

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Joseph T. Ryerson & Son, Inc.)	
Petition For Declaratory Ruling)	
)	
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

**REPLY COMMENTS OF CYNTHIA BRINKER
IN RESPONSE TO INITIAL COMMENTS REGARDING
JOSEPH T. RYERSON & SON, INC.
PETITION FOR DECLARATORY RULING**

My interest in the Ryerson petition deals with the potential of the FCC and the government over-reaching their statutory legal rights to govern free speech over the Internet (IP - Internet Protocol). What I found to be of utmost concern was what appeared to be a case in which Internet communications were being misconstrued as communications being transmitted over “regular telephone lines” (PSTN- Public Switched Telephone Network) and thus open to being governed by the TCPA and JFPA acts. The commission and legal system cannot govern Internet based communications under the TCPA and JFPA. Communications that are within the legal limitations of freedom of speech under the First Amendment of our Constitution (advertisements or not), transmitted and received over the Internet, cannot be classified as a “FACSIMILE” or “FAX” under the rules of the TCPA or JFPA. At most, if Internet communications transpire over SMTP (The Internet’s email protocol) and consumers receive said communications as an e-mail, then said communications are governed by the CAN-SPAM Act which was created to protect Americans privacy when dealing with specific types of Internet based e-mail communications.

Commenters in opposition to the Ryerson petition appear to support the TCPA and FCC’s statutory definition of a FACSIMILE or FAX to include: *“The Commission’s rules define “telephone facsimile machine” to mean “equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to **transmit** that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal **received** over a regular telephone line onto paper.”*^{1 & 2}

¹ FCC DA15-977 Declaratory Ruling in the Matter of Westfax, Inc. Petition for Consideration and Clarification, Adopted/Released Aug. 28, 2015. *See id.* at 8.

² 47 C.F.R. § 64.1200(f)(13)

While the TCPA and Commission have stated on numerous occasions that a computer, server, or any other device CAN be considered a “Facsimile Machine”, they have also clarified this to mean only when the device has the capability or capacity to transmit or receive a signal over a **regular telephone line**. This was specifically worded in order to accurately define in legal terms that NOT ALL Computers or Servers or Devices in the world could be classified as a “Facsimile Machine”, which would be absurd. Obviously, not every electronic device on this earth is a “Facsimile Machine”. The statutory definition language in the TCPA and by the Commission clearly defines what can be classified as a “Facsimile Machine” and was drafted so that technology such as fax modem boards that could reside in a Computer, or “efax server” or any other device, would constitute a “system” directly capable of transmitting or receiving signal transmissions over **“regular telephone lines”** (PSTN- Public Switched Telephone Network).

Commenters opposing the Ryerson petition must take into account that Ryerson appears to have used a computer that has no direct capability of transmitting communications over a “regular phone line” (PSTN) and as explained in the petition that the transmission of the digital media was done over the Internet. If we assume for this discussion that the above is true, then the consumer on the receiving end of this communication has basically four choices in how to receive the communication from an Internet (IP- Internet Protocol) based communication transmission:

1. The consumer has chosen to use some form of service that receives the communication over the Internet (IP) and electronically mails the document as an attachment via email to the consumers email account of choice. In this case, the origination of the communication initiates over the Internet and is received over the Internet (IP- Internet Protocol) and thus did not transmit or be received on “regular telephone lines” (Public Switched Telephone Network or PSTN). I believe this to be the example that most closely represents the Ryerson petition and also grabbed my attention and concern for potential FCC/TCPA infringement on our First Amendment. This example clearly does not fall within the jurisdiction of the TCPA or JFPA as no component of the communication meets the statutory definition. The Commission states in a recent declaratory ruling that communications *“sent as faxes over telephone lines, which satisfies the statutory requirement that the communication be a fax on the originating end”*³. This ruling by the Commission clearly supports that there is a statutory requirement that the communication must be a “facsimile” as legally defined, and must be sent over regular telephone lines. The Commission also ruled: *“The definition of “telephone facsimile machine” sweeps in the fax server and modem, along with the computer that receives the efax because together they by necessity have the capacity to “transcribe text or images (or both) from an electronic signal received over a telephone line onto paper.”*⁴ This ruling states that while the fax server and it’s modem, along with the consumer's computer can be defined as a “facsimile machine”, the ruling clearly states only when “received over a telephone line”. Again, the Commission has been absolutely clear, that in order for a communication to be governed by the TCPA, the communication must originate as a facsimile over regular telephone lines AND be received as a fax over a regular telephone line. In this scenario, quite possibly the CAN-SPAM Act may have governing jurisdiction, but NOT the TCPA or JFPA.

^{3 & 4} FCC DA15-977 Declaratory Ruling in the Matter of Westfax, Inc. Petition for Consideration and Clarification, Adopted/Released Aug. 28, 2015. *See id.* at 9.

2. The consumer has chosen to use some form of service that receives the communication over regular phone lines (as one of the telephone carriers or the service provider may have converted the original Internet based IP communication to a digital communication traversing the PSTN or “regular telephone line”) and then said service converts the communication back to Internet IP communications as an e-mail destined for the consumer's email account of choice. In this example the sender has not sent a facsimile as statutorily defined by the TCPA or supported by the Commission. However, the consumer has chosen to receive the transmission through a service that has the capacity to receive the transmission over a regular telephone line and ultimately receive the communication as an attachment via e-mail. In this case, the sender's communication isn't governed by the TCPA, yet the consumer on the receiving end did receive the communication via a service that can be argued could be governed by the TCPA. I believe this is the scenario to which the Ryerson petition argues that the TCPA act should ONLY govern if the SENDER met the statutory definition of a facsimile and the Commission appears to have ruled favorably to similar arguments in the past: *“the Commission has previously interpreted the TCPA to apply only to those that begin as faxes”*⁵ and *“The TCPA applies to a fax that is sent as a fax over a telephone line”*⁶. These Commission rulings clearly state that in order for the TCPA to govern, the communication must originate as a “facsimile” as statutorily defined. In this example, the communication does NOT originate as a “facsimile” as statutorily defined. Again, since the communication was ultimately received via an email, then quite possibly the CAN-SPAM act should govern in this example but NOT the TCPA act.
3. The third scenario is that the consumer has chosen to use a web based communications solution similar to “Doximity”, a leading web communications solution in the Healthcare industry. Solutions similar to this receive the Internet (IP) based communication in this example via the Internet (IP- Internet Protocol) and not via a signal over a “regular telephone line” (PSTN) and make the electronic document visible to the consumer as a secure document within a web-portal or securely via the solutions proprietary Smartphone & Tablet applications. In this case, again, the communication transmits over the public Internet and never over the PSTN “regular phone line” network. Thus, as in example (1) above, this type of communication cannot be governed by TCPA or the JFPA. It does not matter what devices were used to transmit or receive the communication, what matters is that those devices themselves do not have the capability to transmit or receive the communication over “regular telephone lines” as mandated by the statutory TCPA definition and upheld by the Commission. This example clearly does not fall within the jurisdiction of the TCPA or JFPA as no component of the communication meets the statutory definition. Unlike example (1) above, this example cannot be governed by the CAN-SPAM Act either, as the communication does not transpire through email (SMTP). The communication is limited to proprietary web-portal and Smartphone/Tablet applications most commonly Android and Apple iOS, to which CAN-SPAM Act does not govern.

⁵ & ⁶ FCC DA15-977 Declaratory Ruling in the Matter of Westfax, Inc. Petition for Consideration and Clarification, Adopted/Released Aug. 28, 2015. *See id.* at 10.

4. Finally, the fourth scenario (which is becoming far less prevalent), the consumer has chosen to have a telephone carrier (AT&T, Verizon, CenturyLink, Frontier, etc.) convert all inbound communications destined for their unique ten digit identifier (commonly referred to as a phone number) to the PSTN network, referred to as a “regular phone line” and received by a “facsimile machine” (as defined by the statutory TCPA definition). This scenario is basically a standard fax machine or “All In One” printer/fax machine on the consumer side receiving the communication. In this scenario, the receiving consumer does fall under the governance of TCPA in the sense that the statutory definition has been met on the receiving side of the communication. However, since the communication did not originate as a fax over a telephone line the Commission has already ruled that this end-to-end communication does NOT meet the strict statutory definitions of a transmission covered by the TCPA. The Commission ruled *“There is an end-to-end communication that starts when the faxed document is sent over a telephone line”*⁷ and since this example does not originate as a faxed document sent over a telephone line, this end-to-end communication does NOT fall under the jurisdiction of the TCPA. The Commission also clearly ruled that if the communication began as an electronic message over the Internet, then such communications are not subject to the TCPA. Read here: *“While we understand that the harm to recipients may be the same whether the efax begins as a fax or email, the Commission has previously interpreted the TCPA to apply only to those that begin as faxes. The Commission’s statements address separate factual situations – one involving a communication originating as a fax over a telephone line and another communication originating as an email over the Internet.”*⁸ In this last example, again, the electronic communication began as an electronic message over the internet and NOT as a “fax over a telephone line”.

In conclusion, the Commission has been very clear that electronic communications that originate as Internet based messages and NOT as faxes (as statutorily defined), cannot be governed by the TCPA. It’s equally clear on the receiving side of a communication, that the definition of a facsimile machine requires that the transmission do so over a regular telephone line. It’s that simple.

I thank the Commission for the opportunity to reply to comments.

Respectfully submitted,

Cynthia Brinker

“A concerned citizen leveraging my right to free speech”.

⁷ & ⁸ FCC DA15-977 Declaratory Ruling in the Matter of Westfax, Inc. Petition for Consideration and Clarification, Adopted/Released Aug. 28, 2015. *See id.* at 10.