

**COMMENTS BY WAYNE G. STRANG SUBMITTED IN OPPOSITION TO COMMENTS OF
YELLOW PAGES INTEGRATED MEDIA ASSOCIATION (Yellow Pages I.M.A.) AND
YP.NET (YP.Net) IN SUPPORT OF PETITIONS FOR RECONSIDERATION - CG
DOCKET #02-278, FCC 03-62**

I would like to thank the Commission for the opportunity to oppose the support of Yellow Pages I.M.A. and YP.Net filed by Halprin Temple on behalf of those organizations. This opposition will generally address the comments made

General

The comments submitted by Halprin Temple on behalf of Yellow Pages I.M.A. and YP.Net support Petitions to Reconsider the Commission's decision to eliminate the Established Business Relationship (EBR) as an exemption to the statutory ban on transmitting unsolicited advertisements via facsimile, and its decision to require written evidence of prior express permission or invitation.

The arguments offered are merely dressed up versions of the standard, "It will cost us too much." and "People want to hear from us." that the Commission has heard for many years. Yellow Pages I.M.A. presents an example which it claims proves that "...member companies have[s] already been threatened with suit..."¹ although prior permission had been granted.

Yellow Pages I.M.A. provides as "evidence" a scenario in which a sales person telemarketed² a business and allegedly received permission to "fax over a proposal". Neither a copy of the fax, nor quotes of the alleged statements made were furnished. Further, they make the fallacious statement, "However, if the Commission's rules go into effect, this same exact scene will be repeated over and over again."³ This is ludicrous. In point of fact, ***had the Commission's requirement for obtaining written consent been in force at the time, there could have been no misunderstanding and no threat of a subsequent suit!***

Had the Commission's rule been in place, Yellow Pages I.M.A. would have been protected. Thus the Commission's new rules would ***not*** "result in a landslide of litigation"⁴ as Yellow Pages I.M.A. would have us believe, but instead would serve to ***protect*** their customers from suit.

It becomes quite obvious that the industry wants to continue to foist there advertising off on unwilling residential and business fax machine users unabated.

This is typical of the industry's many attempts to obfuscate and mislead the Commission and the general public as to their reasons for wanting to retain the EBR exemption and weaken the requirements for demonstrating prior express permission or invitation.

¹ Yellow Pages I.M.A. comments dated October 14, 2003 at 1

² Halprin Temple uses the euphemism "called a potential advertiser". Yellow Pages I.M.A. comments at 1.

³ Yellow Pages I.M.A. comments at 2

⁴ Yellow Pages I.M.A. comments at 1

YP.Net claims to have over 18 million listings that would qualify for the EBR and whines that, "The Commission clearly underestimates the gargantuan nature of this task."⁵

As usual, YP.Net uses the industry standard of not giving the complete story.

None of those 18 million ad sales was completed with a "handshake agreement". Each required a written document of some kind. This document could easily contain a paragraph that specifically details what type of faxes the customer could expect, when they could be expected, the number to which they could be expected to be faxed, and allowing space for a date and signature accepting or declining the "opportunity" to receive these faxes.

The excuse, "All of our business is conducted over the internet." is untenable. It should be pointed out that even a non-attorney can read the Commission's statement, "The term 'signature' in the amended rule shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law."⁶ YP.Net's argument therefore, is specious at best. To ensure there is no misinterpretation, the Commission may wish to specifically include the preceding quote in the regulations.

Yellow Pages I.M.A.'s sobs are even more strident. They list several items which they apparently believe are in a grey area when determining whether or not a given fax constitutes an advertisement. **None** of these examples would constitute an unsolicited advertisement⁷ under the TCPA ***provided the Commission's requirement for written permission is satisfied!*** If that requirement were met, there would be no question that the TCPA had not been violated even though the material sent constitutes an advertisement.⁸

But what about the scenario where a live telemarketer obtains "consent" to fax a brochure, proposal or some other type of advertising material? Quite simply, the person granting permission would have to fax⁹ to the advertiser permission to do so that contains the information required by 47 CFR 64.1200(a)(3)(i). It should be noted here that only a live telemarketer could be used in this scenario. Because a, "...business relationship should be defined broadly rather than narrowly (e.g., an exchange of consideration), but that it cannot be formed solely on the basis of a prior solicitation"¹⁰, prerecorded messages or "Permission Please" faxes may not be used.

⁵ Referring to the requirement for written permission. YP.Net comments filed October 14, 2003 at 2

⁶ Report & Order 03-153, June 26, 2003, note 691

⁷ It would do well for attorneys to learn the difference between an "advertisement" and an "unsolicited advertisement".

⁸ As noted earlier this would be a simple matter to negotiate and complete when finalizing the initial agreement.

⁹ Or use another method containing an approved electronic signature.

¹⁰ Report and Order 92-443, para 35 adopting a tentative ruling that the EBR cannot be formed based solely on a prior solicitation.

Yellow Pages I.M.A. falsely declares that requiring written permission for faxed advertisements, "...could cause the advertiser to miss the publication advertising deadline, resulting in the business being left out of the directory for a full year." As previously noted, provided the advertiser granted written permission to fax prior to the January 1, 2005 implementation date, there would be no problem. Any type of fax specified in the original permission, including renewal notices, notices of "special deals", upselling, conference announcements and so on, would not be considered "unsolicited advertisements" and subject to the ban provided in the TCPA.

If the advertiser **declined** to give permission for these faxes, (s)he has already made clear that (s)he does not want to be notified of these events via fax machine.

In an unbelievable twist of logic, Yellow Pages I.M.A. notes that permission to fax to confirm the accuracy of a listing or advertisement, "...cannot be done easily over the phone, and U.S. mail and e-mail may not be brought to the attention of the customer in a timely manner."¹¹

First, they provide no evidence that faxes would be brought to the customer's attention in a **timelier** manner, nor do they provide evidence that notification using another medium **is** brought more quickly to the customer's attention.

More importantly, just two pages later, Yellow Pages I.M.A. states, "The association uses U.S. mail, e-mail and facsimile to notify Members about [information concerning an annual trade show]..."¹², thus negating its own statement that the U.S. Mail and e-mail are not effective in communicating with its customers.

Finally, there is no question that a facsimile confirmation process may be necessary for last minute additions to the directory, however the required written permission is easily handled at the time of the sale, and therefore the argument has no basis in the real world.

Summary

The Commission should deny petitioners request for reconsideration of the Commission's new rules.

As Yellow Pages I.M.A. aptly noted, "The Commission did not change the definition of unsolicited advertisement in its Report and Order."¹³ That is true and the Commission does not have the **authority to change it!** It is a congressionally mandated definition that requires prior express invitation or permission. Period.

¹¹ Yellow Pages I.M.A. comments at 3

¹² Yellow Pages I.M.A. comments at 5

¹³ Yellow Pages I.M.A. comments at 4 and 5

The problems with obtaining written permission to fax are vastly overblown by the industry, particularly in light of the Commission's decision to delay implementation until 2005. This delayed implementation allows adequate time for the industry to comply.

Petitioners almost universally note that they don't want to be lumped in with the "fax blasters" that bombard us with offers of cell phones, satellite TV, vacation specials and the like. Yet it should be noted that just **one** of these blasters, still operating today but possibly under a new identity, is capable of transmitting more than **3 million faxes per day!** This onslaught will only grow if the Commission makes the mistake of granting petitioners requests.

Finally the true motive behind the "scores of Petitions for Reconsideration"¹⁴ received by the Commission is stated nicely by Yellow Pages I.M.A. on pages 3 and 4. "It is an **inconvenience** to both parties to obtain written permission to receive a fax." [Emphasis added]

This entire hoopla has been generated to avoid an "inconvenience".

I would submit to the Commission that the damage to the public resulting from the hundreds of millions of unsolicited advertisements transmitted by facsimile each year¹⁵ far outweighs the "inconvenience" of documenting consent to receive faxed advertisements.

All of the "problems" petitioners claim would be caused by the Commission's actions would be solved by the simple implementation of the requirement for written consent. With this action there would be no need for an EBR for faxes, nor would there be a need for exemptions for special interests such as Yellow Pages I.M.A. and YP.Net. The written permission given by those that want specified faxes would serve to change the character of the faxes from unsolicited advertisements, to mere advertisements or notifications.

This requirement could also be easily met at any point of sale for other interests that choose to use faxing to advertise.

I again thank the Commission for allowing me to express my opposition in this important matter.

Wayne G. Strang

October 20, 2003

¹⁴ Yellow Pages I.M.A. comments at 1

¹⁵ A conservative estimate of 1.5 million per day, 5 days per week at an average of 10 cents per page would result in an actual monetary loss of \$39 MILLION. Businesses of course, would experience higher costs because of the cost of labor involved in receiving and processing these faxes.