

**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

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

It seems that Petitioner Ryerson and its supporters have not realized what appears obvious to everyone else. By using the web browser to upload a fax list and an advertisement to the fax broadcaster's website, Ryerson did not "send" the faxes at issue using the web browser. By merely uploading digital files to a fax broadcaster, no faxes were (yet) "sent" under the TCPA. The faxes were "sent" when the broadcaster (Ryerson's agent¹) acted on Ryerson's instructions.² Ryerson merely used the web browser to give the instructions to its agent. Ergo the faxes were not "sent" electronically using the web browser (or e-mail) but were "sent" as indisputable faxes by the fax broadcaster.

A number of comments misconstrue the underlying facts of the Ryerson petition, due in no small part to the obtuse and tortured wording in the Petition. One such misinterpretation states:

The same analogy may apply to Ryerson's assertion, to which I would agree that a digital "message" communication being sent and received in a digital

¹ I use "agent" in these comments to include both common-law agents and employees, as well as independent contractors.

² As a matter of law, Ryerson is the "sender" under the Commission's TCPA rules.

“message” format cannot possibly be governed by the TCPA.³

This is an inaccurate description of what happens in fax broadcasting in general, and in Ryerson’s case in particular.

Petitioner Joseph T. Ryerson & Son, Inc., apparently opened an account with a fax broadcaster, then uploaded a list of fax numbers 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.

In short, this was not a digital-to-digital communication. Instead it was multiple, independent steps. There was a digital communication (via HTTP protocols on a web site) to merely send *instructions* to Ryerson’s agent (the fax broadcaster). Those instructions told Ryerson’s agent to send faxes. Ryerson had no knowledge or control over the types of fax machines receiving those faxes.⁴ The fax broadcaster had no knowledge or control over the types of fax machines receiving those faxes. But sending faxes to those fax numbers is what was done.

Simply put, Ryerson’s uploading the fax image and fax list to the fax broadcaster was not “sending” the fax. Consider if the fax broadcaster went out of business before sending Ryerson’s advertisement to any of the fax numbers Ryerson provided. In that case, no fax would have been sent. But under Ryerson’s tortured paradigm, the “sending” was done electronically (by Ryerson, not by the broadcaster) and since receipt is not an element of the TCPA, Ryerson already violated the TCPA before the broadcaster acted on Ryerson’s

³ Comments of Michael Friend.

⁴ Which again, highlights the appropriateness of the FCC existing Order that dispenses with this Petition, declaring “[f]inally, 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.” *Rules and Regulations Implementing the TCPA*, 18 FCC Rcd 14014, ¶202 (2003).

instructions. This interpretation is wrong because Ryerson did not send a fax to the broadcaster, Ryerson sent *instructions* to a fax broadcaster.

Here are the steps taken:

	Description	Type of communication
1	Ryerson uploaded the fax document and the fax number list to the broadcaster with instructions of what to do.	Web browser (HTTP, etc.)
2	The fax broadcaster sent the faxes to the fax numbers provided by Ryerson.	Fax protocols, (T.30, T.37, T.38, T.503, T.521, T.62, T.70, etc.)
3	After the fax is received, the contents of the fax are saved, either in memory, on disk or on paper.	Any
4	For e-faxes, the saved copy of the fax image is attached to an e-mail, and sent as e-mail	E-mail (RFC 821, RFC 532, etc.)

The TCPA violation take place *solely* in step 2. The other steps are irrelevant to the TCPA violation.

What escapes many people not familiar with the details various fax technologies such as fax-to-e-mail (“e-fax”) is that in the “fax” transmission is over and done before any fax-to-e-mail conversion happens. Before the fax payload gets converted to an e-mail attachment, the fax transmission was already received and the TCPA was *already* violated. Subsequent re-packaging and forwarding cannot undo the TCPA violation already committed. Receiving an e-mail with a e-fax image as an attachment is no different than receiving a FedEx envelope containing a CD-ROM with an electronic copy of the e-fax stored on it. Neither of those “receiving” events changes the fact that prior to the e-mail or FedEx envelope being sent, a fax was already received and the TCPA was already violated.

For e-faxes, the receiving fax machine of Ryerson’s faxes is not the computer or phone that the recipient reads their e-mail on—it is the fax server run by the e-fax provider from whom the consumer is leasing a dedicated phone number. This is no different from a

phone customer who leases a dedicated phone number from the phone company to receive voice calls. And because fax transmissions that will be forwarded as e-faxes are all first received on fax servers, and the Commission has already declared fax servers as covered by the TCPA, Ryerson's petition has to be denied.

Commenter Cynthia Brinker makes a similar misconception of technology in distinguishing an IP connection as something other than a "regular" telephone line.⁵ The dictionary defines "regular" as "usual; normal; customary"⁶ With millions of people who have their phone service delivered by the Internet (VOIP and FOIP) or by other circuits like T1, it is hard to claim IP-based lines are "unusual" or "abnormal."

If a sending fax machine, for example, is plugged into a VOIP line, the digital data representing the fax image is first translated to analog, then translated back to digital by the VOIP protocols (such as G.711) and then travels further as digital data until it exits a VOIP POP into the analog PSTN to be routed to the destination phone number. The process is reversed for someone receiving a fax over a VOIP line. But what it is plugged into is not the question—the question is can it be plugged into a what Ms. Brinker calls a "regular" telephone line—which it clearly can.

In the event someone believes VOIP is not a "regular" telephone line, ignoring how commonly it is in use today, consider that the Commission and many industry experts anticipate a phase out of the U.S. analog phone system, converting to a telephone system where every home and business uses only VOIP and FOIP.⁷ At that point, there would no

⁵ Comments of Cynthia Brinker ¶6.

⁶ "regular." Dictionary.com Unabridged. Random House, Inc. 12 Jan. 2011. <Dictionary.com <http://dictionary.reference.com/browse/regular>>.

⁷ See, e.g., *Comment Sought on Transition from Circuit-switched Network to All IP Network*, DA 09-2517 (FCC, Dec. 1, 2009) (Public Notice). In February of 2014 the FCC announced that Carbon Hill, Alabama and Delray Beach, Florida were selected as the first cities for such transitions on an experimental basis.

longer be any analog or “regular” telephone lines under Ms. Brinker’s definition, so the sunset of the analog PSTN would be the sunrise of a junk fax free-for-all. Ultimately, such an interpretation is at odds with the Commission, 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.⁸

Indeed, applying different rules to e-fax receivers versus other receivers is exactly what Ryerson wants. But that “makes little sense” and the Commission should summarily deny the Petition as an attempt to “end-around” the 2003 TCPA Order.

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 who has worked in telecommunications and telephony for over 30 years and authored many fax applications. 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 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 for any particular transmission.⁹

Ms. Brinker fails to consider the consequence of her assertion that:

I agree, that if the consumer has chosen to receive communications transmitted to a ten digit DID assigned to the consumer (commonly referred to as a “phone number”) via e-mail, the CAN-SPAM Act should govern the communication.

⁸ *Rules and Regulations Implementing the TCPA*, 18 FCC Rcd 14014, ¶202 (2003).

⁹ Similarly, the FCC has interpreted “capacity” under the TCPA to reach predictive dialers and other equipment that dials numbers from a list.

As I pointed out in my original comments on this petition, consider someone who—without knowledge that the recipient has chosen to receive communications transmitted to that 10-digit DID via e-mail—sends that 10-digit DID a fax, but the contents of that fax, while complying with the TCPA’s notice requirements, fail to satisfy the stricter disclosure requirements of CAN-SPAM.¹⁰ Without any knowledge that his fax was going to be forwarded as an e-mail, the fax sender is now subject to CAN-SPAM under Ms. Brinker’s interpretation.

A number of commenters erroneously believe that the sending device must be a “telephone facsimile machine” under the TCPA. As pointed out in my and other comments, the sending device need only be a fax machine or a “computer or other device.” Any suggestion that the sending device must meet the definition of a telephone facsimile machine or utilize any particular type of connectivity must fail.¹¹

CONCLUSION

When someone sends faxes by providing a list of fax numbers and an advertisement to a fax broadcaster with instruction to send the advertisement to those fax numbers, they are without any doubt sending faxes subject to the TCPA when their agent (fax broadcaster) acts on those instructions. This is true regardless of whether the subsequent faxes are ultimately received by a fax server (e-fax), computer with a fax modem, or a desktop fax machine, and true regardless of any forwarding technology employed after receipt of the fax transmission. Ryerson’s Petition should be denied.

¹⁰ See Comments of Robert Braver at 2.

¹¹ See, e.g. Comments of Mark Gregg at 1 (“I agree with Ryerson that in order for the TCPA to have any jurisdiction over a analog or digital transmission, the transmission must originate from a machine or system that meets the statutory definition of a facsimile machine.”); Comments of Johnnie Daciolas at 2 (“only when a communication message was transmitted via a facsimile machine/system via a telephone line as statutorily defined⁵ AND received by a facsimile machine/system via a telephone line as statutorily defined⁵, can the communication be considered a “FACSIMILE or FAX” as intended by the TCPA and JFPA and thus governed as such.”)

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

Sincerely

/s/ Robert Biggerstaff

Robert Biggerstaff

December 15, 2015