

**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 |) | |
| Act of 1991. |) | |

**PETITION FOR STAY
OF
AMERICAN BUSINESS MEDIA**

**David R. Straus
Thompson Coburn LLP
1909 K Street NW, Suite 600
Washington, D.C. 20006**

Counsel to American Business Media

August 6, 2003

SUMMARY

American Business Media, represents the interests of more than 1,300 of the nation's leading business-to-business publications. It seeks a stay of the Commission's newly-announced rule that replaces the prior finding that the existence of an "established business relationship" between the sender and the recipient of an advertising fax demonstrates "express permission" with a requirement for written and signed permission. American Business Media seeks a stay pending reconsideration of that change, a stay pending clarification that notifications to subscribers of subscription expiration and insertion orders to advertisers are not advertisements, a stay for one year in the event that the Commission retains the signature rule and a stay pending judicial review.

The four factors to be considered all support the granting of the requested stay. Once the Commission has had the opportunity, for the first time, to consider the damage that will be done by the imposition of a signature requirement, we are confident that it will reconsider, and we are equally confident that it will grant the clarifications sought. In addition, because American Business Media shows that the press is entitled to the full protection of the First Amendment, not the lesser protection accorded commercial speech, even when involved in circulation activities, and because courts affirming the constitutionality of the TCPA have relied upon the FCC's prior interpretation and rule, a constitutional challenge is likely to succeed.

If the requested stays are not granted, publishers will suffer irreparable injury, because the manner in which they have conducted business for many

years will be disrupted. Their ability to obtain the “requests” required by the Postal Service will be seriously compromised if they cannot fax even to subscribers, and they will lose circulation, advertising revenues and possibly their postal privileges.

On the other hand, the issuance of the requested stays will not harm others. The complaints about unwanted faxes to which the Commission gives so much weight have been and will no doubt continue to be sent in the absence of an established business relationship. Neither imposition nor a stay of the new rule will affect faxes that have been and will be illegal, so that the only affect of the stay on fax recipients is that they may continue to receive a limited number of faxes from entities with which they already have an established relationship. There is no evidence that such faxes are excessive nor unwanted.

Finally, the public interest will be well served by a stay, since the impending application of the new rule has already caused confusion and disruption in the publishing industry and, we are certain, many others. The TCPA as implemented by the new rules is ambiguous and overly broad. If it is allowed to take effect as scheduled and in its present form, untold and irreparable injury will be done to American businesses and commerce with little or no offsetting benefit to anyone.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

**PETITION FOR STAY
OF AMERICAN BUSINESS MEDIA**

American Business Media, which submitted comments in this docket on November 21, 2002, hereby seeks a stay of the change in the rules governing the nature of the “express permission” that is required in order to send advertisements by fax. This change substituted written, signed permission for the previously-approved “established business relationship,” and was set forth in the Report and Order of the Federal Communications Commission adopted in this docket on June 26, 2003 and published in the Federal Register on July 25, 2003. American Business Media will soon be filing a request for clarification and reconsideration. That document and the affidavits that will be attached thereto are incorporated herein by reference.

Introduction

American Business Media was founded in 1906 and is the industry association for business-to-business information providers. Its members produce magazines, trade shows, CD-ROMS, web sites and other products that

enhance their primary mission: to disseminate information that is vital to American industry and professions. Its more than 200 members publish 1,300 periodicals, maintain roughly 1,350 websites and reach nearly ninety million professionals.

Most specialized business publications do not charge for subscriptions that are requested by readers whose demographics (primarily occupation) suggest an interest in the publication's subject matter. Publishers of such magazines seek to develop a subscriber base of persons involved in the profession or industry covered by the publication (who thus benefit from the content and present an attractive audience for advertisers), and they do so by exchanging the subscription for the necessary demographic information from qualified readers. The United States Postal Service requires that these publishers have proof, re-confirmed at least every three years, that at least 50% of their distribution goes to subscribers who have "paid for or requested" the publication if they are to pay the Periodicals postage rate.¹ It is thus crucial to their ability to use the lower Periodicals postage rates that these publishers receive and maintain proof of a "request" from readers. To obtain such proof, many publishers send facsimiles of the appropriate signature form to renewal subscribers. Publishers also use faxes to communicate with their advertisers, such as to send a confirmation of an ad placement.

¹ See 39 C.F.R. pt. 3001, subpt. C, App. A, §§ 412.31 & 413.41. This proof is a prerequisite to qualification for the lower postal rate for periodicals.

The members of American Business Media have important messages, including advertising, for their readers and potential readers. They have found that for certain purposes, such as informing “requesters” of the need to renew their free subscriptions and providing the form on which to do so, the use of faxes can be essential to their business. The broad reach of the Telephone Consumer Protection Act, with its requirement for “express permission” to send an advertising fax, combined with the enormous financial exposure for even an unintentional violation, combine to greatly limit what we believe is the legitimate use of faxes by American Business Media members. These faxes are as highly targeted as the publications themselves.

The Commission’s recent action essentially revoking the “established business relationship” standard will further and substantially limit the legitimate use of faxes by American Business Media members and will require a drastic change in the way they have conducted their businesses for many years. If that were the only change announced by the Commission, American Business Media would be seeking a stay in order to allow its members time to examine and modify their fax lists and to attempt to reformat documents that might be considered advertisements in order to be certain that they are not. But the Commission did not stop there and allow the statutory term—“express permission”—to govern future conduct. Instead, it substituted a new “written, signed permission” standard that was not identified in its earlier notices seeking comments and was therefore not the subject of public debate.

In American Business Media's request for clarification and reconsideration, as here, we will explain in detail and with supporting affidavits how the new standard imposes a burden that is unrealistic and virtually impossible to meet no matter how much time is given for compliance, unless of course its purpose is to ban all faxed advertisements and many non-advertisements even when they are welcomed by the recipient. In the several weeks that are likely to be available in the absence of a stay,² publishers can barely begin to modify their business practices and collect the signatures that the Commission now says are required.³

Due to the importance of this issue to its members, American Business Media seeks a stay in three parts. First, we ask the Commission to stay the written signature rule until it both completes its reconsideration of that rule and clarifies whether free subscription renewal notices and advertiser insertion orders are advertisements. Second, if it refuses to reconsider and revoke the written signature rule and/or does not find that such renewal notices and insertion orders are not advertisements, the Commission should suspend the

² The Commission has not yet announced an effective date for the written, signed permission requirement, since it is subject to the Paperwork Reduction Act and must be cleared by the Office of Management and Budget.

³ While American Business Media is here representing its members, the Commission should also consider the many smaller publishers and other businesses that do not have the advantage of a trade association to advise them of the new rules, which have not been publicized to any great extent beyond the Beltway except by these associations. *In fact, as of today the FCC's own website continues to advise the public that an established business relationship represents consent to the receipt of faxed advertisements.*

revocation of the established business relationship test and the imposition of the written signature rule for one year, in order to allow American Business Media members time to modify their business practices. Finally, American Business Media is convinced that by virtually banning all faxed advertising by the press and enhancing the chilling effect of the TCPA on the press, the Commission has rendered a statute of already questionable constitutionality unconstitutional. We therefore seek a further stay pending appeal on that ground.

The Standards for the Granting of a Stay are Met Here

The Commission is no doubt familiar with the burdens generally imposed upon those seeking a stay:⁴ a showing of the likelihood of success on the merits, a demonstration that the petitioner will suffer irreparable harm if a stay is not granted, a showing that a stay will not substantially harm others and a demonstration that the public interest favors a stay. Each of these tests is easily met here.

Success on the merits

⁴ See, for example, *Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc.*, 559 F. 2d 841, 843 (D.C. Cir. 1977).

American Business Media expects that its request for deferral or reversal of the written signature requirement will be successful. As will be more fully developed in American Business Media's request for clarification and reconsideration, we anticipate that after the Commission has had an opportunity to examine its new, written signature rule in light of the comments it is now receiving, it will recognize that it has allowed the pendulum to swing too far. Just as Congress could have, but did not, expressly provide an established business relationship defense in the fax sections of the TCPA, a fact seized upon frequently by those seeking its elimination, so too could Congress have used the more definitive phrase "written, signed," rather than "express," to modify "permission."

We understand the Commission's desire for more precision, but we submit that the precision comes at far too high a cost. American Business Media members have successfully used faxes to communicate with requesters and advertisers, and for many years have done so with virtually no complaints. The dearth of complaints should be no surprise, for the typical business publisher does not engage in "broadcast" faxing. Instead, it sends faxes primarily to those who have requested its publications or who have otherwise provided their fax numbers, presumably with the understanding that they would be used.

While these publishers have sent faxes with few, if any, problems, the collection of signatures from their tens (or hundreds) of thousands of subscribers would present an insurmountable hurdle. The Commission's conclusory and

unsupported statement (at ¶ 191 of the June 26th Order) that small businesses “may easily obtain [signed, written] permission from existing customers. . .when customers patronize their stores or provide their contact information” fails to recognize the realities of the publishing business and many other businesses.

First of all, publishers do not have stores. They publish magazines, typically in a single location, and mail them to subscribers across the country. Business-to-business publishers range in size from only a single publication to dozens, and the number of their requesters can range anywhere from less than 30,000 to more than 100,000. The publishers cannot obtain signatures in person, nor can they readily obtain them when the requesters provide their contact information as the Commission suggests, for at least two reasons.

First, in order to comply with postal regulations, the publisher must obtain requests from at least 50% of the publication’s recipients. For the purpose of satisfying advertisers, the publishers generally strive for a much higher percentage. Recently these requests have increasingly been obtained via the Internet, or telemarketing.⁵ No matter how “express” the permission to send faxes might be at the time that the contact information is obtained via the Internet or with telemarketing, under the new rule that permission would be invalid.

⁵ Such non-paper, unsigned requests undergo separate, more stringent, audit procedures by both the Postal Service and the independent audit bureaus, so publishers prefer written requests. The realities of the market, however, have resulted in the trend noted above.

Second, even to the extent that requests and contact information are provided in hard-copy form, and the opportunity to obtain a signed consent is presented, such contact information is typically sought and provided no more frequently than once a year and many times once every three years.⁶ Therefore, absent an extensive and extraordinarily expensive faxing, telemarketing and direct mail effort, obtaining signatures, as the Commission suggests, at the time contact information is provided would take at least a year and sometimes three years. Meanwhile, of course, the publisher would have to figure out how to store and have access to hundreds of thousands of signatures.⁷

For these reasons, American Business Media submits that its request that the written signature rule be reconsidered and then revoked will be successful on the merits.

Similarly, American Business Media expects that its request for clarification that subscription renewal notices and advertiser insertion orders are not advertisements will be successful. As stated earlier, nearly all business-to-business publications are “request” publications that do not charge for subscriptions but make them available free to those whose demographics are attractive to advertisers. Publishers must have a renewal at least every three years, and it is often desirable to obtain them more frequently. Notification of

⁶ A request is valid, for postal purposes, for three years.

⁷ Although the Postal Service requires proof of requests when it conducts a postal audit, it accepts the results of interim audits performed by an audit bureau, and it is therefore not necessary for the publisher to retain all of these records.

customers by fax of the need to renew the request, and providing the appropriate form in that same fax for return by the reader, has proven to be the most effective means for obtaining these crucial requests, both in terms of cost and response rate.

Although American Business Media believes that these transmittals whether related to request or paid subscriptions are a form of customer service, not "advertising" as defined for purposes of the TCPA, we cannot be sure that hundreds of judges in all fifty states (and the District of Columbia) will agree. Therefore, unless and until the FCC is willing to confirm that such notices are not advertisements, most publishers will not be willing to "bet the company" by continuing to send these notices in the way that is best for them and their readers.

Once again, American Business Media submits that it will be successful on the merits of this clarification request, because for both subjective and objective reasons, we expect the Commission to agree that these notices are not advertisements. Subjectively, they are sent to those who are already readers of the publication and are not intended, in the words of the applicable definition, to promote it or make known the "availability or quality of any property goods or services." The recipient of the fax, as an existing paid or request subscriber, already knows of the availability of the product, and the renewal notices typically do not tout its quality. Instead, they provide valuable information to the reader.

Even if it could be argued reasonably that the renewal notice and form make known the existence or quality of a product, they are not, at least with

respect to request publications and again in the words of the applicable definition, “advertisements” for “commercial” products as those words are commonly defined. Both terms are typically used in the context of *selling* an item, not offering it at no charge (to qualified recipients). The Commission has itself confirmed this distinction in the June 26th Order. In addressing the scope of the term “advertisement” for application of the rule exempting prerecorded messages that do not contain “advertising” from the prohibition applied to such messages, the Commission stated (at ¶ 145 of the June 26th Order) that if the “purpose of the message is merely to invite a consumer to listen to or view a broadcast,” it is not an advertisement because, like requester publications, there is no purchase being encouraged. By this reasoning, which we submit is valid, neither a renewal notice nor even a solicitation for a request publication is an “advertisement” under the TCPA. American Business Media therefore expects that it will be successful on this request for clarification.

Finally, American Business Media has requested a stay pending an appeal on the constitutionality of the fax rule as applied to the press, in the event that the Commission refuses to reconsider and withdraw the onerous requirement for written, signed permission. In asserting a likelihood of success on the merits in this context, we recognize that several courts have ruled that the TCPA’s fax provisions are constitutional.⁸

⁸ The latest such decision is *State of Missouri v. American Blastfax, Inc.*, 323 F. 2d 649 (8th Cir. 2003).

However, they did so in the context of, and at times expressly relying upon, the FCC's current rule permitting faxes where there is an established business relationship and without the added burden of obtaining signed, written permission.⁹ Those courts also failed to address the unique protections accorded the press under the First Amendment.

American Business Media submits that with the overlay of the new, written, signed permission rule, a reviewing court is likely to find the TCPA, as it will be implemented under the new rules, to be an unreasonable restriction on speech, especially as applied to the press.

According to the leading case on the subject, regulation of commercial speech is permissible if a four-part test is met. *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). Among the tests are that the restriction must promote a legitimate governmental interest and that the restriction is no more extensive than necessary to promote that interest. For purposes of this discussion only, American Business Media will concede that eliminating unwanted advertising faxes is a legitimate governmental interest. However, we maintain that the requirement of written, signed consent added in the new rules is far more extensive than necessary.

⁹ See *Destination Ventures Limited v. FCC*, 844 F. Supp. 632, 639 n. 1 (D. Oregon 1994) and *State of Missouri, supra*, at 659, where the court determined that the TCPA is not a total ban on faxing because permission can be obtained "though such means as telephone calls. . . ."

As previously discussed, courts affirming the constitutionality of the TCPA have done so in part because the ban on faxed advertising permitted such advertising where there is an established business relationship. Not only has the FCC chosen to remove that crucial condition but it has extended the ban to all faxed ads even when there is express consent if that consent is not written and signed. In going beyond the congressional directive, the Commission has crossed the line from arguably permissible to patently excessive restraint. As the Supreme Court recently held in *Thompson v. Western State Medical Center*, 535 U.S. 357, 371 (2002), "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, it must do so."

Here the Commission has chosen to restrict more speech than Congress directed, and has done so with a single, faulty reference (without citation) to the record. The Commission stated (at ¶ 189 of the June 26th Order) that the established business relationship defense must be abandoned because consumers are still receiving unwanted faxes. *But the Commission failed to draw a link between that alleged harm and the proposed cure, for it is not only possible but also highly likely that the unwanted faxes were sent in the absence of an established business relationship.*¹⁰ In other words, the faxes most complained about were no doubt illegal under the existing regulations, and will continue to be

¹⁰ The well known class actions that have been brought against certain senders of faxes appear to be based on faxes to those with whom there was no established business relationship.

illegal. The Commission's action here terminating the established business relationship defense will restrict the speech of those who wish to communicate generally desired messages to their own customers while doing nothing to stem the tide of faxes that have always been plainly illegal under the TCPA.

And then, to make matters worse, the Commission has made it even more difficult to send faxes to willing recipients by creating and imposing a requirement that goes beyond the legislature's command. The Commission should keep in mind that the sender of a fax, if it is required to have "express permission" in any form, will necessarily bear the burden of demonstrating the existence of that permission if challenged by the recipient. That is enough of a burden without superimposing an insurmountable obstacle.

For these reasons, the next court to review the fax provisions of the TCPA is likely to find that, in its latest iteration, it represents an unreasonable and therefore unconstitutional burden on speech. Even if, however, a court is unwilling to go that far, it could well be willing to recognize the special First Amendment protection enjoyed by the press and find that, as applied to the press (such as American Business Media members), the TCPA is unconstitutional.¹¹

¹¹ As far as we know, this would be a matter of first impression. Although American Business Media raised the issue of the press in an amicus brief to the Eighth Circuit in *State of Missouri*, it had not been raised by any party, and the court did not reach the issue.

When applied to the press, any restriction on the faxing of subscription and certain other information to existing or potential subscribers clearly treads on press freedoms protected by the First Amendment. The Commission has embraced the notion that certain types of entities are entitled to heightened First Amendment protection, agreeing in the context of the telemarketing rules that charities and religions have certain First Amendment rights that others don't have (June 26th Order at ¶ 73). American Business Media raised this very point in its November, 2002 comments, and it was improperly ignored by the Commission, which may not "ignore a constitutional challenge" *Meredith Corp. v. FCC*, 809 F.2d 863,874 (D.C. Cir 1987).

Furthermore, Supreme Court precedent is clear that the First Amendment covers sales and circulation of magazines as well as the mere printing of them; it directly follows that any attempt to restrict or restrain direct-to-person solicitations for magazine subscriptions must be subjected to strict First Amendment standards, not lesser commercial speech standards. Freedom of press does not stop at the pressroom door.

In *Lovell v. City of Griffin*, 303 U.S. 444 (1938), the United States Supreme Court held that a municipal ordinance restricting *circulation* of publications "strikes at the very foundation of freedom of the press by subjecting it to license and censorship." *Id.* at 451. The Court recognized that "[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed without the circulation, the publication would be of little value." *Id.* at 452. *See also Substitutes United For Better Schools v. Rohter*, 496 F. Supp. 1017, 1020 (N.D.

Ill. 1980) (newspaper sales held inextricably bound up with the expressions in the newspaper itself and hence protected by the First Amendment). Accordingly, American Business Media is likely to succeed in a challenge to the application of the new fax regulations—and the TCPA itself—to the press.

For all of these reasons, American Business Media's likelihood of success in its requests for clarification and reconsideration, and in a constitutional challenge, support our requests for a stay of the new rules.

Without a stay, American Business Media members will suffer irreparable harm

Little needs to be added to the discussion above to demonstrate that implementation of the new fax rules this month, or next month (in the case of the signature requirement), will irreparably injure American Business Media members, who for many years have obtained request renewals, communicated with advertisers and sent welcome information about related products such as trade shows to subscribers, advertisers and others with whom they have an established business relationship. The Commission improperly ignored the burden on publishers. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001).

There is no way that they can obtain written, signed permission for anything more than a small percentage of subscribers in one or two months. Especially if the last two sentences of ¶ 191 of the June 26th order are read to

prohibit non-advertising faxes soliciting signatures,¹² any attempt to obtain signatures will be extraordinarily expensive, and it will take at least many months to obtain even a reasonable number. Then if the written signature requirement remains, American Business Media members will face the logistical nightmare of developing a system to maintain these signatures and track constant additions and subtractions. Meanwhile, if the rule is not stayed, they will be forced to change their established business practices, will no doubt lose subscribers¹³ (or at least qualified subscribers, which will jeopardize their postal status) and will expend large sums seeking to obtain signatures that they should not be required to obtain.

During this time, as shown above, American Business Media members will be deprived of their constitutional rights. Loss of constitutional freedoms “for even minimal periods” constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976.)

A stay will not harm other interested parties

¹² Given the references to negative options in those sentences, we read them as simply but inartfully addressing negative option faxes. We intend to seek clarification. Suffice it to say here that a letter explaining the need for and requesting signed permission to send future faxes does not meet any definition of “advertisement,” and the FCC is not empowered to make non-advertising faxes illegal pursuant to a statute limited to advertisements. Calling a cow’s tail a leg does not make it a five-legged creature.

¹³ Loss of “customer base” has been found to constitute irreparable injury. *PDK Labs, Inc. v. Reno*, 134 F.Supp 2d 24,37 (D.D.C. 2001)

In contrast to the severe and irreparable business losses that American Business Media members will suffer if the new rules take effect, the only “harm” to others from a stay is that some people will receive no more than a couple of faxes—faxes in which they are likely to be interested—than they would if the rule is placed into effect. Although we recognize the cost shifting implications of fax receipt, the few cents that such faxes might cost (if they are indeed printed and not received by a computer) will be, we submit, less burdensome to the recipients of those faxes than the alternative of some combination of emails, phone calls and direct mail all seeking a return, written, signed document authorizing future fax advertisements. As noted previously, American Business Media doubts that legitimate targeted faxes to those with whom the sender has an established business relationship have been the cause of consumer complaints, and we neither send broadcast, indiscriminate faxes nor are asking the Commission to do anything to legitimize such faxes. We are asking only that it maintain the status quo while it, and then if necessary the courts, reconsider the action announced in the June 26th Order.

A stay would be in the public interest

The Commission’s unexpected action replacing the established business relationship defense with a signed permission requirement has created turmoil in the publishing industry, at least in that portion of the industry represented by the members of American Business Media. Used to dealing with faxes in

communications with subscribers, advertisers and others, these companies and their decision makers are at a loss when seeking a proper course of action. On the one hand, they fear the consequences to their businesses if they suddenly cease all faxes, as they would do if they wish to avoid both legitimate and illegitimate threats of litigation. On the other hand, continuing any significant amount of faxing, including the faxes with subscription expiration notices and renewal forms that are the lifeblood of the industry, can rapidly expose them to multi-million dollar class actions.¹⁴ Even winning such a case by proving the legitimacy of the faxes would be an expense than many in this hard-pressed industry cannot bear.

There is no need for the Commission to create or permit this upheaval. It is apparent that its actions, while no doubt undertaken in a good-faith effort to protect consumers from unwanted faxes, will have unintended consequences to which the Commission paid little if any attention and that could not have been and were not contemplated by those previously submitting comments in this docket.

It is time to defer the implementation dates, take a step backward and a deep breath and reconsider how best to carry out the purposes of the TCPA.

¹⁴ We have not yet even mentioned the further ambiguities inherent in determining from whom written authorization would be required. If an employee of a company gives permission, can the owner of the company and, presumably, of the fax machine collect \$1,500 from the sender because it was the owner's paper and toner? What if a person authorized to give permission is replaced in a job, and a fax is sent to him at the authorized fax number the next day (or week or month)? Is the sender liable?

Respectfully submitted,

David R. Straus
Thompson Coburn LLP
1909 K Street, NW, Suite 600
Washington, DC 20006
Phone: 202-585-6921
Facsimile: 202-585-6969
E-mail: dstraus@thompsoncoburn.com

Counsel for American Business Media

Dated: August 6, 2003