

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the matter of</b>	)	
	)	
<b>Rules and Regulations Implementing</b>	)	<b>CG Docket No. 02-278</b>
<b>The Telephone Consumer Protection</b>	)	
<b>Act of 1991.</b>	)	

**REQUEST OF AMERICAN BUSINESS MEDIA  
AND JOBSON PUBLISHING  
FOR LEAVE TO FILE SUPPLEMENTAL COMMENTS**

Pursuant to Section 1.429 of the Commission’s Rules of Practice and Procedure, 47 C.F.R. § 1.429, American Business Media and Jobson Publishing L.L.C., each of which has participated actively in this rulemaking proceeding, hereby request permission to file the enclosed “Supplemental Request for Reconsideration and Clarification of American Business Media and Jobson Publishing.”

There are compelling reasons that this request should be granted.

American Business Media’s August 25, 2003 “Request for Reconsideration and Clarification” addressed several issues. In the reconsideration portion of that pleading, American Business Media asked the Commission to reconsider and reverse its finding that the “express invitation or permission” requirement of the TCPA can be satisfied only with written, signed consent. American Business Media urged the Commission to find, instead, that it would be appropriate to give independent meaning to the statutory

term "invitation" by ruling that when a person voluntarily gives his fax number to a business, it is with the expectation that it will be used for a business purpose. The act of voluntarily providing a fax number (as opposed to simply having it appear on letterhead or a business card) therefore represents express invitation.

In the portion of that pleading seeking clarification, American Business Media asked the Commission to further define the term "advertising" in order to make clear that subscription expiration and renewal notices and other documents are not advertisements within the meaning of the TCPA and to reexamine certain language in its order dealing with the faxing of forms seeking permission to send advertising faxes.

Jobson Publishing's request explained its use of faxes to notify pharmacists and others of changes in the dosage, usage or other characteristics of pharmaceuticals, and to notify professionals of conferences. It is rightfully concerned that, without a clarification by the Commission, it will be targeted by groundless lawsuits brought in state courts throughout the country, even though its faxes are not advertisements by any reasonable definition of that term.

American Business Media's and Jobson's requests have the overriding purpose of permitting American Business Media's members and Jobson to continue the use of legitimate faxes while shielding them to some extent from the type of frivolous lawsuits that have plagued many members for the past year. As the Commission is probably aware, plaintiffs' lawyers pursue such lawsuits even when there is an established business relationship, on the ground that the Commission exceeded its authority in finding that the existence of such a relationship represents the requisite invitation or permission. They also pursue these suits when the faxed material is not

an advertisement. They do so safe in the knowledge that a legitimate business will pay to dispose of these cases, because the only other options are to pay more than the claim in legal fees to defend the case (and the burdensome discovery requests that typically accompany these form complaints) or to accept a default judgment.

In the past month, well after the time for filing the earlier comments, counsel for American Business Media and Jobson has learned of a new, very troubling and possibly unethical tactic by the well-organized plaintiffs' bar,<sup>1</sup> a tactic discussed in the supplement comments that we seek to file. This tactic, which involves the purchase of advertising faxes and unauthorized assignments of rights by newly created companies for the sole purpose of bringing TCPA lawsuits, substantially increases the risks and the stakes for American Business Media members, Jobson and others that wish to use faxes lawfully. It therefore greatly reinforces the need for Commission action limiting and clarifying liability under the TCPA as requested in American Business Media's and Jobson's earlier requests.

Because the information contained in the supplemental comments that accompany this request was not available sooner, and because it is relevant to the Commission's deliberations—especially with respect to the need for further

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<sup>1</sup> See [www.junkfax.org](http://www.junkfax.org)

clarification—American Business Media and Jobson should be permitted to file their Supplemental Request for Reconsideration and Clarification.

*/s/ David R. Straus*

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Counsel for American Business Media and  
Jobson Publishing L.L.C.

Dated: November 25, 2003

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**SUPPLEMENTAL REQUEST FOR RECONSIDERATION  
AND CLARIFICATION OF AMERICAN BUSINESS MEDIA  
AND JOBSON PUBLISHING**

American Business Media and Jobson Publishing L.L.C. file this supplemental pleading in order to bring to the Commission’s attention a very troubling, possibly unethical and unfortunately effective tactic by plaintiffs’ attorneys that greatly enhances the risk of groundless lawsuits against senders of faxes that do not violate the TCPA. As explained here and in the Request for Leave to File that accompanies this supplement, this increased risk of groundless lawsuits and the growing expense of making payments to terminate them reinforce the need for the reconsideration and clarifications sought in American Business Media’s and Jobson’s August 25<sup>th</sup> pleadings.

American Business Media’s and Jobson’s earlier pleadings asked the Commission to apply a more reasonable test of “express invitation or permission,” so that those voluntarily providing fax numbers to businesses would be deemed to have “invited” those businesses to use the fax numbers for a business purpose. There would

be no other reason for the fax number to have been provided. They also sought clarification that certain types of faxed documents, such as subscription expiration and renewal notices, offers of truly free subscriptions (not short trial subscriptions that turn into paid subscriptions), advertiser insertion orders and notifications to pharmacists of changes in the characteristics or uses of prescription drugs, are not advertisements.

They did so because, in the past year, senders of these types of faxes have been threatened with lawsuits, or have actually been sued, in state courts around the country with increasing frequency. The initial threatening letter, or the letter that accompanies a copy of the filed complaint, seeks a prompt settlement for a payment of some or all of the \$1,500 that is asserted as statutory damages, and sometimes threatens a class action if a prompt payment is not received.

Tempting as it might be for the recipients of these groundless lawsuits to adopt a "millions for defense but not a penny for tribute" posture, the practical realities dictate that the only reasonable course is to pay the \$700, or \$1,000, or \$1,500 demanded. Clearly the cost of mounting a defense and winning, almost always in another state, exceeds the cost of settling, and the ultimate threat of a class action suit raises the legal cost stakes markedly.

Unfortunately, the growing band of plaintiffs' attorneys has now seen just how easy it can be to become alchemists and turn faxes received by friends and colleagues into cash simply by sending a threatening letter to a legitimate business. Expanding their horizons, they have very recently devised an even more nefarious scheme to increase the rewards for themselves and the risk to those legitimate businesses.

This new scheme came to American Business Media's counsel's attention in early October, when an American Business Media member on the East coast received a complaint, a request for production of documents, interrogatories, a request for admissions and a notice of deposition, all filed in an Arizona state court by an attorney in Phoenix on behalf of something called "FCC Enforcement Company." FCC Enforcement claimed to be the "successor in interest" to a company to which the publisher had sent a fax giving notice that it was time to renew a free subscription to a publication.

The publisher suspected fraud and spoke with the in-house counsel for the supposed assignor of these rights, and he knew nothing about the fax or the assignment. This counsel investigated the matter and learned that a former customer of its Phoenix facility had recently stopped by and offered to purchase all advertising faxes from the receptionist for \$2 per fax, if the receptionist would sign an assignment of all rights and interest in the faxes to FCC Enforcement Company. She was thrilled to comply, and the lawsuit followed.

Fortunately for the publisher, the counsel for company that allegedly made the assignment was understandably angry, and he wrote to the attorney for FCC Enforcement Company demanding that he withdraw the case. A copy of that letter, with the identities of the parties deleted, is attached as Appendix A. Unfortunately,

however, despite the obvious wrongdoing, the lawsuit has not been withdrawn (yet).<sup>1</sup>

Within a week of learning about this travesty, counsel for American Business Media discovered that an attorney in Denver is running nearly the same scam. In this case, the American Business Media member publisher received a letter (redacted copy attached as Appendix B) threatening a lawsuit on behalf of U.S. Fax Law Center, Inc. The fax in question, another notification that it was time to renew a *free* subscription (Appendix C), had been sent to a subscriber to one of the publisher's periodicals, certainly not to U.S. Fax Law Center, Inc. A phone call to the counsel for U.S. Fax Law Center, Inc. brought both the claim that he had "thousands" of these cases and a copy of the assignment (Appendix D), which discloses that the recipient of the fax would be paid \$50 by "U.S.A. Tax (sic) Law Center" for "each fax which USAFLC successfully processes and upon which it realizes a dollar recovery."

When counsel for the publisher telephoned the assignor, the assignor stated that he did not carefully review the faxes that he had provided to USAFLC and that he would ask the assignee not to pursue this particular case. At this point, we do not know whether his wishes will be followed.

American Business Media and Jobson recognize that the FCC can neither write the private cause of action out of the law nor police the legal profession to prevent the stream of unjustified but threatened lawsuits from turning into a flood. But the

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<sup>1</sup> This same Phoenix attorney sued another American Business Media member on the basis of an assignment signed by the husband of the secretary who happened to sit next to the fax machine to which the subscription renewal—intended for her boss—was sent. The publisher spent \$800 to obtain the services of a Phoenix attorney, who persuaded the plaintiff's lawyer to withdraw the case (or face ethical charges). A call to the clerk of the court in which this case was filed revealed that there are at least 41 cases pending in which FCC Enforcement, which was formed in September, is the plaintiff.

Commission can, and we submit should, exercise the rulemaking authority it does have to provide maximum protection to those who are faxing when there is an established business relationship and when there has been an "invitation" to a business as defined above and in earlier pleadings. In addition, the Commission should further address the meaning of the term "advertising" to provide the clarifications previously sought by American Business Media and Jobson.

If the Commission does not, more publishers will be forced to adopt the policy that some American Business Media members have already adopted, which is simply to stop using faxes even where there is a relationship with the recipient, the fax is not an advertisement, opt out is offered and this effective means of communication has brought no complaints. As a result, their businesses will be harmed, in part through loss of subscribers, as will the businesses of the intended recipients, who will lose access to valuable and often free sources of quality information. That is not what Congress intended.

*/s/ David R. Straus*

David R. Straus

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Counsel for American Business Media and  
Jobson Publishing L.L.C.

Dated: November 25, 2003

VIA: FEDERAL EXPRESS

October 16, 2003

Re: FCC Enforcement Co., etc.

Dear Mr.

I represent \_\_\_\_\_ subsidiary of \_\_\_\_\_

This correspondence demands that you immediately cease and desist from using the name of \_\_\_\_\_ any manner whatsoever, including any litigation filed or pending related to alleged violations of the Telephone Consumer Protection Act. You have no authority or permission from \_\_\_\_\_ to represent \_\_\_\_\_ or use its' name in any lawsuits and you are hereby directed to cease this practice immediately or we will take legal action for injunctive and monetary relief. Your improper and unauthorized actions are causing a direct and immediate harm to our business relationships and reputation and your agent's actions interfere with our vendors and employees in the conduct of daily business activities. Specifically, you are to immediately cease solicitation in our imaging centers and from contact with our employees at their work sites. In addition, be advised that that \_\_\_\_\_ and \_\_\_\_\_ deny that you have any legal authority to use their business names or file litigation on their behalf against \_\_\_\_\_ and assert that your averments in that particular lawsuit are misleading and untrue. These misstatements subject \_\_\_\_\_ to legal actions, expense and possible damages for which you will be held responsible as well as for damages to our reputation and loss of goodwill in the community.

Please advise us immediately of your compliance with these demands. If we have not received reasonable assurances that these have been met within 14 days, we will take swift action to protect rights and to seek compensation for these injuries.

Sincerely yours.

General Counsel

**MACHOL & JOHANNES, P.C.**

Dominion Plaza, Suite 800 North  
600 Seventeenth Street  
Denver, Colorado 80202-5462  
(303) 830-0075 • (866) 729-3328  
Fax (303) 830-0047

August 27, 2003

**DEMAND IS  
HEREBY MADE  
FOR PAYMENT OF  
\$1,000.00  
IN DAMAGES**

**Re: Violation of Telephone Consumer Protection Act and Colorado Consumer Protection Act**

**Our File No.:**

**US Fax Law Center, Inc. Client Acct No.:**

We are writing to you regarding your unsolicited facsimile transmission of advertising to (see enclosed copy). This was sent without the "prior express invitation or permission" of the recipient as required by law.

A federal law enacted in 1991 called the Telephone Consumer Protection Act (the "TCPA") makes it illegal 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). The federal law also provides that a person who sends such an advertisement by fax is liable for \$500 in damages for each fax. If the court finds that the defendant acted willfully or knowingly (that is, you knew you were sending unsolicited faxes, regardless of whether you knew about the TCPA), the court may triple the damage award. See 47 U.S.C. 227(b)(3).

By sending this unsolicited fax advertisement, you violated the TCPA and are now liable to pay a statutory remedy of not less than \$500 per violation under 47 U.S.C. § 227(b)(3). A single faxed page may have multiple TCPA violations, such as the header of your fax does not comply with FCC regulations (47 C.F.R. § 68.318(d)).

We are serious about enforcing the TCPA and hereby make demand for payment of damages in the amount of \$1,000.00. To save everyone time and effort, we are willing to discuss settlement of this demand. To do this, call Janel Head in our office at 303/563-0450.

If you do not choose to settle, we can assure you that we will do our part to help enforce the laws as Congress intended.

We also demand at this time that you immediately cease and desist from sending any facsimiles to in the future and remove their fax numbers from your databases. You may want to consider the advisability of sending unsolicited faxes to anyone else in the future.

Very truly yours,

**MACHOL & JOHANNES, P.C.**

Jacques A. Machol, III

For the Firm

Violations: 2 Federal d1jf2f.frm

Tue, July 08 2003

TO:

106911 - 1  
F3G021

Please make any corrections to the information listed to the left.  
If person is no longer with the company,  
please pass this form along to another interested individual.



**YOUR SUBSCRIPTION IS ABOUT TO EXPIRE!**

You must renew NOW to continue receiving *f* at no charge!

**FAX to: 1- FREE Subscription Application**

COPY

FR:

YES! Send me \_\_\_\_\_ and the \_\_\_\_\_ **FREE!**  No  
Signature *X* \_\_\_\_\_ Date: \_\_\_\_/\_\_\_\_/\_\_\_\_  
Required. Does not obligate me or my company M D Y

First Name (please print) \_\_\_\_\_ Last Name (please print) \_\_\_\_\_  
Phone \_\_\_\_\_ Fax \_\_\_\_\_

E-mail Address \_\_\_\_\_  
May our advertisers or others contact you by phone, fax or e-mail?  Yes  No  
TO QUALIFY: You must answer all questions. The publisher reserves the right to serve only those individuals who qualify for a free subscription.

1. Your Government or Business Classification: (Please check ONE only)
  - A. GOVERNMENT
    - 01  Municipal (City, Township)
    - 02  County
    - 03  State
    - 04  Special District
    - 05  Federal (including Military)
  - B. PRIVATE INDUSTRY
    - 06  Consulting Engineering Firm/Consultant/Management Company
    - 07  Contractor (Performing Public Works Services)
    - 08  Architectural, Design Firm
    - 09  Private Water Company
    - 10  Water/Wastewater Utility
    - 11  Dealers, Manufacturer, Mfr. Rep, Distributor
    - 12  Public Libraries & Educational Institutions
    - 13  Industry Associations & Societies
    - 14  Other (Please be specific)
2. For Government Employees Only: What is Your Primary Government Department? (Please check ONE only)
  - A  Public Works (including Engineering)
  - B  Highways, Streets, Roads & Bridges, Airports (Construction, Maintenance & Surveying)
  - C  Water/Wastewater
  - D  Solid Waste/Resource Recovery & Recycling
  - E  Fleet Maintenance
  - F  Equipment Maintenance
  - G  Building Maintenance
  - H  Traffic Control
  - J  Parks & Recreation
  - K  Transportation
  - L  Environment/Pollution Control/Conservation
  - M  Public Safety
  - N  Planning/Zoning/Inspection
  - P  Administration
  - R  Information Systems
  - X  Other (Please be specific)
3. What is Your Title? (Please check ONE only)
  - A. PUBLIC WORKS OPERATIONS
    - 16  Director, Chief
    - 17  Manager, Planner
    - 18  Superintendent
    - 19  Engineer
    - 20  Foreman, Supervisor, Inspector
    - 21  Surveyor
    - 22  Operator, Technician, Coordinator
    - 23  Specialist
    - 24  Information Systems Mgr.
    - 25  Purchasing / Procurement
    - 29  Other (Please be specific)
  - B. GOVERNMENT ADMINISTRATION
    - 30  City Manager
    - 31  County Manager
    - 32  City Clerk
    - 33  County Clerk
    - 34  Mayor
    - 35  Administrator
    - 36  Commissioner
    - 37  Executive Director
    - 38  Chairperson
    - 39  Supervisor
    - 40  Council Member
    - 41  County Judge
    - 42  Other Elective Title
    - 43  Other Non-Elective Title
  - C. PRIVATE INDUSTRY MANAGEMENT & STAFF
    - 50  President, CEO/COO, Chairperson, Owner, Partner, Principal
    - 51  Executive/Sr. VP, VP, Director, Administrator, Commissioner, General Manager
    - 52  CFO, Treasurer, Comptroller, VP/Dir./Mgr. Finance, Secretary Office/Branch Manager
    - 53  Purchasing, Estimator
    - 54  Engineering VP/Dir./Mgr., Chief Engineer, Engineer, Consulting Engineer
    - 55  Operations, Maintenance VP/ Dir/ Mgt Department Mgr/Head/Dir. Chief, Project Manager, Manager, Foreman, Supervisor, Superintendent, Crew Chief, Operator, Technician, Specialist
    - 56  Architect/Designer/Surveyor
    - 57  Sales/Marketing
    - 58  Consultant, Advisor
    - 65  Other (Please be specific)

**FAX this form to:**  
Please do not use a cover sheet with this fax transmission!

14000973

# ASSIGNMENT

The undersigned W.A. A Colorado Corp. does hereby assign, sell, transfer, and assign all right, title, and interest in an to any and all unsolicited facsimile transmissions it receives or has received, as well as any and all attendant rights in connection with the Telephone Consumer Protection Act and any similar consumer protection statutes, to USA TAX LAW CENTER, INC., d/b/a U.S. FAX LAW CENTER, INC. ("USFLC").

In consideration of this assignment, USAFLC agrees to and shall pay the sum of Fifty Dollars (\$50.00) to assignor for each fax which USAFLC successfully processes and upon which it realizes a dollar recovery.

USAFLC shall pursue letter demand and suit upon illegal transmissions of junk fax advertisements in its sole discretion as it deems appropriate, realizing that not all faxes are capable of resulting in a recovery because of inability to identify or locate the sender(s) or because of the financial condition of the sender(s), or for other factors which USAFLC cannot control.

Assignor shall sign if requested an affidavit that neither it nor its personnel have given express permission for the transmission of fax advertisements to it. USAFLC makes no warranty or representation or warranty or any kind whatsoever, express or implied.

In Witness whereof, the parties have set their hands this 3rd day of April, 2003.

ASSIGNOR:

ASSIGNEE:

\_\_\_\_\_

USA TAX LAW CENTER, INC.,  
d/b/a U.S. FAX LAW CENTER,  
INC., A Colorado Corporation

A \_\_\_\_\_

By: \_\_\_\_\_

By: Ed Ott

Name/Signature

Ed Ott, Vice President

Name/Printed

8200 So. Quebec St., Suite A-3185  
Englewood, CO 80112  
Phone: 303.949.4118  
303.471.8558

Title

Address

City, State & Zip

Phone:

Fax Machine Number(s):