

**Before the
Federal Communications Commission**

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

MOTION FOR STAY

Reed Elsevier Inc. (“Reed Elsevier”), by and through its attorneys, and pursuant to 47 C.F.R. §1.41, hereby requests the Commission to stay the effective date of Section 64.1200(a)(3)(i) of the Commission’s rules, as amended, requiring a signed, written consent to receiving facsimile advertisements (the “Fax Consent Rule”). 47 C.F.R. § 64.1200(a)(3)(i).

I. Background

Reed Elsevier is one of the world’s leading publishing and information companies, employing more than 20,000 people in the United States. Reed Elsevier provides critical information in both hard copy and electronic formats to the government, scientific, legal, educational, and business communities. Within these identified market segments, Reed Elsevier offers a wide array of information-driven services and solutions to businesses. Reed Elsevier businesses and services include:

- Reed Business Information (“RBI”), the largest publisher of business and professional publications in the United States. RBI maintains a long tradition of providing business information through more than 150 targeted print magazines, more than 140 web sites, online communities, directories, CD-ROMs and extensive databases serving 18 markets.
- Reed Exhibitions, the world’s leading organizer of trade and consumer events with more than 470 events in 29 countries. Reed Exhibitions organizes 60 shows in the U.S., ranging from technical shows on engineering, computers, construction and manufacturing topics to consumer shows on boats, automobiles, hunting and fishing,

and home design products. These shows are held in a variety of cities across the U.S. and attract more than 26,000 exhibitors and more than one million visitors to the host cities.

- Harcourt Education Group, a leading U.S. educational publishing company serving the K-12 market. The Harcourt schools education portfolio includes: Harcourt School Publishers, which publishes print- and technology-based instructional materials for students in K-8; Holt, Rinehart and Winston, a recognized leader in secondary educational publishing; and Harcourt Trade Publishers, which publishes distinguished fiction and non-fiction for children and adults.
- LexisNexis, the preferred provider of decision support information and services to legal, business and government professionals, with over 3 million subscribers. LexisNexis online service contains: 4.1 billion searchable documents; over 35,000 sources of information; a proprietary search engine that allows customers to search and retrieve information faster and more accurately than the Internet; and over 16,000 databases.
- Elsevier, a leading supplier scientific, technical and medical information to research libraries and scientists. Elsevier publishes 1,200 journals containing 160,000 articles a year, 400 books, as well as CD-ROMs and online products.

Reed Elsevier will join a number of other parties in petitioning for reconsideration of the Commission's interpretation that "prior express permission or invitation" required to send requested business communications by fax under the Telephone Consumer Protection Act of 1991, 47 U.S.C. §§ 227(a)(4), 227(b)(1)(C) (the "TCPA") means that a written consent of the recipient must be obtained by the sender. For the reasons articulated below, the Fax Consent Rule should be stayed pending completion of the Commission's decision on reconsideration. Even if the Commission does not change its interpretation on reconsideration, which Reed Elsevier hopes will not be the case, the Fax Consent Rule should be stayed at least for one year from its effective date, in order for companies to have a realistic opportunity to comply.

II. Analysis

A. *Likelihood of Success on the Merits*

The first of the four factors under which the Commission analyzes requests for stay weighs in favor of its grant.¹ Reed Elsevier is likely to succeed on the merits because nothing in the TCPA or its legislative history compels the Commission to conclude that “prior express invitation or permission” requires a fax sender to obtain the express *written* consent of a recipient. There is nothing in the text of the TCPA indicating that the consent must be in writing. The legislative history of the TCPA shows that with respect to the “prior express consent” that is necessary for prerecorded message/automated dialing for telephone calls, Congress had a writing requirement in a previous bill and stripped it out. S. Rep. No. 178, 102d Cong. 1st Sess. 4 (1991) (“Senate Report”).

Other provisions of the Communications Act support that written consent was not contemplated for the prior express permission or invitation needed for faxes. Where Congress wanted to impose a writing requirement in privacy provisions of the Communications Act on Commission-regulated entities, it made that requirement explicit. For instance, Section 631 of the Communications Act obligates cable operators to notify their subscribers in writing of their policies on collection and disclosure of personally identifiable information. 47 U.S.C. § 631(a)(1) (requiring of cable operators a “separate, written statement”). Similarly, Section 231(d)(1)(A) of the Communications Act, governing disclosure of information collected for the purposes of restricting access to communications of material harmful to minors, requires “prior written or electronic consent” of the individual or his or her parent or guardian. 47 U.S.C.

§ 231(d)(1)(A). Outside of the privacy context, Congress made written consent explicit in Section 615(c) of the Communications Act, which governs the circumstances under which a cable operator and a noncommercial educational station may waive carriage requirements for existing stations. 47 U.S.C. § 535(c).

Similarly, in other privacy contexts, Congress clearly and explicitly evidenced its intent for a written consent requirement in the text of the statute. In the Family Educational Rights and Privacy Act, Congress required, as a condition of funding, that educational agencies obtain “written consent from the student's parents specifying records to be released.” 20 U.S.C. § 1232g(b)(2)(A). In the Video Privacy Protection Act, Congress provided that a video tape service provider may disclose personally identifiable information concerning any consumer . . . “to any person with the informed, written consent of the consumer given at the time the disclosure is sought.” 18 U.S.C. § 2710(b)(2)(B). Clearly, where Congress wanted written consent, it knew how to say so explicitly.

The legislative history of the TCPA demonstrates that Congress was concerned primarily about faxes to *consumers* from entities with whom the recipient has no relationship. Congress objected to “junk faxes” that impose costs on consumers, who must pay for toner and printing. Senate Report at 2-4, 6. Congress seemed not concerned in the business-to-business context where there was a basis to believe that the recipient had invited the fax or had given the permission to receive the fax. First, where the recipient already has expressed some affirmative interest, either through a transaction, an application or other means to the sender, there is express

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See, e.g., *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *AT&T v. Ameritech*, 13

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invitation or permission. Faxes sent in this context are not “junk faxes,” because they are being individually directed and not sent randomly to a list. Indeed, Reed Elsevier’s success rates for faxes sent to customers demonstrate that many of such customers want to receive these faxes. Second, in the business-to-business context, the costs of receiving such faxes are *de minimus* and will not be borne by consumers.

Reed Elsevier and other parties petitioning for reconsideration also are likely to succeed on the merits because the Commission has not met its burden to show that the Fax Consent Rule would survive a challenge to its constitutionality under the First Amendment. The Commission must demonstrate that obvious alternatives that are less burdensome are insufficient to protect consumer privacy. *U.S. West v. FCC*, 182 F.3d 1224, 1238 (10th Cir. 1999). In the TCPA Order,² the Commission based its decision to require written consent primarily on comments from individual consumers, consumer groups, and some small businesses, not in the business-to-business context between senders and their customers.³ The Commission simply does not have a record to impose the extent of regulation of commercial speech that the Fax Consent Rule imposes and survive a constitutional challenge.

B. Irreparable Harm

Reed Elsevier will suffer irreparable harm if the stay is not granted. Reed Exhibitions sends out approximately 3.65 million faxes to 700,000 participants, both exhibitors and

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FCC Rcd 14508 (1998).

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 03-153 (released July 3, 2003) (the “TCPA Order”).

³ TCPA Order at ¶¶ 188-189.

attendees, at 33 shows in the U.S. For many of its customers, faxes are the only mechanism through which Reed Elsevier makes its offers known. There is simply no practical way for Reed Elsevier to obtain signed, written consents needed to comply with the Fax Consent Rule by its approximate effective date of early September. In fact, a stay of less than a year will make it difficult for businesses such as Reed Exhibitions and RBI, which communicate with many of their customers only once per year, to comply. These entities must obtain additional contact information and new forms and communicate with their customers during that yearly cycle. The costs of this onerous requirement will not be recouped if the Commission changes its rule on reconsideration but does not stay the Fax Consent Rule. The number of parties filing reconsideration petitions and meeting with FCC Consumer and Governmental Affairs Bureau staff attests to the extent of the irreparable harm of the Fax Consent Rule. The second factor weighs decisively in favor of granting a stay.

C. Harm to Others if the Stay is Granted

The harm associated with granting a stay is minimal. Fewer than one percent of Reed Exhibition's customers take advantage of its policy to allow existing customers to opt out of receiving communications that would be prohibited without written consent under the Fax Consent Rule. Most reputable businesses offer this option for recipients to opt out of receiving such faxes. Unlike in the business-to-consumer context, where consumers bear the cost of such faxes directly, the harm to consumers in the business-to-business context is nonexistent. In addition, although the Commission's prior interpretation was in effect for 11 years, no individual or organization petitioned the FCC to reverse its conclusion, suggesting little if any harm exists in the business-to-business context. Thus, the third factor for analyzing a request for a stay supports its grant.

D. Public Interest

The final factor overwhelmingly supports grant of a stay. The Commission already has heard, on an *ex parte* basis, from the wide range of business, association, and nonprofit severely impeded by the Fax Consent Rule. Many interests affected, such as renewal requests for advertiser-funded publications, including RBI periodicals, provide substantial benefits to businesses and consumers (through free trade journals, for instance) at no cost to the consumer. These will be curtailed significantly if a stay is not granted. The ineffectiveness and substantial costs of other forms of communicating with existing customers present compelling public interest rationales for granting a stay. Direct mail is 500-600% more expensive than faxing, and often is disregarded. E-mail may be filtered, not read, and/or prohibited by state and impending federal legislation. For businesses, nonprofits, and associations alike, the Fax Consent Rule will dramatically and negatively impact a primary means of communicating with existing customers, clients, and members. Given the longstanding nature of the prior interpretation and the paucity of record support for the Fax Consent Rule in the business-to-business context, the public interest would be well served by grant of a stay of at least one year from its effective date.

III. Conclusion

WHEREFORE, Reed Elsevier respectfully requests that the Commission stay the effective date of the Fax Consent Rule pending its decision on reconsideration, or, at a minimum,

for one year from its effective date.

Respectfully submitted,

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