message, even though the initial step is taken via an e-mail client. When someone uploads a list of 10-digit telephone numbers and a fax image to a fax broadcaster's web site, they are undoubtedly sending faxes as a result of their actions even though they used a web browser to start the process.

Petitioner thinks CAN-SPAM should apply to e-faxes where after the fax is received, the fax image is converted from a fax image to a file, and that file is then later e-mailed as

⁴ Similarly, the FCC has interpreted "capacity" under the TCPA to reach predictive dialers and other equipment that dials numbers from a list.

⁵ *Rules and Regulations Implementing the TCPA*, 18 FCC Rcd 14014, ¶202 (2003).

an attachment. This doesn't make sense considering the following examples:

- If someone sends a letter to a business associate, and that associate is away from the office and has instructed his assistant to fax all incoming correspondence to him while he is away from the office. The person who sent the letter however, did not cause the fax to be sent.
- Similarly if someone with the e-mail address "joesmith@somemail.com" sets up his mail client to fax each incoming e-mail to him, a person who sends Joe an e-mail has not cause a fax to be sent.
- On the other hand, when someone sends an e-mail to "555-123-4567@verizon.net" that is a text gateway, and the sender directly intends to create a text message to be sent as an SMS to the cell phone using the phone number "555-123-4567" and is responsible for the TCPA violation if that text was sent without express consent.

If the converse were true, and someone sends a fax ad to "555-666-7777" and that faxed ad is then converted to an e-fax and appears in someone's e-mail inbox, it would subject that person to CAN-SPAM despite the fact he had no reason to know his fax would be converted to an e-mail. CAN-SPAM has disclosure requirements that exceed those in the TCPA, so compliance with the TCPA (which would be anticipated by someone sending a fax) does not satisfy CAN-SPAM.

Finally, the TCPA applies to a broad range of equipment on the sending side—"any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine..." All the devices and machinations described by the Petition fall squarely within "telephone facsimile machine, computer, or other device." The TCPA does not place any limit on the type of communication line, format, or other aspect of the connectivity of the sending device. As multiple courts have held, the TCPA is violated by *sending*, and receipt

is not an element of a TCPA violation.⁶ Ergo *how* it was received (if at all) can't be an element of the violation..

The Petition is Facially Absurd

The gravamen of the petition states “messages that are both initiated and received in digital form should be subject to the rules governing email, not the TCPA. ... The fact that digital transmissions may (in some instances) be converted to analog protocols and sent over telephone lines is a distinction without a difference.” This paradigm is facially absurd.

Consider that many junk fax broadcasts are “initiated in digital form” by the sender using a fax service bureau’s website portal, to upload a) a list of fax numbers and b) a document to be sent. Under the Petition, anyone who received one of those missives via a fax-to-e-mail service like e-fax would have no TCPA violation, but instead has a CAN-SPAM violation. The fact that the faxes were sent over the analog PSTN at some point and later converted to an e-mail, is a “distinction without a difference” to Petitioner.

Similarly, some fax broadcasts begin as an e-mail, where an advertiser sends an e-mail to their customer contact at a fax service bureau and says “please send the attached document to the attached list of 5,000 fax numbers.” Petitioner would argue (as at least one actual fax advertiser has done) that because those “faxes” were initially “sent” as an e-mail the TCPA does not apply.

The Commission, like the courts, should not be fooled by such subterfuge that is designed to evade the law rather than comply with it. It doesn't take rocket science to distinguish actions of a sender designed to send faxes from actions designed to send e-

⁶ *Critchfield Physical Therapy v. Taranto Group, Inc.*, 293 Kan. 285 (2011); *Am. Home Servs., Inc. v. A Fast Sign Co., Inc.*, 734 S.E.2d 31 (Ga. 2012).

mails.

Harms

While paper and ink may not be consumed by faxes that ultimately arrive as an e-mail attachment, they also are not expended when a fax server receives a fax and the user views it on the screen without printing. Thus the lack of expending of paper and ink is not dispositive, particularly since there are concrete harms from those faxes that are not printed. For example, fax images attached to e-mails can be several megabytes in size. Particularly for users that read e-mail on a cell phone, large images in e-mail take significant resources to download and can cause a person to exceed their data allotment or other increases in costs. People with per-minute and per-byte plans also have direct costs involved with such faxes. Plus many e-fax services have usage charges on top of the phone providers.

Petitioner claims “Connector’s phone line was not tied up for incoming business calls or faxes” but this is not true. A user of an e-fax services subscribes to a dedicated telephone number for their exclusive use to receive faxes. When that line is busy with a junk fax, other faxes can be rejected. Junk faxes certainly impact the overall capacity of the switches and other hardware involved, and thus increase the overhead and eventually the charges that a customer has to pay for the service. Ultimately, all junk faxes irresponsibly and illegally consume a portion of the national telecommunications infrastructure and interfere with interstate commerce.

In addition, junk faxes received at an e-fax type account are worse than spam e-mail because they cannot be caught by ISP or personal spam filters or whitelists since all the e-faxes come from the same e-mail address (that of the e-fax provider).

But with all junk faxes, the interruption, invasion of privacy, and waste of time to review, attempt to opt-out, and sort the junk from legitimate correspondence is still there.

CONCLUSION

Like text messages, faxes are sent to 10-digit telephone numbers.⁷ When someone sends faxes by uploading a list of fax numbers and a document to a fax broadcaster's website, they are without any doubt sending faxes subject to the TCPA regardless of whether they are received by a fax server (e-fax.), computer with a fax modem, or a desktop fax machine.

Thank you very much for your time considering my comments. I remain,

Sincerely

/s/ Robert Biggerstaff

Robert Biggerstaff

December 8, 2015

⁷ Ignoring Group IV ISDN faxes for the moment. I also use the term "10-digit" to include the other situations where the number of digits can vary, such as 7-digit local dialing, and longer numbers used to make international calls.