

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

_____)
In the Matter of)
)
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991))
_____)

CG Docket No. 02-278
CC Docket No. 92-90

COMMENTS OF XPEDITE SYSTEMS, INC.

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TABLE OF CONTENTS

SUMMARY	i
I. BACKGROUND	1
11. PROPOSED CHANGES TO THE COMMISSION’S RULES	3
A. <u>Unsolicited Facsimile Advertisements</u>	
1. Fax Broadcasters	3
2. Established Business Relationship	8
3. Prior Express Invitation or Permission	9
B. <u>Other Issues</u>	
1. Definition of Autodialers	11
2. Identification Requirements	12
3. Artificial or Prerecorded Messages	13
4. State Preemption	14
5. National Do-Not-Call List	14
III. CONCLUSION	16

SUMMARY

Congress expressly sought to avoid imposing liability on an entity that merely transmits a fax message, but does not originate or control the content of the message. Accordingly, the Commission has determined that common carriers and fax broadcasters should not be held liable for sending prohibited fax messages unless these entities have a high degree of involvement in the transmission of the message, or actual knowledge of an illegal use. Although the Commission has articulated this exemption in several orders, the Commission's rules do not directly address this exemption.

Xpedite Systems, Inc. ("Xpedite") encourages the Commission to amend its rules to set forth the fax broadcaster exemption, and to clarify the practices that may expose a fax broadcaster to liability under the TCPA and the Commission's rules. Such clarification would aid Xpedite and other legitimate businesses that offer their fax services to clients, and would provide consumers and regulators with necessary guidance as to whom shall be liable for TCPA non-compliance.

Xpedite further urges the Commission to amend its rules to expressly provide for a "prior business relationship" exemption from the general prohibition on transmitting unsolicited advertisements via facsimile. The Commission, following Congressional intent, has recognized that such a relationship provides the requisite consent to receive such an advertisement. Clarifying the lawfulness of such faxes would result in less confusion for businesses and consumers alike, and would protect ongoing business relationships without compromising the privacy of individuals.

Xpedite also submits its comments on issues relating to autodialers, artificial and prerecorded telephone calls, state preemption and a national “do not call” database. Xpedite requests that the Commission implement its TCPA rules in a manner which protects consumers while ensuring that the intent of Congress to preserve legitimate marketing arrangements is fulfilled.

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COMMENTS OF XPEDITE SYSTEMS, INC.

Xpedite Systems, Inc. (“Xpedite”) hereby respectfully submits its comments in response to the *Notice of Proposed Rulemaking and Memorandum Opinion and Order* in the above-referenced dockets, released by the Federal Communications Commission (the “Commission” or “FCC”) on September 18, 2002, FCC 02-250, 67 Fed. Reg. 62667 (Oct. 8, 2002) (the “NPRM”). The NPRM solicits comments on a number of topics relating to the rules the Commission adopted pursuant to the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (the “TCPA”). In summary, such rules restrict unsolicited advertising via telephone and facsimile machine.

I. BACKGROUND

Xpedite is a supplier of communications services, offering electronic document distribution and data messaging services using its enhanced information delivery system. Xpedite’s system allows customers to transmit their messages to electronic mail, telex, facsimile machines, or telephone numbers. Xpedite’s customers

provide the content and format of the messages, and Xpedite provides the delivery system. Xpedite exercises no editorial control or discretion over the content of its customers' messages, and in most instances does not even view (or in the case of voice communications, hear) its customers' messages because the communications are transmitted to Xpedite through an automated computer process.

Xpedite serves a sophisticated clientele in a number of business-to-business sectors, including financial services, professional associations, publishing, technology, and manufacturing. Xpedite's multimedia messaging services help companies manage information distribution to and from their customers, predominantly critical time sensitive information such as bank statements, billing invoices, subscription renewals, purchase orders, rate sheets, and pricing or product announcements. For example, a client may use Xpedite's system to fax a broker's statement to a customer showing daily activity on the customer's stock portfolio. Other examples are hotel confirmations sent to confirmed guests and proof of delivery in the express mail context. Due to its experience in the enhanced messaging industry, Xpedite can provide meaningful comments in this proceeding.

II. PROPOSED CHANGES TO THE COMMISSION'S RULES

A. Unsolicited Facsimile Advertisements

The TCPA and the corresponding Commission rules generally prohibit the sending of unsolicited commercial advertisements to fax machines, with certain exceptions. However, it is important to recognize, as Congress did when it enacted the TCPA, that not all forms of fax advertising are illegal or intrusive. *See* House Report, 102-317, 102d Cong., 1st Session (1991), p. 9-10 (clarifying that the goal of the TCPA is not to make all facsimile advertising illegal because, when conducted properly, transmitting advertisements via faxes is “an established lawful marketing practice”).

1. *Fax Broadcasters*

Fax broadcasters such as Xpedite transmit the facsimile messages of others without exercising any editorial control or discretion over the content of the messages, without generally providing any of the facsimile numbers to which the messages are sent, and often without even viewing the messages because they are transmitted to the fax broadcaster through an automated computer process. Due to the limited role of such fax broadcasters in the delivery of such faxes, Congress clearly expressed in the TCPA's legislative history that “[t]he regulations concerning the use of [fax] machines apply to the persons initiating the telephone call or sending the message and do not apply to the common carrier or *other entity that transmits the call or message and that is not the originator or controller of the content on the call or message.*” **S.** Rep. No. 102-178, at 9 (emphasis added).

The Commission properly interpreted the TCPA and followed the direction of Congress in holding that “[i]n the absence of a ‘high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions,’ common carriers will not be held liable for the transmission of a prohibited facsimile message.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8780 (1992). To further clarify that fax broadcasters are covered by this exemption, the Commission has stated that “the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with the rule.” *Rules and Regulations Implementing the Telephone and Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12407 (1995).

However, there are certain entities who, while presenting themselves as fax broadcasters, actually become involved in more than the mere transmission of messages, such as by creating or editing the content of the messages or by providing the fax numbers to which the messages are sent. Recognizing such situations, the Commission has tried to clarify which entities qualify as fax broadcasters, finding that “[f]acsimile broadcast service providers are businesses or individuals that transmit messages on behalf of other entities to selected destinations and that do not determine either the message content or to whom they are sent.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 12 FCC Rcd 4609, 4610 (1997) (“1997 TCPA Order”).

Courts have acknowledged this distinction when deciding claims arising under the TCPA. For example, the U.S. District Court for the Central Division of Illinois acknowledged and followed the Commission’s fax broadcaster exemption. In dismissing a claim by a state attorney general against a fax broadcaster, where it was alleged only that the fax broadcaster transmitted another entity’s advertisements, the court held:

This logic [of imposing liability] would impose an obligation on every retail copy store, hotel, or other establishment that offers fax services to the public, to read every message customers wish to send, to decide whether a message is advertising, and if so, to determine whether the advertising is unsolicited. The Court agrees with the FCC that Congress did not intend to put such a burden on businesses who offer communications services to the public; Congress intended to put the burden on the entity that desires to advertise. *The transmission service provider should not **be** a censor; it should only **be** liable if it **is** knowingly involved in the illegal conduct or has actual notice that the communication is illegal and fails to prevent the transmission.*

Illinois v. Discovery Marketing, Inc., et. al. Order, Civ. No. 99-3243 (C. D. Ill. Feb. 14, 2000, Scott, J.) (emphasis added) (pertinent sections attached as Exhibit A).

The NPRM asks whether the rules should be amended to clarify that certain practices may expose a fax broadcaster to liability under the TCPA and the Commission’s rules, for example, by specifying particular activities that would demonstrate a “high degree of involvement.” NPRM, ¶ 40. Although previous Commission orders have shed some light on this issue (*e.g.*, as noted in the NPRM, the

Commission has found that maintenance of a list of telephone facsimile numbers for use in directing a client's advertisements "indicates a fax broadcaster's close involvement in sending unlawful fax advertisements"), the rules themselves do not directly address the activities that constitute a fax broadcaster's "high degree of involvement."

Xpedite encourages the Commission to amend its rules to set forth the fax broadcaster exemption intended by Congress and previously articulated in Commission orders. The Commission should also specify the activities that would subject a fax broadcaster to potential liability under the TCPA and the Commission's rules. A rule clarifying which activities demonstrate a "high degree of involvement" by fax broadcasters in such activities would better inform the fax broadcast business community about the limitations on their industry. Further, it would likely afford consumers a greater measure of protection from unlawful faxing by discouraging the purchase of general fax number lists from fax broadcasters. In many instances the client of such a fax broadcaster would not have an established business relationship with the recipients on such lists, which would make the transmission of faxes to those numbers unlawful. A fax broadcaster would be deterred from offering such broad lists if it were clear that the fax broadcaster could also face liability for such transmissions. Moreover, having such information stated in the rules would better inform the general business community, regulators, and consumers, rather than having such information only in Commission orders and enforcement decisions. Xpedite and other legitimate businesses that offer

¹ See NPRM ¶ 40, citing *Fax.com Notice of Apparent Liability*, FCC 02-226 (rel Aug. 7, 2002).

their fax services to clients take great care in ensuring that their operations are lawful. Clarifying the rules would help in this endeavor.

The NPRM also questions whether the requirement that facsimile advertisements identify the entity on whose behalf the message is sent has been effective in protecting consumers' rights to enforce the TCPA. NPRM, ¶ 40. Specifically, the rule provides that all facsimile messages must contain in the top or bottom margin of each page or on the first page "an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges." 47 C.F.R. § 68.318(c)(3).

The Commission has clarified that when a message is transmitted by a fax broadcaster on behalf of a client, it is the client's identifying information that must be contained on the fax. See *1997 TCPA Order*, 12 FCC Rcd at 4613 (reconsidering its previous determination that the identifying information of both the fax broadcaster and the entity on whose behalf the fax message was sent must appear on the message and holding that the TCPA "mandates that a facsimile include the identification of the business, other entity, or individual creating or originating a facsimile message and not the entity that transmits the message."). Such a rule protects consumers' rights by enabling them to determine the sender of the fax, thus allowing them the means to terminate an existing business relationship for the purposes of receiving such faxes, to otherwise halt the receipt of faxes from that business, and to identify the advertiser in the

event the consumer wishes to pursue legal remedies. In addition, the mandatory listing of a fax broadcaster's identifying information could confuse consumers and delay the termination of the consumer's existing business relationship request, as fax broadcasters are not required to maintain "do not send" lists for their customers.

2. *Established **Business Relationship**.*

As explained in the NPRM, while the Commission (following Congressional intent) has determined that "a prior business relationship between a fax sender and recipient establishes the requisite consent to receive telephone facsimile advertisement transmissions," such an exemption from the general prohibition on transmitting unsolicited advertisements via facsimile is not expressly provided for in the rules. NPRM, ¶ 39. The exemption protects ongoing business relationships without compromising the privacy of individuals, which is the central goal of the TCPA. *See* House Report, 102-317, 102d Cong., 1st Session (1991), p. 18 (noting that the established business relationship exemption reflects a balance between "a desire to not unduly interfere with ongoing business relationships" and a consumer's privacy interests). Accordingly, Xpedite strongly encourages the Commission to amend its rules to explicitly provide for such an exemption. This would clarify the lawfulness of such faxes and result in less confusion for businesses and consumers alike.'

² *See, e.g.*, Comments of American Business Media filed in this proceeding on November 22, 2002, at 9 (urging the Commission to provide expressly for the established business relationship exemption, and generally discussing the mutual, meaningful benefits of communicating with existing customers).

The scope of the business relationship exemption should extend to the business itself, rather than turn on particular products. It would be very difficult to manage the exemption if it were product-based (such that if the relationship were formed based upon one specific product, the business would not be able to send faxes to the customer concerning different services or products). For example, if a customer purchased a sweater from a business, could that business contact the customer regarding a sale on jeans? What about a new line of body care products produced by the company? One person might consider such products to be sufficiently related, while another may not. The costs of policing such an exemption would outweigh any such benefits. Moreover, customers may be interested in receiving information regarding new products from a trusted company. The consumer can always terminate the business relationship exemption by notifying the company that it no longer desires to receive such messages, just as a consumer can terminate the relationship in the telemarketing context.³

3. *Prior Express Invitation or Permission.*

The NPRM questions whether the publication of a fax number in an organization's directory constitutes an invitation or permission to receive an otherwise unsolicited fax. NPRM, ¶ 38.

³ Presumably, the consumer would be able to identify the advertiser by the identification information that an advertiser is required to provide on a facsimile. *See* 47 C.F.R. § 68.318(c)(3). *See also* Comments of American Business Media, at 9-10 (“the recipient should be fully capable of easily terminating that [existing] relationship or limiting the range of permissible faxes with a simple phone call or return fax.”).

A number of Xpedite's clients are trade associations communicating with their members. Members of such associations anticipate and expect the organization to contact them in a variety of manners to inform them about important issues, upcoming events and offers and benefits available to association members. By providing the organization with their fax numbers, the members are giving their permission to receive such transmissions. If a member did not wish to receive messages in such a manner, that member would either decline to provide his fax number in the first place, or could contact the organization and request that no additional fax messages be sent to him. A blanket prohibition on such transmissions would severely restrict the ability of trade associations and other organizations to communicate important information to their members.

Furthermore, such publication grants similar permission to other members of the organization to the extent that the messages relate to the business of the organization. If a member agrees to the publication of his fax number in a directory that is circulated to all members of such organization, the member clearly is agreeing to be contacted by the other members concerning matters relevant to the organization. One of the primary goals of belonging to such an organization is to reap the benefits from the sharing of information among the membership. Restricting or prohibiting such communication would damage the effectiveness of such associations.⁴

⁴ In addition, many associations make clear to their members and prospective members that directory listing information may be made available to third parties. These associations frequently ask their members to "opt in" or "opt out" of such distributions. Where an individual or entity has "opted in" or "opted out" of such a distribution, consent
(continued...)

B. Other Issues.

1. *Definition of Autodialers.*

The NPRM asks whether Congress intended for the definition of “autodialer” to encompass *any* equipment that can dial numbers automatically (either by producing numbers at random or by generating them from an existing database). ¶24. The answer to this question is quite obviously “no.” The TCPA defines an automatic telephone dialing system as “equipment which has the capacity to store or produce telephone *numbers to be called using a random or sequential number generator* and to dial such numbers.” 47 U.S.C. § 227(a)(1). A fundamental element of such a system, as clearly stated in the express language of the statute, is placing calls to telephone numbers produced at random or in sequence. Such random calls may be troublesome as they can reach unlisted telephone numbers, wireless telephone customers, emergency phone lines, and health care facilities. However, such concerns are not raised by equipment that merely dials numbers from a list provided by the sender of valid telephone numbers that were specifically programmed into the equipment. Restricting such calls would burden legitimate telemarketing practices, contrary to the stated intention of Congress and the President. *See* Sen. Rep. No. 102-178, p.11 (Signing Statement of President George Bush) (stating that he signed the bill “because it gives the Federal Communications Commission ample authority to preserve legitimate business practices.”).

(...continued)

(or the lack thereof) to receive any fax advertisements should be determined on that basis, pursuant to the association’s applicable procedures.

2. *Identification Requirements.*

The Commission's rules require that telephone solicitations and artificial or prerecorded telephone messages contain certain identifying information, including the name of the entity placing the call and a telephone number or address of such entity. 47 C.F.R. §§ 64.1200(d) and (e)(2)(iv). The NFRM seeks comment on whether the Commission's rules require clarification concerning calls to which such identification requirements apply. NPRM, ¶¶ 28-29. Although Xpedite believes that the rules are unambiguous concerning the types of calls to which such requirements apply, Xpedite encourages the Commission to clarify that the identifying information required is that of the party *on whose behalf the call is made*. Many telephone solicitors contract with third parties for the actual placement of such calls, particularly permissible artificial or prerecorded messages, and such third parties generally have no control over the content of the messages or the telephone numbers to which such messages are delivered. It was unmistakably Congress' intention that the identifying information be that of the party on whose behalf the call is made, not the third party vendor who is merely acting like a common carrier in transmitting the message. *See* Sen. Rep. No. 102-178, p. 9 (explaining that the regulations concerning the use of automatic dialing devices, artificial or prerecorded voice messages, or other similar devices "apply to the persons initiating the telephone call or sending the messages and do not apply to the common carrier or other entity that transmits the call or message and that is not the originator or controller of the content of the call or message."). Although section 64.1200(e)(2)(iv) of the Commission's rules contains some language to this effect (requiring identification of "the

name of the person or entity on whose behalf the call is being made”), that subsection, as well as § 64.1200(d), would benefit from clarification on this point.

3. *Artificial or Prerecorded Messages.*

It is prohibited to call a residence using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is for emergency purposes or is specifically exempted. 47 C.F.R. §64.1200(a)(2). The NPRM questions whether the Commission should revisit its previous conclusion that there exists an established business relationship exemption. NPRM, ¶ 34. Xpedite strongly encourages the Commission to preserve this exemption so as not to hinder ongoing business relationships. For example, some companies wish to use prerecorded messages to collect business debts from clients. Other companies use prerecorded messages for subscription renewals. Moreover, as explained above, Congress was clear that it did not intend for the TCPA to impede ongoing business relationships. *See* House Rep., 102-317, 102d Cong., 1st Session (1991), p. 18 (providing for an established business relationship exemption so as not to “unduly interfere with ongoing business relationships”). Further, the President recognized such an exemption when signing the TCPA into law. Sen. Rep. No. 102-178, p.11 (Signing Statement of President George Bush) (stating that the TCPA provides the Commission with the ability to preserve legitimate business practices, including “automated calls to consumers with whom a business has preexisting business relationships...”).

4. *State Preemption.*

Xpedite believes that the Commission should preempt state laws that seek to regulate *interstate* telemarketing and facsimile advertising. In enacting the TCPA, Congress specifically stated that “States do not have jurisdiction over interstate calls.” Sen. Rep. No. 102-176, p. 3. In fact, the genesis of the TCPA was to supplement the state laws, which (since they only covered intrastate calls) had a “limited effect.” *Id.* Nevertheless, state laws have been invoked by private parties and state regulators in response to telemarketing that originates and terminates across state lines. *See, e.g.*, NPRM, ¶ 63 (noting that the attorneys general of all fifty states indicated to the FTC that they have enforced their own “do not call” laws against telemarketers irrespective of whether such calls are interstate or intrastate in nature). Interstate telemarketing communications should solely be governed by the TCPA, pursuant to the Communications Act, 47 U.S.C. §152(a), and the TCPA’s clear legislative history. Moreover, the preemption of state laws that seek to regulate interstate telemarketing and facsimile advertising would establish consistent legal standards for courts adjudicating TCPA matters involving interstate communications.

5. *National Do-Not-Cull List.*

Xpedite supports the adoption by the Commission of a national do-not-call database. Xpedite believes that such a database would enhance consumer protection and privacy and would assist telemarketers in complying with the TCPA. Xpedite concurs with the Commission that “a national list might provide consumers with a one-step

method for preventing telemarketing calls.” NPRM, ¶ 49. However, to ensure that this goal is reached, the Commission should preempt states from having separate state “do not call” databases. As to whether states may exercise “concurrent” jurisdiction and enforce federal standards, Xpedite reserves judgment, but believes that state concurrent jurisdiction would be preferable to dual federal/state “do not call” databases, as explained below.

The various state “do not call” databases and the federal “do not call” list maintained by each telemarketer have resulted in a regulatory morass. Entities that seek to comply with all of these requirements are confounded by the constant, costly monitoring of an ever-changing array of state-by-state implementation of “do not call” lists and the required updates. Moreover, many of the state “do not call” databases vary in their coverage (*e.g.*, some include wireless telephone numbers, some do not). The monitoring of state-by-state developments, and the updating of the lists on a state-by-state basis is a burdensome, and costly undertaking for businesses. *See, e.g.*, NPRM, ¶ 9 (discussing the varied state “do not call” lists, including associated expenses).

The establishment of a single, national database would alleviate the burdens on businesses by centralizing in one database those consumers who do not wish to receive telemarketing calls. A centralized database would better protect consumer interests by making the “do not call” request applicable for all consumers nationwide. Thus, a consumer residing in a state that does not have a “do not call” database would be able to protect its privacy rights by adding its name to the national list. Consumers and businesses would not have to consider whether a telemarketing call is “interstate” or

“intrastate.” Rather, a consumer on a national “do not call” database would be covered, and telemarketers would be prevented from calling that consumer (absent any exceptions, such as a prior existing business relationship) irrespective of whether the call is interstate or intrastate. In addition, a consumer would not have to determine whether or not that consumer had already asked to be put on a specific company’s “do not call” list. Rather, a national list would provide a simple, streamlined method to avoid unwanted telemarketing calls. Xpedite requests that the Commission state that it is the underlying advertiser’s responsibility to comply with any national “do not call” list/database.

Xpedite understands that many consumers in states that have “do not call” databases have already added their numbers to those databases. Xpedite proposes that the creation of a national database could begin with the importation of the various states’ lists into a national database. Thereafter, the Commission and state regulators could advise the public that numbers on the state lists would now be part of a national database, and that any individual who wishes to add a telephone number (or to change a number) could do so while the database is being implemented. Such a process would alleviate any consumer confusion while also allowing the new, national database to benefit from the states’ undertakings.

III. CONCLUSION

In enacting the TCPA, Congress sought to protect consumers from unwanted telemarketing while ensuring that legitimate marketing practices would be permitted. This proceeding provides the Commission with the opportunity to further implement these goals. Xpedite respectfully requests that the Commission take such

actions as are consistent with these Comments, including the maintenance of the Congressionally-sanctioned facsimile broadcaster exemption and the clarification of the types of activities that may fall outside of the exemption. The clarification of these and other issues discussed herein will provide much needed guidance to the telemarketing industry as well as promote consumer protection goals.

Respectfully submitted,

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Its Attorneys

December 9.2002

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

PEOPLE OF THE STATE OF ILLINOIS)
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) Plainriff,)
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) v.)
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) DISCOVERY MARKETING, INC.,)
) and SOURCE MARKETING, INC.,)
) d/b/a/ Fax Source.)
)
)
) Defendants.)

No. 99-3243

FILED

FEB 14 2000

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

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ORDER

JEANNE E. SCOTT, U.S. ~~District~~ Judge:

This matter comes before the Court on Defendant Source Marketing, Inc.. d/b/a/ Fax Source's (Fax Source) Motion to Dismiss. The Plaintiff People of the State of Illinois (Illinois) claims Fax Source violated the Telephone Consumer Protection Act, 47 U.S.C. §227 et seq. (TCPA), and the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. (CFA). The Complaint alleges that Fax Source is a fax broadcaster that distributed Defendant Discovery Marketing, Inc.'s (Discovery) advertisements to consumer fax machines in Illinois. Count IV

‘selected the recipients of Discovery’s messages or knew whether the recipients requested the information. Without some allegations of notice or knowing participation, Count IV of the Complaint fails to state a claim.

Illinois urges the Court to reject the FCC interpretations of the **TCPA**. It argues that *Fax Source* violated the plain meaning of the statute. The TCPA declares that it shall be unlawful, “to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.” **47 U.S.C. §227(b)(1)(C)**. Fax Source **used** a machine to send advertising: the advertising was unsolicited; **thus**, Fax Source must be liable.

This logic would impose **an** obligation on every retail copy store, hotel, or other establishment that offers fax services to the **public**, to read every **message** customers wish to send, to decide whether a message is advertising, and if so, to determine **whether** the advertising is unsolicited. The **Court** agrees with the FCC that Congress **did not** intend to **put** such a burden on businesses who offer communications services to the public: Congress intended to put the burden on the entity that desires to advertise. The transmission service provider should not be a censor; it should only be liable if it is knowingly involved in the illegal conduct or **has actual** notice

'that the communication is illegal and fails to prevent the transmission.

Count IV fails to state a claim.

Illinois states a supplemental state claim in **Count VI** for violation of the CFA. The CFA prohibits unfair and deceptive practices in commerce. 815 ILCS 505/2. Sending Discovery's messages in Illinois is clearly a commercial practice. 815 ILCS 505/1(f) (1996). The practice becomes deceptive if it creates a likelihood of deception or has a capacity to deceive. People ex rel. Hartigan v Knecht Services Inc., 216 Ill.App.3d 843, **857**, 575 N.E.2d 1378, 1387, 159 Ill.Dec. 318, 327 (1991). Here, Fax Source modified its **sending** equipment to remove that information. Omitting this **information** could cause recipients to believe their employers either sent the message or authorized the message. Creating such **an** impression could create a likelihood of deception or have a capacity to deceive. Count VI therefore states a **claim**.

Fax Source **argues** again that **only Discovery should** be **liable** under the CFA because it is responsible for the content of the message. Fax Source cites Zekman v. Direct American Marketers, Inc., 182 Ill.2d 359, 369, 695 N.E.2d 853, 859, 231 Ill.Dec. 80, 86 (1998), in support of **this** argument. The Zekman Court held that the telephone company cannot