

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

In the Matter of)
Rules and Regulations Implementing) CG Docket No. 02-278
the Telephone Consumer Protection of)
1991)

COMMENTS OF ROBERT BIGGERSTAFF

Background of Commenter

I am a degreed engineer and I have spent my entire professional career designing, developing, and working with computer networks and database systems, both in the private sector and for systems used by the United States government. As a result of my career, I became acutely aware of a number of technologies that increased what I perceived to be invasions of privacy. As a result, I have been very concerned in the area of privacy protections for many years, and have taken affirmative steps to bring some of these issues to light, and seek remedies for them. My work with government agencies in this area has included membership in the South Carolina Joint Legislative Privacy Study Commission (2000-2001); Panelist, U.S. Department of Commerce *Public Meeting on Internet Privacy*, (Panel on Critique of Industry Presentations, June 24, 1998); Guest Lecturer, *Information Systems and Society*, Information Systems Management Program, Trident Technical College, Charleston, SC; and Panelist, *Public Workshop on Consumer Information Privacy*, Federal Trade Commission (Panel IIIB: Other Approaches Session One: Database Study, June 10, 1997).

In addition, I have published a number of articles regarding interpretation and application of the Telephone Consumer Protection Act (“TCPA”), including *Application of the Telephone Consumer Protection Act To Intrastate Telemarketing Calls and Faxes*, 52 FED. COMM. L. REV. 667 (2000) and *State Courts and the Telephone Consumer Protection Act of 1991. Must States Opt-In? Can States Opt-Out?* 33 CONN. L. REV. 407 (2001). Both have been cited as authority by a number of state and federal courts. I also publish a slip

reporter service of TCPA related litigation, and administer the web site devoted to TCPA litigation issues at <http://www.tcpalaw.com>, with the assistance of a number of attorneys who graciously volunteer their time and resources to assist that effort.

I have been involved in several hundred consumer and state actions under the TCPA across the country, assisting both private attorneys and state Attorneys General in understanding the statute, providing research, and other support. Based on my experience in TCPA litigation, a number of state legislators have sought out and relied on my experience in drafting and implementing their own states' telemarketing and junk fax legislation. I have also litigated several dozen TCPA cases personally as a plaintiff. My direct experience in both the prosecution of TCPA claims, assisting in other litigation, fending off a blizzard of complex and sometimes baffling arguments of junk faxers and telemarketers has provided me significant insight and a broad statistical sample of cases to draw substantial conclusions from on the current state of affairs with respect to the statute.

I therefore speak with extensive firsthand knowledge when I say that a number of issues repeatedly arise in TCPA actions, often frustrating consumers, the courts, and the intent of the statute.

For example, in what can only be described as a Kafkaesque interpretation in a TCPA case in Virginia, although the Commission's rules under the TCPA require a company to keep a list of people who have asked not to receive further telemarketing calls (47 C.F.R. 64.1200(e)) AT&T **successfully argued** the law does not require AT&T to actually refrain from calling those people on the list. Stephen Dinan and Margie Hyslop, *States Trying to Restrict Telemarketers*, THE WASH. TIMES, Feb. 3, 2000 at C3. Another telemarketer argued that the average consumer's message on their home answering machine instructing callers to "leave a message" was "express invitation" for the caller to make pre-recorded telemarketing calls. *Agostinelli v. LM Communications, Inc.*, defendant's memo. of law, No. 00-SC-86-2862 (Magis. Ct. S.C. August 17, 2000). In a case where I was the plaintiff, a telemarketing firm claimed that a prerecorded call that asked "if 6 days and 5 nights in Florida for only \$97 sounds good to you, press '1' now to hear all the details" was actually

a “survey” exempted from the TCPA and by pressing ‘1,’ I had consented to receive the solicitation. A chiropractor making prerecorded calls in my state to attract new clients, argued that calls offering chiropractic service were exempted from the TCPA as they were made for “emergency purposes” because people’s health is always an emergency. Because the fora for consumer actions under the TCPA are almost exclusively state small claims courts, these arguments often prevail when presented before non-attorney magistrates and against non-attorney pro se plaintiffs. In my opinion, some unscrupulous defense attorneys have made improper representations to small claims courts - for example presenting a single cherry-picked case from another venue supporting the defendant’s argument, while failing to advise the court of a dozen opinions otherwise. Defense attorneys have even cited reversed case law claiming it was still authority, and claimed a lower court opinion was that of a state supreme court.

I personally had a junk faxer’s attorney who was rampantly violating the law, tell me “we know it’s illegal, but it is too lucrative to stop” as they made over \$6 million annually. Others have told me they know they are violating the statute, but intend to make it so hard on any consumer who takes them to small claims court, that they willingly spend \$10,000 to fight a \$500 TCPA claim so as to “discourage others from trying it.” The Commission itself has found similar fact patterns with regards to Fax.com, Inc. and its operatives. *See In the Matter of Fax.com*, 17 F.C.C.R. 15,927 (2002).

In addition to these enforcement issues, there are problems with some existing Commission interpretations of the statute. For example, the Commission has concluded that there is an exemption to the prohibition on unsolicited faxes for faxes sent where there is an “established business relationship” (“EBR”). However, that exemption was considered by Congress, **and then removed from the statute before passage**. Compare the version reported by the House in H.R. 1304, 102d Cong., 1st Sess. § 3 at (a)(4), (Passed by the House, Nov. 18, 1991) with the version that was enacted. In fact, every court to consider this question has concluded that the Commission’s creation of this EBR exemption for faxes is in error, and ruled that there is no such exemption for unsolicited faxes. (Copies of these

cases are provided in the appendix hereto.)

Based on my experience described above, I respectfully suggest that the Commission should:

- 1 Establish a national Do-Not-Call registry
- 2 Clarify that “property, goods, or services” as defined by the Commission’s rules at 47 C.F.R. 64.1200(f)(5) is to be broadly interpreted, and include items being provided free of charge.
- 3 Correct the erroneous exemption for prerecorded calls made “on behalf of” tax-exempt nonprofits.
- 4 Correct the erroneous exemption for junk faxes sent with an “established business relationship.”
- 5 Clarify the exemptions at 47 C.F.R. 64.1200(c)(4) to make consistent with the statute and legislative history, that no calls are exempted if they are any form of a solicitation.
- 6 Eliminate the exemption for prerecorded calls to businesses
- 7 Eliminate the exemption to the identification requirements for prerecorded calls made by debt collectors.
- 8 Prohibit blocking of CallerID, and require telemarketing companies with trunk lines or more than 4 outgoing telephone lines for telemarketing calls to use equipment that provides CallerID.
- 9 Limit the exemption for calls made by tax-exempt nonprofit entities to calls soliciting donations, and not apply the exemption to calls made by or on behalf of nonprofits advertising property, goods, or services.

- 10 Require full legal name, phone number, and physical address of both the advertiser and the fax broadcaster on all facsimile advertising transmissions.
- 11 Adopt a reasonable limitation of the “Established Business Relationship” exemption.
- 12 Adopt a rule that “prior express permission or invitation” to send fax advertisements or make prerecorded marketing calls must be obtained in writing, and must be retained by the advertiser.
- 13 Clarify and adopt clear and unambiguous regulatory language that the TCPA applies to intrastate, interstate, and foreign calls and faxes.
- 14 Clarify that a prerecorded message can not itself obtain permission to deliver a further prerecorded message.
- 15 Clarify that the statutory definition of “willful” at 47 U.S.C. § 312(f) is applicable to the TCPA.
- 16 Clarify that the attorney fee provisions of 47 U.S.C. § 206 applies to consumer actions under the TCPA.
- 17 Clarify and adopt regulatory language that all violations of the Commission’s regulations at 47 CFR 64.1200 and 68.318 are actionable under 47 U.S.C. §§ 227(c) and (b).
- 18 Clarify the “common carrier” exemption for fax broadcasters should be strictly construed to apply only to entities that play no role in the fax advertising other than transmitting they message without providing any other service to the advertiser, such as procuring the fax numbers, or referring them to third parties for such assistance.

- 19 Clarify that no state enabling legislation or “opt-in” needed by states before a consumer can avail themselves of the private right of action in the statute.
- 20 Clarify that intentional “hang-up” calls made by telemarketers are “telephone solicitations” under 47 U.S.C. § 227(a)(3) and thus must comply with the disclosure requirements of the Commission’s rules.
- 21 Clarify that a consumer’s “do-not-call” request supercedes all exemptions, and that such a DNC request must be honored for 10 years regardless of subsequent transactions within a business relationship.
- 22 Clarify that advertisers are liable for unsolicited fax advertisements regardless of their use of third parties or independent contractors for fax broadcasting or telemarketing.
- 23 Clarify that calls purporting to be a “survey” but are conducted as a ruse or are a mere precursor to a subsequent call are covered by the statute and Commission’s rules
- 24 Require conspicuous notice on all equipment designed for use in making prerecorded telephone calls, that federal law places significant restrictions on the use of such devices for making unsolicited telephone calls.
- 25 Clarify that the general federal statute of limitations at 28 U.S.C. § 1658 of four years applies to TCPA causes of action in state courts.

I have set forth a more detailed discussion of each issue below. Notably, most of my comments do not suggest any finding that would require a change in the Commission’s rules, or even a change in policy. Most of the comments I have made address areas where a more direct and unambiguous statement of existing policy will be a welcome clarification to the landscape of TCPA issues. While many things may be clear to those experienced with

administrative agency law and related federal issues, I can assure you that the average consumer and small claims court magistrate generally have little experience in those issues, which leaves a fertile landscape for inaccurate conclusions, especially when those inaccuracies are urged by well-heeled defense attorneys.

The remedy, and one that I can attest from first hand experiences is sorely needed, is clear, unambiguous statements removing the “wobble room” used to stir up confusion and twist the words of the statute and the Commission’s regulations into a contorted mess. This will simplify the ability of everyone - consumers, small claims courts, and telemarketers, to determine if a particular practice violates the statute or accompanying regulations.

1. Establish a national Do-Not-Call registry

Over half the states now have such registries and the FTC appears likely to impose a similar registry. The Commission’s jurisdiction is necessary to make a national registry complete so as to reach those entities that the FTC can not.

Obviously the details of such a list will require much debate, but several concepts will be important. Most important, there must be no exemptions. Exemptions will subject the rule to constitutional challenges and repeated litigation. Exemptions will also breed “loophole hunting” and persons never intended to qualify for them will form front companies and undertake other contortions to continue making calls to people who have placed their number on the national list. Finally, exemptions are unwarranted. When someone says they don’t want telemarketing calls, they mean it.

2. Clarify that “property, goods, or services” as defined by the Commission’s rules at 47 C.F.R. 64.1200(f)(5) is to be broadly interpreted, and include items being provided free of charge.

There have been a number of advertisers claiming that their fax advertisements and prerecorded calls are not “unsolicited advertisements” because the items being advertised are “free” to the consumer or not “for sale.” For example, faxes and prerecorded calls for “free”

investment seminars, “free” air conditioner cleaning, “free” life insurance quotes. As with conventional advertising, name recognition and free “loss leader” goods and services are common advertising techniques. Commercial radio stations all over the country (and even some television stations) have been making prerecorded calls to peoples’ homes encouraging them to listen to (or watch) that station’s broadcasts. They argue that these are not advertisement of “property, goods, or services” because their broadcast is not “for sale” to the consumer being called. At least one advertiser is sending faxes with nothing but a web site address and a company logo, telling the recipient to “visit this site” where the recipient is hit with multi-level marketing schemes. These are all part of the same evil that Congress sought to abolish. Courts have found these calls are covered by the statute. *See, Agostinelli v. L.M. Communications of South Carolina, Inc.*, No. 00-SC-86-2862 (Mag. Ct. S.C., Feb. 14, 2002) (included in appendix hereto).

The TCPA is a remedial consumer protection statute, and “should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.” *Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1950). Exemptions from provisions of remedial statutes “are to be construed narrowly to limit exemption eligibility.” *Hogar v. Suarez-Medina*, 36 F3d 177, 182 (1st Cir 1994); *See, also*, 3 N. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 60.01. “[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.” *Tcherepnin v. Knight*, 389 U.S. 332, 335 (1967) The Commission recognized that the concepts and definitions in the TCPA are properly considered broadly. For example, in discussing the definition of “Established Business Relationship” the commission said:

Many commenters concur with our tentative conclusion that a business relationship should be defined broadly rather than narrowly . . . A broad definition of the business relationship can encompass a wide variety of business relationships (e.g., publishers with subscribers, credit agreements) without eliminating legitimate relationships not specifically mentioned in the record.

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 17 FCC Rcd. 8752 ¶ 35 (1992).

Consistently applying the principles of construction of remedial statutes and the broad principles embodied in the TCPA, calls promoting “free” loss leaders, radio and TV broadcast services, and other commercial offerings should clearly fall under the umbrella terms “unsolicited advertisement” and “telephone solicitation.” This requires no change in the Commission’s rules, only a clarifying interpretation that the intent of the TCPA is, and always has been, to cover such calls and faxes.

3. Correct the erroneous exemption for prerecorded calls made “on behalf of” tax-exempt nonprofits.

The Commission adopted an interpretation that calls made by “or on behalf of” tax-exempt nonprofits should be exempted because it would be inconsistent to treat calls made by a paid telemarketer calling on behalf of the charity different than calls made by the charity itself. However, this exact expansion of the exemption was considered **and explicitly rejected by Congress**. Compare the version of the TCPA passed by the House with the one actually enacted later. It is black letter law that an agency can not read back in an exemption that Congress considered and expressly rejected. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). Compare the Commission’s definition at 47 C.F.R. 64.1200(f)(3)(iii) (“**by or on behalf of** a tax-exempt nonprofit organization”) with the statute at 47 U.S.C. ¶ 227(a)(3) (“**by** a tax exempt nonprofit organization”).

Furthermore, it is not inconsistent to treat these callers differently. We often give exemptions from liability to direct charitable volunteers when a commercial entity hired by the same charity would have liability for the same act. For example, my undergraduate degree is in engineering. If I volunteer to go work on a house for Habitat for Humanity, I will have certain liability exemptions for my work because I am volunteering for a charity. However, if they hired me to do the exact same work, I would not receive those exemptions

in the law. An emergency medical technician who is off duty, and acts as a good Samaritan by helping someone in an accident, will be exempted from liability under good Samaritan rules when he would be liable for the same acts if he was responding to the accident as part of his employment. The FTC has concluded that while it has no jurisdiction over certain entities, it does have jurisdiction over telemarketers calling on behalf of those entities. *See* NPRM ¶ 55 and note 190.

In addition, this exemption is being roundly abused. I am personally aware of several entities making prerecorded calls claiming to be “on behalf of” a tax-exempt nonprofit entity, when in fact, that nonprofit entity receives little of the money. A magazine broker can make prerecords at any hour of the day or night, and if they give one tenth of one penny to a charity for each subscription sold, they can claim exemption from the TCPA. What appear to be “sham” nonprofit entities are set up by or in association with for-profit telemarketers (often both “entities” are housed in the same office - how convenient) merely as a front to engage in otherwise prohibited prerecorded calling campaigns.

Requiring a written contract authorizing the use of the nonprofit’s name is not an effective solution. I have seen little evidence that any problems are caused by callers incorrectly claiming some portion of the sales will benefit a nonprofit. The more acute problem is that unscrupulous commercial telemarketers and merchants can use prerecorded telemarketing schemes to sell their own or another entities commercial wares, by making a small (and I mean small) diversion of sales income to a nonprofit. The nonprofit is receiving some money (money that appears to the nonprofit is legitimate) but the telemarketer is simply using that as a low cost ruse in order to further the sales of his own wares by prerecorded telemarketing calls that would otherwise be prohibited.

This requires a change in the Commission’s rules, to remove the phrase “or on behalf of” from 47 C.F.R. 64.1200(c) and 47 C.F.R. 64.1200(f)(3)(iii).

4. Correct the erroneous exemption for faxes sent with an “established business relationship”

The Commission originally noted that consent to receive faxes “may” be inferred from the existence of a business relationship. *Memorandum Opinion and Order*, at note 87. Subsequent Commission promulgations have however, raised this to an absolute exemption. *See, FCC Reminds Consumers About 'Junk Fax' Prohibition*, 2001 WL 138410 (Feb. 2001). However, all courts have rejected the Commission’s position. (See cases included in the appendix hereto.) For example:

Plaintiffs’ Motion for Summary and Declaratory Judgment Against the Claimed “Established Business Relationship Defense” is in all things GRANTED; accordingly, the court holds and declares that there is no established business relationship exemption, exception or defense to unsolicited fax advertising under the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq.

Girards v. Inter-Continental Hotels Corp., No. 01-3456-K (Tex. Dist. Ct., Apr. 20, 2002).

As with the exemption for calls made “on behalf of” nonprofits, Congress considered, then rejected, an exemption for “established business relationship” for unsolicited faxes. Indeed, Congress included both an “Established Business Relationship” (“EBR”) exemption and a prior express permission or invitation exemption for telemarketing calls, **but not for faxes**. This demonstrates that those two terms mean different things, and they can not be the same. One can not “imply” the other as that would violate the basic rules of statutory construction. Since Congress included that exemption for telemarketing calls, and left it out for faxes, that leaving out was intentional. “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Rodriguez v. United States*, 480 U.S. 522, 525 (1987).

Congress did at one time, include an exemption for both “established business relationship” and “prior express invitation or permission” in the junk fax provisions of the TCPA. For example the House version of the TCPA included an “established business

relationship” exemption for unsolicited fax ads:

The term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person (A) without that person's prior express invitation or permission, or (B) with whom the caller does not have an established business relationship.

H.R. 1304, 102d Cong., 1st Sess. § 3, § 227(a)(4), (Passed by the House, Nov. 18, 1991). This language was replaced by the Senate, in the final version of the TCPA passed a month later. *See* 137 Cong. Rec. S18781 (Nov. 27, 1991) (Statement of Senator Hollings) (“Mr. President, I am pleased to report that we have come to an agreement with the House on a bill to restrict invasive uses of telephone equipment. The amended version before the Senate today of S. 1462 ... incorporates the principal provisions of ... H.R. 1304, which passed the House on November 18.”). When Congress deletes language from a bill before enacting a statute, the deleted language is not to be “penciled back in” later by an administrative agency or the courts:

The Conference Committee, however, deleted this “effects on commerce” provision, leaving only the “in commerce” language of 2 (a). [footnote omitted] Whether Congress took this action because it wanted to reach only price discrimination in interstate markets or because of its then understanding of the reach of the commerce power, its action strongly militates against a judgment that Congress intended a result that it expressly declined to enact.

Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974).

It appears that the Commission’s prior interpretation was not necessarily inconsistent with the statute, but has been taken out of context. It is true that the existence of a business relationship *may* indicate a level of communications between parties that, *if examined closely*, would reveal some document or contract that grants prior express permission or invitation to receive advertisements by fax. This observation however, has been taken out of context and altered to mean the mere existence of a business relationship automatically

constitutes express consent to receive fax advertisements. The latter is clearly in error, and not what the Commission's 1992 Report and Order stated. *See* 7 FCC Rec. 8752, n.87 (1992). Because of the exceptionally broad construction intended by "Express Business Relationship," merely calling a store and asking what time they close would open the caller up for unlimited junk faxes and prerecorded solicitation calls.

Correcting this misinterpretation requires no change in the Commission's rules, only a clarifying interpretation that the mere existence of a business relationship does not, and never has, *automatically* constituted express consent to receive fax advertisements, and a business relationship alone is not a defense to a TCPA violation.

5. Clarify the exemptions at 47 C.F.R. 64.1200(c)(4) to make consistent with the statute and legislative history, that no prerecorded calls are exempted if they contain a solicitation.

As originally drafted, the TCPA was a blanket ban on all calls delivering a prerecorded message. A late addition to the statute was made to give the Commission the authority to exempt certain calls. This was to allow commercial voice-mail and message forwarding services to continue to function. Senator Hollings was explicit however, that the Commission was NOT authorized to exempt telemarketing calls:

In considering whether to exempt certain calls, however, the bill states that the FCC may not exempt telephone solicitations. These calls are certainly commercial calls and the evidence before the Congress leaves no doubt that these types of calls are an invasion of privacy and a nuisance.

137 Cong. Rec. S18781 (Nov. 27, 1991) . The exemptions adopted by the Commission exempt calls made by or on behalf of a tax-exempt nonprofit, even if such calls do contain solicitations. This is improper. The statute set out limits on the category of calls the Commission was permitted to exempt:

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

- (i) calls that are not made for a commercial purpose; and
- (ii) such classes or categories of calls made for commercial purposes as the Commission determines--
 - (I) will not adversely affect the privacy rights that this section is intended to protect; and
 - (II) do not include the transmission of any unsolicited advertisement; and

In order for a call to be exemptable by the Commission, it must either be:

Not made for a commercial purpose

or

If made for a commercial purpose, must not 1) adversely affect the privacy rights that the TCPA is intended to protect **and** also must not 2) include the transmission of any unsolicited advertisement.

Unless a call made for a commercial purpose meets **both** of the latter criteria, it is not in the category of calls that the Commission was authorized to allow to be exempted. Thus as a matter of law, a call for any commercial purpose containing an unsolicited advertisement can not be exempted from the provisions of paragraph (1)(B) of the statute.

Correcting this misinterpretation requires no change in the Commission's rules, only a clarifying interpretation that if a call is any type of solicitation, it can not qualify for an exemption from the statute.

6. Eliminate the exemption for prerecorded calls to businesses

Exempting prerecorded calls to businesses was within the purview of the Commission, but the ease of using a proliferation of new devices to make prerecorded calls is becoming more and more of a burden on businesses. I am aware of many businesspeople who receive these calls. The Commission should reconsider this exemption and remove it from the Commission's rules.

7. Eliminate the exemption to the identification requirements for prerecorded calls made by debt collectors.

Debt collectors use prerecorded messages to call debtors, but they often reach **other** consumers who are **not** the debtor. Often the debt collectors are reaching wrong numbers, and homes of people who have no idea who the debtors are because the debt collectors often have a wrong telephone number for the debtor in their files. Because these debt collectors are prohibited by the FDCPA from disclosing the debt to anyone other than the debtor, they refuse to identify themselves in these prerecorded messages. The Commission has tacitly approved this practice.

However, these repeated prerecorded calls are more and more a burden to innocent consumers who are not the debtor, but are being hounded by these robot calls because the debt collectors have a wrong number in their database. Debt collectors call the same number repeatedly - sometimes much more frequently than telemarketers. This has happened repeatedly to me, and I find it enormously frustrating. These calls are repeatedly being made to my home, despite me hanging on through these prerecorded calls in an attempt to reach a “live person,” making return calls at my own expense, and having the live operators refuse to identify themselves or their company so that I can make a complaint.

If debt collectors are under an obligation not to disclose a debt to a non-debtor that conflicts with the disclosure requirements of the TCPA, then they should simply not use prerecorded messages - let them make live calls. It would be certainly silly for them to be asked to be relieved from the header and identification requirements for faxes. The header requirements for faxes and identification requirements for prerecorded calls are **mandatory** - there is no requirement that such communications have any solicitation in them in order for the header and identification to be required. 47 U.S.C. § 227(d). Only the “telephone solicitation” disclosure rules (47 C.F.R. 64.1200(e)) are limited to calls made for the purpose of solicitation, and certainly the disclosure requirements of the TCPA with regard to live calls do not apply to live debt collection calls that are not solicitations.

Correcting this misinterpretation requires no change in the Commission’s rules, only a clarification that the commentary in the *Report and Order*, 7 FCC Rcd. 8752 ¶¶ 36-40, only regarded **live** debt collection calls, and not prerecorded calls or faxes by debt collectors.

8. Prohibit blocking of CallerID, and require telemarketing companies with trunk lines or more than 4 outgoing telephone lines for telemarketing calls to use equipment that provides CallerID.

Claims that telemarketers can't provide CallerID are false. Few if any are still using switches that are not SS7 compatible. Indeed, nearly all have upgraded to digital switches to take advantage of monitoring of supervision signals so as to be more efficient in their calling algorithms. Many however, program their switches to intentionally not provide caller ID or to provide false information (like "000-000-0000"). This practice is already being prohibited by several states. There is some evidence that telemarketers intentionally locate facilities and select carriers specifically so CallerID data will not be passed along to the destination. The Commission should rely on its resources in the Common Carrier Bureau to determine the technical issues correctly, and adopt regulations accordingly.

This requires a change in the Commission's rules, requiring CallerID information to be provided.

9. Limit the exemption for calls made by tax-exempt nonprofit entities, to calls soliciting donations, and not apply the exemption to calls advertising property, goods, or services.

Congress relied heavily in the Field Research Study in justifying exempting calls made by charities. *See* Senate Report No. 102-171 at 1. (Citing Field Research Corp., *The California Public's Experience with and Attitude Toward Unsolicited Telephone Calls*, at 9 (March 1978) (survey conducted for Pacific Telephone Co., on file in Cal. Pub. Util. Comm'n File No. OII12)). That study shows however, that it was calls for "donations" to charities that were perceived as less intrusive than commercial calls. (See Appendix hereto, copy of Table II-1 from the Field Research Study). There is no justification to extend that exemption to calls by charities which are selling commercial goods, and competing with commercial entities in the marketplace.

This does not require a change in the Commission's rules, but rather only a clarification that calls from any entity - nonprofit or otherwise, containing unsolicited

advertisements or solicitations other than for donations, are in fact commercial calls regardless of the identity of the caller, and thus not exempted from the Commission's rules.

10. Require full legal name, phone number, and physical address of both the advertiser and the fax broadcaster on all facsimile advertising transmissions.

A rampant problem with fax advertisements, is the lack of identification of anyone to complain to, or any way to identify the sender or the advertiser. Tracking these people down becomes almost impossible unless the recipient wants to go to the trouble of subpoenaing phone records, or in some cases, having to purchase the product just to find out who the company is.

Because of the abuses, the identification requirements of the TCPA need to be more explicit. "Identification" is ambiguous. The Commission should require 1) full legal name, 2) working phone number, and 3) accurate and complete physical address of both the advertiser and the fax broadcaster on all facsimile advertising transmissions. This is the minimum necessary, and should present no burden to advertisers. Indeed, who would not want their accurate name, address, and phone number on their advertisements?

This does not require a change in the Commission's rules, but rather a clarification that "identification" is satisfied only if the full *legal* name, working phone number, and accurate and complete physical address are included on all facsimile advertising transmissions, fully identifying both the advertiser and the fax broadcaster.

11. Adopt a reasonable limitation of the "Established Business Relationship" exemption.

The current definition is overly broad. Advertisers have argued successfully that simply visiting a web site or calling a store to find out what their hours of operation are constitutes an EBR, subjecting the consumer to prerecorded calls, and calls at any hour of the day or night. At least one telemarketer has argued that buying a newspaper at a newsrack 10 years ago is an EBR. This is unreasonable today.

For an EBR exemption to be reasonable and not abused, there needs to be a 90 day time limit, and an actual purchase, or in the alternative, affirmatively providing the business with the consumer's phone number with an express permission that advertising calls may be made thereto.

12. Adopt a rule that “prior express permission or invitation” to send fax advertisements or make prerecorded marketing calls must be obtained in writing, and must be retained by the advertiser.

The recent events with falsified “permission” and rampant abuse claiming “negative option” permission because someone did not object to junk faxes, demonstrates that this is clearly necessary now. This will also assist legitimate advertisers who can demand such permissions be produced by a fax broadcaster before contracting with that broadcaster. It provides a standard of conduct that is easy to demonstrate.

13. Clarify and adopt clear and unambiguous regulatory language that the TCPA applies to intrastate, interstate, and foreign calls and faxes.

Whiles this has been done implicitly with recent Commission actions, this issue still confuses many people. Clear, unambiguous language directly in the Commission's commentary would greatly help.

The Commission has already reiterated that the TCPA applies to both interstate and intrastate calls. My article *Application of the Telephone Consumer Protection Act To Intrastate Telemarketing Calls and Faxes*, 52 FED. COMM. L. REV. 667 (2000) more fully sets out analysis of this issue.

The Commission's recent citation to 21st Century Fax(es), *In the Matter of 21st Century Fax(es), Ltd., Notice of Apparent Liability for Forfeiture*, 17 FCC Rcd 1384 (2000), makes clear that foreign faxers are also subject to the TCPA. However the Commission's conclusion involved several factual determinations that do not provide a procedural guide for others.

I suggest that the Commission adopt a common sense approach that courts are familiar

with. If a fax broadcaster or telemarketer is found to be “present” within a state with sufficient contacts to be subjected to the state court’s personal jurisdiction, such a determination would be dispositive of whether that faxer or telemarketer was present “within the United States” for the purposes of the TCPA. Indeed, this was the ultimate determination alluded to by the Commission. *Id.*, at ¶ 5 (“Congress focused on the violator having a presence in the United States such that the state courts would have personal jurisdiction.”)

This would not require any change in the Commission’s rules, but can be accomplished with appropriate commentary and clarifying interpretation.

14. Clarify that a prerecorded message can not itself obtain permission to deliver a further prerecorded message.

My personal experience has shown that many prerecorded telemarketing calls have messages that say “For an important message, press 9” or some similar message. Then after the consumer presses “9” they receive a prerecorded solicitation. The telemarketers claim that by pressing “9” the consumer has given them permission to deliver the following solicitation, and that the first part of the message that asks permission, is not itself an “unsolicited advertisement” as defined by the statute. This evasion is becoming more and more rampant in the industry. While the Commission has noted that a solicitation to determine if a consumer wants to receive a solicitation is itself a solicitation, this construction has escaped most people. *Memorandum Opinion and Order*, 10 FCC Rcd 12391 ¶ 15 (1995). Addressing this practice clearly and unambiguously is necessary.

This does not require a change in the Commission’s rules, but rather only a reiteration of the concept that a call or message seeking permission to receive a solicitation, is itself a solicitation under the TCPA, and satisfies both the definition of “telephone solicitation” and “unsolicited advertisement.”

15. Clarify that the statutory definition of “willful” at 47 U.S.C. § 312(f) is applicable to the TCPA.

Various courts have applied inconsistent and widely varying definitions to the term

“willful” as used in the statute and Commission’s rules. This is unfortunate as a federal statute should be uniformly construed and applied. *Jerome v. United States*, 318 U.S. 101, 104 (1943) The statutory definition of “willful” at 47 U.S.C. § 312(f) is clearly applicable to the TCPA.

This does not require a change in the Commission’s rules, but rather only a clarification that the statutory definition of “willful” at 47 U.S.C. § 312(f) is and always has been applicable to the TCPA.

16. Clarify that the attorney fee provisions of 47 U.S.C. § 206 applies to consumer actions under the TCPA.

This would not require any change in the Commission’s rules, but can be accomplished with appropriate commentary and clarifying interpretation.

17. Clarify and adopt regulatory language that all violations of the Commission’s regulations at 47 CFR 64.1200 and 68.318 are actionable under 47 U.S.C. §§ 227(c) and (b).

In some cases, it is unclear which portions of the Commission’s regulations are promulgated under which sections of the statute, and thus which portions of the regulations are actionable by the consumer. While some sections of the regulations do reflect language of specific portions of the statute, it seems equally clear that many of the regulations serve to implement multiple portions of the statute. For example, the regulations at 47 CFR 64.1200(e) were generally considered to apply to live telemarketing calls, actionable under 47 U.S.C. § 227(c), but the Commission has noted recently that those regulations also can apply to prerecorded calls, actionable under 47 U.S.C. § 227(b).

It would be desirable if the Commission would identify which regulations are actionable under which sections of the statute.

This does not require a change in the Commission’s rules, but rather only a clarification in appropriate commentary.

18. Clarify the “common carrier” exemption for fax broadcasters should be strictly construed to apply only to entities that play no role in the fax advertising other than transmitting the message without providing any other service to the advertiser, such as procuring the fax numbers, or referring them to third parties for such assistance.

It appears that the Commission may have been misled in the role of “fax broadcasters” until recently. The original belief was that these were simply service bureaus, that took a customer’s document and customer’s list of phone numbers, and then broadcast that document to the customer’s list of numbers. In this scenario, the broadcaster did not prepare the ad, provide the fax numbers, advise the client on proceeding, or assist the client in obtaining the fax numbers from a third party.

The reality is quite different. Often these fax broadcasters provide the fax numbers, provide order-taking services (i.e. provide the 800 number for inbound calls in response to the fax ads), provide a “fax removal” service, or send the client next door to a different company to obtain the fax numbers (yet the invoice is for both the fax broadcasting, and rental of the fax list). This type of involvement is not akin to the role of a common carrier, and thus they should not enjoy the exemptions that those acting as common carriers enjoy.

This “exemption” is subject to the traditional notion of construction, that exemptions from such remedial consumer protection acts is to be narrowly construed ... to limit exemption eligibility. *Hogar v. Suarez-Medina*, 36 F3d 177, 182 (1st Cir 1994).

I believe that the benefits from a non-exhaustive list of activities that would by definition constitute a “high degree of involvement” would aid everyone in making day-to-day decisions on this issue. For example a fax broadcaster that engages in sending of facsimile advertisements additionally provides any of the following should be deemed to have the requisite “high degree of involvement” in the acts of their advertisers:

- a. providing, obtaining, or arranging with another entity to provide the fax numbers to which the faxes are to be sent;
- b. providing order-taking
- c. participating in the content of advertisement in any way, including but not limited to provided any contact telephone number(s) or “opt-out” services for

- the advertiser;
- d. providing mail forwarding, drop box, or other contact forwarding services to the advertiser so they can remain unidentified;
 - e. sending of any advertising material by facsimile without obtaining an attestation in writing by the advertiser that the advertiser has affirmatively obtained prior express permission or invitation to send advertising material to each fax number;
 - f. sending of any advertising material by facsimile that does not clearly identify both itself and the advertiser;
 - g. sending of facsimile advertisements for any entity after being given notice by any recipient of an advertisement or any government body, that the fax in question was unsolicited.

The Commission should also clarify that although that the strict vicarious liability of the advertiser does not diminish the joint and several liability of the broadcaster. This does not require a change in the Commission's rules, but rather only a clarification that the exemption for those acting as a mere conduit, is to be narrowly construed.

19. Clarify that no state enabling legislation or “opt-in” is needed by states before a consumer can avail themselves of the private right of action in the statute.

This does not require a change in the Commission's rules, but rather only a clarification citing the numerous court decisions on point. My analysis of this issue is more fully set forth in the article, *State Courts and the Telephone Consumer Protection Act of 1991. Must States Opt-In? Can States Opt-Out?* 33 CONN. L. REV. 407 (2001).

20. Clarify that intentional “hang-up” calls made by telemarketers are “telephone solicitations” under 47 U.S.C. § 227(a)(3) and will violate the disclosure requirements of the Commission's rules.

The Federal Trade Commission recently concluded that such “hang-up” calls where the consumer answers the call, but there is no telemarketing agent available to respond,

constitutes a violation of the identification requirements of the FTC's Telemarketing Sales Rule. The FCC's rules impose a similar requirement, and thus calls made for the purpose of telemarketing where the consumer is not provided those disclosures also violate the Commission's rules at 47 C.F.R. 64.1200(e)(2). At least one appellate court has reached a similar conclusion that "hang-up" calls are "telephone solicitations" under the TCPA. *Irvine v. Akron Beacon Journal*, 2002 Ohio 2204 (Ohio App., 2002).

I can tell you first hand that these "hang-up" or "dead ringers" calls are increasing in frequency and annoyance.

I find incredulous that a commercial business can simply ignore something as plain and simple as identification requirements, and use a device that they affirmatively **know** will violate those requirements. If I as a businessman can't comply with a statute regulating my industry, I can lobby for change, or I can chose another line of business. Nothing gives me the right to just ignore it. If Congress or the Commission has decided that certain mandatory measures are a condition of engaging in a certain practice, then so be it. Telemarketers are not above the law. How would things be if hazardous waste haulers simply said the regulations were too burdensome and ignored them?

This does not require a change in the Commission's rules, but rather only a common sense recognition that calls made for the purpose of solicitation are "telephone solicitations" under the statute, and must provide the disclosure requirements of 47 C.F.R. 64.1200(e)(2).

21. Clarify that a consumer's "do-not-call" request supercedes a telemarketer's exemption for calls within an "established business relationship" and that such a DNC request must be honored for 10 years regardless of subsequent transactions within a business relationship.

One consumer recently had to litigate this question all the way to the Ohio Supreme Court, and in fact, lost this issue at trial and in the court of appeals. *Charvat, v. Dispatch Consumer Services, Inc.*, 769 N.E.2d 829, 95 Ohio St.3d 505 (Ohio, 2002). Few pro se consumers have the ability, or desire, to go to this extreme and telemarketers know it. The clarification in existing commentary is simply not sufficient to prevent pro se consumers

from being disabused. Clearer direction with explicit language in the regulations themselves (not just in the commentary accompanying the regulations) is needed.

This does require a change in the Commission's rules to explicitly set out that a "do-not-call" request expressly supercedes any business relationship exemption. Because the Commission was directed to develop the definition of "Established Business Relationship" this change is within the Commission's existing authority.

22. Clarify that advertisers are liable for unsolicited fax advertisements regardless of their use of third parties or independent contractors for fax broadcasting.

Several advertisers have successfully argued for insulation from liability for acts of "independent contractors" making telemarketing calls or sending junk faxes - in contradiction to the Commission's orders that establish strict vicarious liability for such advertisers. As a federal law, state courts can not use state common-law defenses to the federal cause of action. See *State Courts and the Telephone Consumer Protection Act of 1991. Must States Opt-In? Can States Opt-Out?* at 424, note 94 and citations therein. The Commission should adopt language that specifically rejects insulation from liability by use of "independent" contractors. Indeed, Congress was aware of the scenario of "fly-by-night" fax broadcasters that would escape liability to reconstitute under a different name and serve the same advertisers. See, e.g., *Hearing on H.R. 628, 2131 and 2184 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong. (1989) (testimony of Prof. Ellis regarding "boiler room" type fax broadcasters that would dissolve and reconstitute to avoid liability).

This does not require a change in the Commission's rules, but rather only a reiteration of the Commission's prior interpretations and clarifying commentary.

23. Clarify that calls purporting to be a "survey" but are conducted as a ruse or are a mere precursor to a subsequent call are covered by the statute and Commission's rules.

The statute and applicable regulations prohibit calls delivering a pre-recorded

messages to residences unless the caller obtains the “prior express permission or invitation” of the called party or qualifies for the narrow exemption permitted by the statute. That exemption permits the FCC to exempt calls made for a commercial purpose, only if they, inter alia, do not “adversely affect the privacy rights that this section is intended to protect.” 47 U.S.C. § 227(b)(92)(B)(ii)(I). Indeed, the statute originally did not have such an exemption - all unsolicited prerecorded calls of **any** nature were flatly prohibited. A late amendment was made at the request of Congressman Bryant of Texas to permit his constituent, MessagePhone, to continue offering its service of letting callers from pay phones record a personal message to be delivered in the event the person they were calling was not available.

Take for instance the scenario where you are at an airport, you missed your flight and only have a few minutes to call your spouse with the updated flight information. The line is busy and you have to leave. With my constituent's service, you could record a message; they would attempt to deliver a few minutes later, even if you were completely removed from a telephone. * * * The broadness of the Senat[e]'s original definition of an autodialer would have prevented the telemessaging services I have described.

137 Cong. Rec 11,311-12 (Nov. 26, 1991) (statement of Mr. Bryant)

Some telephone companies are beginning to offer a voice messaging service which delivers personal messages to one or more persons. A person calling from a pay telephone at an airport, for instance, may call and leave a recorded message to be delivered later if the called line is busy or no one answers the call. Some debt collection agencies also use automated or prerecorded messages to notify consumers of outstanding bills. The FCC should consider whether these types of prerecorded calls should be exempted and under what conditions such an exemption should be granted either as a noncommercial call or as a category of calls that does not invade the privacy rights of consumers. In considering whether to exempt certain calls, however, the bill states that the FCC may not exempt telephone solicitations. These calls are certainly commercial calls and the evidence before the Congress leaves no doubt that these types of calls are an invasion of privacy and a nuisance.

137 Cong. Rec 18,784 (Nov. 27, 1991) (statement of Mr. Hollings). This shows exactly what Congress intended and was considering.

One of the foundational principles of statutory construction is that the TCPA is a remedial consumer protection statute and “should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.” *Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1950). “[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.” *Tcherepnin v. Knight*, 389 U.S. 332, 335 (1967). Exemptions from provisions of remedial federal statutes “are to be construed narrowly to limit exemption eligibility.” *Hogar v. Suarez-Medina*, 36 F3d 177, 182 (1st Cir 1994); *See, also*, 3 N. Singer, *Sutherland Statutory Construction* § 60.01. To adopt the position that any prerecorded call that asks questions like a “survey” would be to effectively gut the TCPA, so telemarketers would be free to engage in unlimited prerecorded calling if they simply prefaced their missive with a couple of bogus “survey” questions. Such a construction would clearly conflict with the intent of the statute, and violate one of the oldest canons of construction:

[T]he office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

Heydon's Case, 3 Co. Rep. 7a, 7b; 76 Eng. Rep. 637, 638 (1584).

The FCC addressed this question peripherally in regard to “calls conducting research, market survey, political polling, or similar activities which do not *involve* solicitation as defined by our rules.” *Report and Order*, 7 FCC Rcd. 8752,(1992) ¶ 41. (Emphasis added). In a footnote, the Commission noted:

See para. 45, *infra.*, emphasizing that market research or surveys would be prohibited under § 227 of the TCPA and § 64.1200(a)(1) if the called party

were charged for the call without the party's prior express consent or if such calls contain unsolicited advertisements.

Calls purporting to be a survey but are actually precursors as part of a solicitation campaign, clearly “involve” solicitations under the rules. The legislature expressly contemplated that telemarketers would try this loophole with “pretext” surveys, and made clear:

A call encouraging a purchase, rental or investment would fall within the definition, however, even though the caller purports to be conducting a survey.

S. Rep. No. 102-177, p. 5, Oct. 8, 1991. The reasoning for this is clear. Consumers found such pretext calls offensive. The watershed statistical analysis which Congress had in front of it in drafting the TCPA was the Field Research Study. *See* S. Rep. 102-177 at 2, n1 (1991) citing Field Research Corp., *The California Public's Experience with and Attitude Toward Unsolicited Telephone Calls*, at 9 (March 1978) (survey conducted for Pacific Telephone Co., on file in Cal. Pub. Util. Comm'n File No. OIII2); cited in Susan Burnett Luten, *Give Me a Home Where No Salesmen Phone: Telephone Solicitation and the First Amendment*, 7 HASTINGS CONST. L.Q. 129-164; see, also, Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 128.

Table II-1 of the Field Research Study is attached as Exhibit “B” and shows that calls purporting to be conducting a survey as a pretext for selling something were even **more** objectionable than prerecorded solicitations! Only crank and obscene calls were more objectionable. *Id.* Even calls from bill collectors were less annoying. *Id.*

In drafting the statute, Congress permitted only a narrow range of calls to be exempted from the prerecorded message prohibition. One of the conditions set out by Congress is that any rule the FCC adopted is prohibited by the statute itself from exempting any call that “adversely affect the privacy rights that this section is intended to protect.” 47 U.S.C. § 227(b)(2)(B)(ii)(I). Because these “fake” survey calls are considered in the very study Congress referenced, to be more intrusive than straightforward prerecorded sales calls, they can not - as a matter of law - have been exempted by the FCC. Such an interpretation can

not be valid as it violates the TCPA itself.

This is a pristine example of where the application of the time honored “duck test” is appropriate - “If it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck.” *BMC Industries, Inc. v. Barth Industries, Inc.*, 160 F.3d 1322, 1337 (11th Cir., 1998).

Instructive here is the recent case of *Irvine v. Akron Beacon Journal*, 770 N.E.2d 1105 (Ohio App. 2002). That case concerned computer made telemarketing calls made to a consumer’s home where no solicitation was actually made in the calls, but they were made as part of a process to determine if a future solicitation should be made.¹

The fact that these particular calls were one step removed from the actual sales pitch does not mean that the purpose of the calls was not to, ultimately, attempt to sell a subscription to the Beacon Journal. This court is not persuaded by Beacon Journal's argument that the calls it generated by the autodialer, with no intention of connecting them to a telephone solicitor, did not qualify as “telephone solicitations.” Whether a solicitor is at the other end of the phone or not, when the telephone rings, the intrusion into the home and the seizing of the telephone line is the same. In fact, an argument can be made that when the telephone rings and no one is on the other end, the recipient is even more disturbed and inconvenienced than if a sales person is at the other end of the line.

Id. at 1118-19. This reasoning is sound and the Ohio Supreme Court denied certiorari.

This would require no change to the existing rules, but a clarification that the Commission’s earlier comment that calls “involving” solicitations include calls made as a part of a series of calls where a subsequent call may be for the purposes of solicitation.

24. Require conspicuous notice on all equipment designed for use in making prerecorded telephone calls, that federal law places significant restrictions on the use of such devices for making unsolicited telephone calls.

My experience has shown me that unscrupulous vendors are selling or leasing, often

¹ The newspaper was calling to see if the number called was a working phone where someone lived who could purchase the newspaper.

at exorbitant costs, personal computers and other devices designed to make prerecorded calls to homes, and have either failed to disclose that severe restrictions exist on the use of those devices, or in some cases have affirmatively misled purchasers about the legalities of use of those devices for making prerecorded solicitation calls. Otherwise honest business persons have been duped.

I suggest that the Commission require that manufacturers and sellers of these devices be required to affix a prominent notice to those devices, and include in all manuals and accompanying documentation, that the use of those devices for the delivering of prerecorded messages to consumers is severely restricted by federal law.

This would require a change in the existing rules.

25. Clarify that the general federal statute of limitations at 28 U.S.C. § 1658 of four years applies to TCPA causes of action in state courts.

This question has resulted in significant wasted resources of courts and litigants. It is abundantly clear that the TCPA, by being passed into law in 1991, is covered by the general federal statute of limitations at 28 U.S.C. § 1658, which applies to all federal statutes passed after 1990. Most state court (and litigants) are however unaware of 28 U.S.C. § 1658.

This does not require a change in the Commission's rules, but rather only a clarifying commentary.

Conclusion

While the interpretation of several points I have made may be clear to the Commission, I assure you they are not nearly so clear to the courts and consumers. Many of the points I have made require no change to the Commission's rules. However, I can not stress enough that my experience has amply demonstrated to me that forceful reiteration of the Commission's prior interpretations with clarifying, unambiguous, and easy to understand commentary is critical to uniform and effective application of the statute and the Commission's rules.

ADDITIONAL ISSUES

First Amendment Implications

The commission also seeks comment on “any proposed changes to our current rules implicate these constitutional standards.” NPRM¶ 12. However, the Commission has identified *Central Hudson* as the only standard discussed. This ignores a number of other standards that are applicable to various portions of the TCPA.

Central Hudson only applies to “content based” restrictions of commercial speech. Most portions of the TCPA are content-neutral for the purposes of First Amendment analysis. See *Hill v. Colorado*. In addition, the Supreme Court has reiterated that there is no First Amendment right to trespass for speech purposes. E.g. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *N.O.W. v. Operation Rescue*, 37 F.3d 646, 655-56 (4th Cir. 1994).

With regard to the TCPA, the restrictions on sending unsolicited commercial faxes are a valid restriction of trespass and nonconsensual theft of fax machine resources. A number of courts have agreed. (A number of these cases, such as *Micro Eng. v. St. Louis Ass’n of Credit Mgmt., Inc.*, No 02AC-008238 XCV (Div 39, Aug. 13, 2002), are included in the appendix to these comments). Requiring telemarketers to record DNC requests, train their agents, and implement reasonable practices and procedures to achieve compliance with the statute and Commission’s rules are not speech restrictions, but commercial business regulations.

The restriction against any unsolicited telemarketing calls in violation of a DNC request, is a valid regulation against a trespass notice, no different than a law that provides fines for violating a “no trespassing” or “no soliciting” sign. These are not speech restrictions, but neutral laws giving the property owner control over invited persons entering his property.

The restrictions on making prerecorded telemarketing calls to homes are also content-neutral. Each case to consider such statutes has so held. The leading case on the TCPA’s restrictions on prerecorded calls is *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995), *cert. denied*, 115 S. Ct. 2615 (1995). The Ninth Circuit unanimously concluded:

The provision in the Telephone Consumer Protection Act of 1991 banning automated, prerecorded calls to residences is content-neutral. Congress adequately demonstrated that such calls pose a threat to residential privacy. The ban is narrowly tailored to advance that interest, and leaves open ample alternative channels of communication. Thus, it does not violate the First Amendment.

Id. at 975. Other courts have reached the same conclusion with regards to state laws nearly identical to the TCPA. *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir.1995); *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996).

While there is a certain invasive aspect of uninvited solicitation calls to a man's home, such calls do not present direct pecuniary costs to the recipient (such as faxes) and are not in violation of a prior notice (such as calls in violation of a DNC request). But this is a restriction on a delivery method, and thus is analyzed under the time, place, and manner restrictions. The portion of the Commission's regulations regarding time of day of solicitations are also properly analyzed as time, place, and manner restrictions.

The only "content-based" portion of the statute and Commission's rules, are the mandatory disclosures required of faxes, prerecorded messages, and "live" telemarketing calls. These are compelled commercial speech in one respect. However, the United States Supreme Court has never viewed compelled commercial speech to be problematic, when rationally related to furthering consumer interests in fair and accurate dealings with businesses. "Compelled speech" cases such as *Riley v. Nat. Fed. of the Blind*, 487 U.S. 781 (1988), concern "pure" speech, not commercial speech.

The Commission is unnecessarily placing a higher burden on the TCPA by presuming that all portions of the TCPA must be justified under the *Central Hudson* test for content based speech. In addition, there are a number of legal scholars who believe that the Court is on the threshold of a modification to the *Central Hudson* standard. If that occurs, statutes previously justified under *Central Hudson* will be subjected to successive relitigation. By making the correct determination now and constructing the Commission's regulations as content-neutral time, place, and manner regulations, that unfortunate waste of resources and

uncertainly can be avoided in the context of the TCPA.

Overall effectiveness

The Commission also seeks comment on “the overall effectiveness of the company-specific do-not-call approach.” NPRM ¶ 14. My personal experience, and those revealed to by other plaintiffs’ litigation, has convinced me that this approach is not sufficiently effective.

For example, when I instructed a caller from AT&T not to call my home again, I was informed that this would take up to 90 days, and that I would still be called by other AT&T companies. It turns out that AT&T operates multiple companies, such as their mobile services, Internet services, long distance service, local service, etc., and require a separate “do-not-call” request to each. A telemarketer from MBNA credit card who I made a DNC request to, informed me that my request would end calls from her call center, but that MBNA had over a dozen “call centers” and that I must make a separate DNC request to each call center. I was surprised to receive calls from MCI last year, since I had previously been involved in TCPA litigation with MCI, and was assured in the past by their counsel that I would “never” be called again. I was shocked to learn that the explanation for my call was that MCI/Worldcom apparently is a “new” company after the merger, and previous “do-not-call” requests made to MCI before the merger are not being honored by the “new” company.

In addition, some telemarketers willfully violate the rule, but avoid suits by placing those calls only once per year. Indeed, these companies actually include these intentional violations in their policies. A local newspaper here has in its policy that they will call people on their do-not-call list once a year to see if they want to remain on their do-not-call list!

In my personal experience, having to make separate requests of each calling entity is burdensome. Despite being rigorous at making DNC requests to all telemarketers calling my home, I continue to receive those calls. To determine if a TCPA violation has occurred, I must keep burdensome records, and have to determine if two similar-sounding names are in fact the same caller. It seems there is a never ending list of callers, and each has to call me at least once in order to receive my DNC request. I desperately wish there was some way to give notice to them all at once, prophylactically. Similar to my ability to put a “no soliciting”

sign on my door is a single act to stop all solicitors.

My experience also shows that many times, I am unable to make a DNC request because the callers “hang-up” before I get a chance to do so. In my experience, once I tell the caller I am not interested, I often never have a chance to take a breath and continue with a DNC request. They hang up, anticipating that request is coming. Also some telemarketers require “magic words” and instruct their agents that unless a consumer explicitly says the words “put me on your do-not-call list” that they will not consider that a valid “do-not-call” request. *See Wilder v. DialAmerica Marketing, Inc.*, No. CV810946 (Super. Ct. Ca. Nov. 20, 2002) (included in the appendix hereto).

And then there are the predictive dialer “hang-up” calls. I have at times received nearly a dozen such calls in one day. No way to identify the caller and no way to tell them to stop calling. In litigation, I have subpoenaed telephone records from the LEC at great expense, and have learned the identity of some of these hang-up callers, finding as many as six hang-up calls from the same caller in one day.

Time Frame of DNC requests on the national list

The Commission seeks comment on the appropriate time frame for DNC requests to be honored and other related practices. It is true that some percentage of telephone numbers change each year. It is also true that many people keep the same telephone number for decades. Any specified time period will necessarily be imperfect.

Rather than a specified time period, after which the consumer’s prior request is discarded and ignored, I suggest a technological solution. One is to provide telemarketers with a list of numbers that have been reassigned by the LEC, and have those numbers removed from the national DNC list. I believe this is unsuitable, because it would just be throwing those unlucky consumers to the wolves. Reassignments are not always the result of a change in hands of a phone number. In addition, a number may also change hands to a person whose prior number was also on a national DNC list.... only to now subject them to 90 days of unrelenting calling.

A better solution would be requiring the LEC, when assigning a new phone number, to provide the new subscriber with notice that the number to which they have been assigned

is, or is not, in the national DNC list, with instruction on how to add or remove that number to or from the list if they so choose. Reassigned numbers should not be removed from the national list automatically. In the alternative, they should at least not be removed for a minimum of 2 update cycles of the national database, in order for the new subscriber to have time to move in and get settled, indicate that they wish the new number to remain on the national list, and have the next update of the list be distributed and put into place by telemarketers with the new subscriber's wishes reflected. This will prevent what would amount to a mandatory Hell period for all new subscribers during which time they are targeted by telemarketers before they have a chance to get on the next update of the national DNC list.

The foundation to this policy is simple: the vast majority of people do not like receiving telemarketing calls. Evidence of this is overwhelming:

0.1% "like" receiving them (Field Research Corp. Commissioned by Pacific Telephone & Telegraph, 1978).

83% prefer not to be called, 11% more say it depends (Public Pulse, The Roper Organization - Inc. Magazine, January, 1989).

67% are very annoyed (The Roper Organization - American Demographics Magazine, March, 1991).

78% find it unacceptable (Ebasco Consulting, commissioned by the Washington State Utility Commission, 1985).

86% consider it annoying (Field Research Corp. Commissioned by Pacific Telephone & Telegraph, 1978).

70% see it as an invasion of privacy (Walker Research - Telemarketing Magazine, March 1991).

69% consider it an offensive way to sell (Walker Research - Telemarketing Magazine, March 1991).

82% think it is either an invasion of privacy or a nuisance (Harris-Equifax

Consumer Privacy Study, 1991).

When a subscriber is assigned a new phone number, which is more likely: They are someone who desires to receive an avalanche of telemarketing calls, or is it more likely that the new subscriber does not want that avalanche? Which is the more appropriate policy choice: the smaller number of people who move and wish to receive telemarketing calls do not receive them in the interim period until their phone numbers are removed from the national list, or the larger number of people who move and don't want to receive the calls, must endure them until their phone number finally appears on the next publication of the national list. In addition, the advent of local number portability will soon mean that moving to a new house will not automatically mean getting a new phone number. It would be unnecessary complexity to establish one rule now, only to have to review it once portability is widespread. A better policy would be to plan for the future now.

Industry statistics

The industry information cited by the Commission, NPRM ¶ 7 and note 34, is misleading. While the number of **outbound** calls is correctly estimated by the industry at 104 million per day, estimates from the industry with regard to dollar volume (cited as \$435 million annually in 1990) are deceptive, as the industry is including sales from **IN**bound telephone sales calls, as well as **OUT**bound telemarketing calls. The teleservices industry includes calls made by a consumer to an 800 number to order items out of a catalog along with sales of goods made by outbound telemarketing calls. When asked to separate out those numbers, the industry simply shrugs its shoulders and says they don't have that breakout. The reason is self evident - only a tiny, tiny fraction of such sales occur by outbound, cold-call telemarketing. The Commission should view the statistics from the DMA and ATA with great skepticism.

Retaining company-specific lists.

It is a legal necessity to retain company-specific do-not-call lists. Unless company-specific lists are required, there is no way for a consumer to stop calls from an entity that has an exemption, such as an established business relationship, from the national list. Even if the

national list is absolute, and has no exemptions, company-specific lists are still needed so a consumer can immediately stop calls from a particular company, and not have to wait several months for the next iteration of the national list to be published.

Time frame for processing consumer DNC requests.

The answer to this is simple, and illustrated by a paraphrased conversation I had with a telemarketer from a large long distance carrier. When I requested that they never call my number again, they said it would take up to 60 days for my request to flow through their system. I asked if I had *accepted* their offer, would I have received further calls? She replied that no, if I accepted their long distance service offer, that I would be coded in the computer and not receive any more sales calls. If they have the ability to stop calling people immediately if they buy the service, they should be required to implement the same level of technology and diligence to processing their do-not-call requests.

If it takes 7 days for a do-not-call request to flow through a telemarketer's system and become effective, then telemarketers should simply refrain from ever calling a number more than once in a 7 day period. If they take 30 days for the request to be fully effective, they should wait 30 days. If they can accomplish it in one day, then they can recall numbers in one day. This will mean that a consumer's request will immediately stop the calls from that telemarketer. By requiring telemarketers to set out in writing in their do-not-call policy, the fixed time frame in which do-not-call requests will take effect, and prohibiting a telemarketer from calling any number more than once in whatever period they specify in their do-not-call policy, the Commission will fully and fairly address this issue. If a telemarketer wants to recall people more often, they can invest in the resources to make do-not-call request go into effect faster.

Interplay between Sections 222 and 227.

The resolution to the problem suggested by the Commission at NPRM ¶ 19, is simple. An affirmative act should always take precedence over a passive act. A consumer who has been passive and failed to "opt-out" under the provisions of section 222, has in fact expressed no preference - merely inaction - which could be due to a number of things besides an intent to consent to the use of their CPNI information. On the other hand, a consumer

who makes an affirmative choice to be listed on a no-not-call list, has expressed an unambiguous, explicit choice. That express choice must be given greater precedence.

Autodialers

The Commission has correctly identified that autodialers that work from an installed list of numbers present no difference to the consumer than those that use random or sequential number generators. It is a distinction without a difference, and this is a pristine example of where the application of the time honored “duck test” is appropriate - “If it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck.” *BMC Industries, Inc. v. Barth Industries, Inc.*, 160 F.3d 1322, 1337 (11th Cir., 1998). The remedial construction due a consumer protection statute such as the TCPA and the Commission’s rules dictates that the dialers described in paragraph 23 of the NPRM are covered by the TCPA.

Random calls to identify receiving equipment

The Commission has identified a practice being employed by industry, that if done by a 12 year old, would result in criminal prosecution for harassment - making intentional hang-up calls to people’s homes and businesses. This is no different from making prank calls asking “do you have Prince Albert in a can... then you should let him out!” and hanging up. Indeed, these hang-up calls can be disturbing to consumers, and the Commission has identified with regard to predictive dialer “abandon” calls. This practice should be prohibited.

Predictive Dialers

Predictive dialers are despicable. The industry makes over 100 million outbound telemarketing calls a day, and thinks they are being nice guys by only 5 percent (5 million) of those calls being intentional hang-ups? 5 million per day? Efficiency is not an excuse. It would be efficient for an offensive paramour to walk through a bar and blatantly proposition every woman - just to efficiently find the one out of 100 that wouldn’t throw a drink in his face. Does that give him an excuse to offend the other 99 women?

The FTC is correct here (*See* NPRM § 29, citing 67 Fed. Reg. at 4524), and the Commission would be correct in following the determination by the FTC that predictive dialer “hang-up” calls are violative of any law or regulation that requires affirmative

identification of the caller and his company. While this practice has gone on for some time, and is undoubtedly efficient for marketers, I note that the Commission has in the past prohibited continued use of certain very efficient marketing practices due to abuse. For example, negative option letters of agency to PIC changes were once used - but due to abuse are now restricted. A recent appellate decision from Ohio also held that hang-up calls are solicitations under the TCPA. *Irvine v. Akron Beacon Journal*, 2002 Ohio 2204 (Ohio App., 2002). The same fate is destined for predictive dialer abandon calls.

Established Business Relationship

A nuance of the established business relationship has arisen in some cases where a telemarketer was making random calls, and just “happened” to reach an individual with whom it had an established business relationship, although that relationship was formed by dealings with other products or services, and that relationship involved the consumer providing a different phone number to the telemarketer than the number to which the telemarketer made the random cold-call. These telemarketers have argued in court that no matter how they do it, if they reach a *person* with whom they have an EBR, they are exempt from the TCPA.

For example, I placed a classified ad in a local newspaper, and provided my work number and address to the newspaper in connection with placing that classified ad. Several months later, I received repeated telemarketing calls at my home from that newspaper, attempting to sell me subscriptions. I never had subscribed to that paper. The only business I had ever done with the paper was that classified ad. When calling my home, the newspaper’s telemarketer was making random cold-calls, and did not even know the name of the party she was calling, or even if the person she was calling already had a subscription to the newspaper or not.... they were simply dialing randomly, all the numbers in the area.

This newspaper argued that because I had placed a classified ad, they had an EBR that exempted them from the TCPA. Had the call been placed to the phone number I had provided in the course of the business relationship, had that call been placed to sell more advertising and not a subscription, and had that call been placed within a reasonable period of time, then yes, I could see a basis for there being an EBR. But not in the circumstances

of random cold-calls, and “accidentally” reaching someone at an unpublished number who happened to have been a customer of a different service.

In keeping with the legislative history of the statute, the Commission should clarify that to qualify to assert the EBR exemption, the caller must have been calling that particular phone number because of, and in furtherance of that EBR. “Accidentally” reaching someone who did business with you in the past doesn’t count.

Publishing facsimile numbers in trade journals.

The statute requires “express” permission or invitation to send fax advertisements. This requirement is statutory, and is not something that can be altered. The definition of “express” is provided by Black’s in court case from South Carolina:

The term “prior express invitation or consent” is not defined in the statute. Black's Law Dictionary defines “express” as:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. *Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn.*, 34 F.2d 270, 274. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with “implied.”

Black's Law Dictionary (Revised 6th ed.). Webster's dictionary provides a similar definition. This is the proper definition to use within the context of the TCPA and is confirmed by the FCC's opinion:

Although the term “express permission or invitation” is not defined in statutory language or legislative history, there is no indication that Congress intended that calls be excepted from telephone solicitation restrictions unless the residential subscriber has (a) clearly stated that the telemarketer may call, and (b) clearly expressed an understanding that the telemarketer's subsequent call will be made for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services.(2)

In the Matter of the Telephone Consumer Protection Act of 1991,

Memorandum Opinion and Order, ¶ 11, 10 FCC Rcd 12391, 78 Rad. Reg. 2d (P&F) 1258 (August 7, 1995) 1995 WL 464817 (F.C.C.).

Biggerstaff v. Low Country Drug Screening, No. 99-SC-86-5519 (Magis. Ct. S.C. Nov. 29, 1999). The court went on to hold that publication of a fax number in the Chamber of Commerce Directory was not express permission or invitation for other members to send junk faxes.

Publishing numbers in a trade journal or other membership organization roster is simply not “express” consent for other members to use those numbers to send junk faxes. Simply put, if a particular trade publication wishes that publication of fax numbers in its directory should be available by members to send junk faxes, they can include “set forth in words” express language to that effect when collecting the fax numbers from their members. Indeed, membership in some organizations is mandatory as is publication of contact information in membership directories, such as state bar associations and professional engineering societies. Such a situation should not declare open season on a professional’s fax machine.

State law preemption

One misunderstood area of preemption frequently raised in the context of the TCPA, is made by telemarketers and junk faxers that claim compliance with a state law (either less or more restrictive than the TCPA) shields them from compliance with the TCPA. The ambiguous savings provisions of the TCPA contributes to confusion here.

Congress declared that if a state has a more restrictive statute applying to intrastate calls and faxes, that such a state statute would not be preempted. As the express will of Congress, it seems clear that the Commission can not adopt a construction contrary to that express statement of intent. States can continue to implement state laws that are more restrictive than the TCPA. In a state with its own telemarketing law, a consumer can pursue a claim in court for either, or both, the state law violation in addition to TCPA violations. *See, e.g., Kaplan v. Ludwig*, 2001 WL 1153093 (N.Y.A.D. Sep. 28, 2001). *See, also, Mennen v. Easter Stores*, 951 F.Supp. 838 (N.D. Iowa 1997). The federal statute in that case

had a similar provision to the TCPA providing that it did not preempt a “more restrictive” prohibition against employee polygraph tests. The *Mennen* court held that whether the state statute was **more or less restrictive**, the employer had an independent duty to comply with the federal statute.

But, the Commission should clarify that merely complying with a state law (which is either more, or less restrictive than the TCPA) or the existence of a more (or less) restrictive state law does not shield one from violating the TCPA. Such “reverse preemption” is improper. See *State of Texas v. American Blast Fax, Inc.*, 121 F.Supp. 2d 1085 (W.D. Tex. 2000) (“While the TCPA does provide that more restrictive state laws are not preempted by the TCPA, see 47 U.S.C. § 227(e), it does not follow that, should a state pass more restrictive laws regarding junk faxes, the TCPA is then preempted in that state. The TCPA contains no “reverse preemption” clause for its ban on unsolicited fax advertisements. This ground for dismissal is wholly without merit.”)

Verifiable (and verified) consent.

The TCPA finds its roots in tort law - trespass to chattels and nuisance trespass. One of the foundational principles of trespass law is that mistaken consent to use property is not a defense. See, e.g., Restatement (Second) of Torts § 164, Intrusion Under Mistake; *Serota v. M. & M. Utilities, Inc.*, 285 N.Y.S.2d 121, 124 (1967) (defendant's "mistaken belief that his visit was authorized" was irrelevant to trespass claim). In keeping with that principle, telemarketers relying on consent must bear the responsibility for obtaining, and verifying, that they do have consent from the consumer before making calls or faxes that will violate the statute absent such consent. As noted by the Commission, some marketers have apparently used fraudulent tactics, or even falsified “permission” documents. Consent is also a classic affirmative defense, and the Commission should make clear, that the existence of prior express permission or invitation must be proven by the marketer who wishes to avail themselves of that exemption. “[H]e who claims the benefit of the exception must establish clearly and fully his right thereto.” *Horton v. Colorado Springs Masonic Bldg. Soc.*, 64 Colo. 529, 540, 173 P. 61 (1918).

I thank the Commission for its time in considering my comments. I remain,

Sincerely,

Robert Biggerstaff

Appendix to Comments of Robert Biggerstaff, CG Docket 02-278.

The appendix to my comments will be transmitted under separate cover.

Appendix to Comments of Robert Biggerstaff, CG Docket 02-278.

Table II-1 from the Field Research Study

Girards v. Inter-Continental Hotels Corp.,

No. 01-3456-K (Tex. Dist. Ct., Apr. 20, 2002)

Biggerstaff v. Websiteuniversity.com, Inc.,

No 00-SC-86-4271 (S.C. Mag. Ct. March 20, 2001)

Wilder v. DialAmerica Marketing, Inc.,

No. CV810946 (Super. Ct. Ca. Nov. 20, 2002)

Brentwood Travel, Inc. v. Lancer, Ltd.,

No. 01CC 000042 (Mo. Cir. Ct. Aug. 15, 2001)

Harjoe v. Colonial Life & Accident Ins. Co.,

No 02CC-1983 (Div. 45) (Mo. Cir. Ct., Aug 29, 2002)

Biggerstaff v. Computer Products,

No. 99-SC-86-2892 (Magis. Ct. Charleston County S.C. Sep. 29, 1999)

IDream Solutions, Inc. v. Ellsworth, Inc.,

No. 01AC-014959 (Div. 39. Mo. Cir. Ct., Nov. 12, 2002)

Kondos v. Lincoln Property Co.,

No. 00-08709-H (D.C. Tex., July 12, 2001)

Biggerstaff v. Low Country Drug Screening,

No. 99-SC-86-5519 (Small Claims Ct. Charleston, Co. S.C. Nov. 29, 1999)

National Educational Acceptance, Inc., v. Smartforce, Inc.,

No. 01AC-2849 (Div. 41) (Mo. Cir. Ct., Jun. 21, 2002)

Micro Eng. v. St. Louis Ass'n of Credit Mgmt., Inc.,

No 02AC-008238 XCV (Div 39, Aug. 13, 2002),

Biggerstaff v. SBS Resort Promotions, Inc.,

No. 99-SC-86-3267 (Small Claims Ct. Charleston, Co. S.C. Dec. 15, 1999)

Brentwood Travel, Inc. v. Annex Computers, Inc.,

No. 01AC13051 (Mo. Cir. Ct. Dec. 18, 2001)

Brentwood Travel Serv., Inc. v. Ewing,

No 01AC-022171 (Div. 39) (Mo. Cir. Ct., Apr. 30, 2002)

Harjoe v. Colonial Live & Accident Ins. Co.,

No 01AC-11555 (Div. 35) (Mo. Cir. Ct., May 2, 2002)

Connor v. Cumpston,

No. 01-SC-86-3799 (S.C. Mag. Ct., Feb. 13, 2002)

Charvat v. Hallmark Mortgage Svcs., Inc.,
No. 00-CVH-09-8352 (Ct. C.P. Ohio, Sep. 4, 2001).

Davis, Keller, Wiggins, LLC. v. JTH Tax, Inc.,
No. 00AC-023289 (Mo. Cir. Ct. Aug. 28, 2001).

Brentwood Travel, Inc. v. Lancer, Ltd.,
No. 01CC 000042 (Mo. Cir. Ct. Aug. 15, 2001)

R.F. Schraut Heating & Cooling, Inc. v. Maio Success Systems, Inc.,
No. 01AC11568 (Mo. Cir. Ct. Aug. 14, 2001)

Mathemaesthetics, Inc., v. Reiner,
No. 00CV951, (Dist. Ct. Colo., Aug. 15, 2001).

Coleman v. Real Estate Depot, Inc.,
No. 00AC 013006 FCV (Mo Cir. Ct. March 27, 2001)

Zeid v. Redding Law Firm,
No. 01AC-013005 (Div. 39, Mo. Cir. Ct. Mar. 19, 2002)

Agostinelli v. Roberts Mtg. Co.,
No. 01-SC-86-2537 (Mag. Ct. S.C., March 25, 2002).

Shields v. Lone Star Utility Savers, Inc.,
No. 759,971 (Harris County Tex., May 10, 2002)

Coleman v. Varone,
No. 00AC-023298 (Mo Cir. Ct., Mar. 26, 2001).

Margulis v. VoicePower Telecom., Inc.,
No. 00AC-013017 (Mo. Cir. Ct. March 22, 2001)

Zeid v. Image Connection,
No. 01-AC002885 (Div 39) (Cir. Ct. Mo., Oct 30, 2001)

Harjoe v. Freight Center, Inc.,
No. 00AC-005196 (Mo. Cir. Ct. Jan. 9, 2001)

Bailey v. Cookies in Bloom,
No. 01CV292 (D.C. Colo, July 6, 2001)

Agostinelli v. L.M. Communications of South Carolina, Inc.,
No. 00-SC-86-2862 (Mag. Ct. S.C., Feb. 14, 2002).

Mey v. Feature Films for Families,
No. 01C-233 (Mag. Ct. W.V., March 21, 2002)