

November 30, 2002

Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-204B
Washington, DC 20554

RE: Comments from The Kauffman Group Inc.
In the Matter of Rules and Regulations Implementing the Telephone Consumer
Protection Act of 1991
CC Docket No. 02-278 and 92-90

To Whom It May Concern:

My name is Maury Kauffman. Since its founding in 1990, I have been President of The Kauffman Group Inc., a facsimile technology and services consulting and analyses firm.

I am the author of two books: Computer Based Fax Processing (Telecom Books/Flatiron Publishing, 1994) and Internet and Computer Based Faxing (Telecom Books/Flatiron Publishing, 1998). From July 1998 through April 2001, I was the *Life in the Fax Lane* columnist for Computer Telephony Magazine. I have written more than 50 articles on facsimile technology, services and marketing; published in technology publications ranging from: Information Week to Telecom Business to Voice Processing Asia and from sales and marketing publications ranging from: Marketing Tools to Selling Power to Sales and Marketing Strategies and News. I have been quoted in over one hundred trade and general technology, communications and sales and marketing publications, worldwide, ranging from Barrons to Business Week to Forbes, from Target Marketing to Telephony, from Teletalk (Germany), to The South China Morning News.

I have been an invited speaker/presenter at over fifty technology, telephony, communications and marketing conferences in ten countries. I was Chairman of the FaxAsia '96 conference held in Singapore. I have spoken at virtually every Fax Directions, FaxWorld, FaxAsia, FON (Fax on the Net) US, FON Europe, FON Asia, and Computer Telephony Expo since 1993. I have spoken at Internet World US and Internet World United Kingdom, Internet Telephony Expo, Telecom Business and six Direct Marketing Association (DMA) national conventions.

In December, 1995, I was awarded a Star of the Industry by Computer Telephony Magazine. I am also a past Vice President of the Philadelphia Direct Marketing Association. I have consulted extensively for telecommunications, technology and facsimile-focused companies. Some of my clients include: AT&T, EasyLink, Hewlett Packard, GTE, IBM, Intel, J2 Global Communications, Lucent, MCI/WorldCom, Microsoft, Pitney Bowes, Qwest, Sprint and Xpedite Systems.

I testified at trial on behalf of defendant Fax.Com and was the only certified Expert Witness in *State of Missouri, ex rel. Jeremiah W. (Jay) Nixon, Attorney General v American Blast Fax, Inc., et al.*, The case was heard in the United States District Court for the Eastern District of Missouri, Eastern Division. Case No. 4:00CV933 SNL (“MO v ABF”)

The judge’s decision: *“Applying the Central Hudson standard to the prohibition of unsolicited fax advertisements, the government fails to meet its burden in demonstrating that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree. Furthermore, the government’s claim under the MPA was based on the assumption that defendants violated the TCPA. Since the Court finds that the provision prohibiting the sending of unsolicited advertisements is unconstitutional, the MPA claim must also fail. Dated this 13th Day of March, 2002.”*

I have worked in, researched and studied the facsimile technology and services industry for 12 years and am respected worldwide. It is my hope the following comments regarding this matter will assist the Commission in its Rules Making and decisions. Though comments were requested for the whole of the TCPA, I will limit mine to those that directly relate to my specific areas of expertise: facsimile technology and the sending of unsolicited facsimile advertisements.

I. Introduction

Prior to discussing changes and remedies, one must take a brief look back at the history of the facsimile industry and why the facsimile provisions were originally included in the TCPA. And then examine what technological, demographic and other changes have occurred in the decade since it was written. Only then, can professional opinions on the law, changes and remedies be intelligently expressed.

II. Brief History of Fax Broadcasting and the TCPA

The hardware technology that enabled computer-based facsimile broadcasting (or mass faxing) was invented in the mid-1980’s at GammaLink Corporation (now owned by Intel Corp.) GammaLink’s computer-based fax boards separated the individual components of a fax machine (modem, scanner, etc.) and relied on a computer to more quickly and efficiently handle some of the phases of the fax transmission. The fax board was given

increased intelligence and most importantly, the ability to handle multiple, simultaneous facsimile transmissions. The invention sparked an industry.

Within a few years, certainly by 1988, fax server software manufacturers and fax service bureaus emerged. (A fax server is a combination of hardware and software that reside on a computer network, that permits multiple desktops to send and receive faxes from the same or shared telephony lines. Fax service bureaus are service providers whose primary business is to send and/or receive fax transmissions for their customers.)

The ability to a) program a computer to transmit dozens or hundreds of faxes or; b) hire a bureau to provide such a service; excited communications, marketing and other professionals. Some of the earliest fax broadcasting applications were in the fields of public relations (faxing press releases) and political oriented organizations (faxing advocate information and/or opinions on behalf of memberships and/or donors to elected officials at every level of government.)

In fact, some believe, had congressional offices NOT been one of the earliest targets of personalized fax broadcasting campaigns, (members of Congress received disproportionately, a significantly higher number of faxes as compared to consumers and business at large); restrictions on facsimile-based advertising, etc, would never have been included in what is essentially a law restricting telemarketing: the TCPA.

In 1992, the following statements were true and forecasts made:

- 1) 1992: At least 189 Fax Service Bureaus existed in the US.
Forecast: By 1997: Over 500 Fax Service Bureaus in the US
- 2) 1992: Total US Fax Broadcasting Service Bureau Revenue: \$41.5M
Forecast: By 1997: Total US Fax Broadcasting Service Bureau Revenue: \$610M
(69.2% Cumulative Annual Growth Rate)
- 3) 1992: All Major Common Carriers and all 7 Regional Bell Operating Companies provided enhanced fax services and fax broadcasting
- 4) 1992: 30% of all faxes are for intra-company communications

III: TCPA As It Was Written: Many Shades of Grey

Do the following examples violate the TCPA?

1) The Food and Drug Administration (FDA) issues a warning regarding the dosage of a particular drug. The pharmaceutical manufacturer sends a fax to every doctor in the US explaining the FDA's ruling and clarifying exactly what the drug dosage should be. Because the pharmaceutical manufacturer does not ever see the actual prescriptions, they do not know for certain if every doctor in the US has ever prescribed this drug; or,

for that matter, any drug they manufacture. *Does informing doctors, (who may have never prescribed any the company's products,) of the proper dosage of the drug, advertise the availability of the drug and thus constitute a violation of the TCPA?*

2) A software company finishes the latest upgrade of their product. They want to notify their entire customer-base of the immediate availability and cost of the upgrade. The company sends a fax to every customer registered in their database. A fax is sent, addressed to: Professor of Geometry, ABC College. David Smith, the professor who originally purchased the software has since retired. The fax is given to Tom Jones, who now teaches Geometry, but has no prior relationship with the software company. *Does the offer of the software upgrade violate the TCPA?*

3) A cruise line has a ship sailing in one week, in which half of its cabins are empty. The cruise line sends a fax advertising the availability of the berths at a 50% discounted rate and double commission bonus, to every travel agent in the country. The cruise line hopes the travel agents will explain the discount to their retail customers and help fill-up the ship. There are certainly some travel agents in the US that have never done any business with this cruise line. *Does this fax violate the TCPA?*

4) The Consumer Product Safety Commission (CPSC) issues a recall of a baby stroller deemed unsafe. The stroller's manufacturer, now responsible for the recall, typically sells its products to wholesalers and distributors, who in turn sell them to retailers. The manufacturer, wanting the stroller removed from retail shelves, as soon as possible, sends a fax to every infant and baby products retailer in the US. The fax explains the recall, describes the stroller in question and suggests an alternative stroller be substituted. *Does the suggestion of the substitute stroller constitute an offer and therefore violate the TCPA?*

5) A bio-tech company discovers a new, potentially life-saving protein and presents the findings at a scientific symposium during the American Society of Protein Specialists national conference. However, only ten percent of the Society's members attend the conference. The bio-tech company rents the association's membership list, removes the names of the members who attended the conference, and faxes the other 90% a white paper describing their discovery and requesting input. *Does this fax, that is written under the bio-tech company's letterhead violate the TCPA?*

6) A consumer visits a local hardware store, looking for a contractor to build a deck for his home. The hardware store sends a fax to all local contractors, (whether they shop in the hardware store or not,) advertising the request for business. The hardware store hopes the chosen contractor will buy the lumber from their store. *Does this fax violate the TCPA?*

The following week, the same hardware store has a sale on lumber. It sends a fax to all local contractors, advertising the sale. *Does this fax violate the TCPA?*

As the law is currently written, many arguments can be made on both sides of the examples above. Though some of the details have been changed, all of the examples are actual, real-world events, where fax broadcasting was utilized.

IV. Technological and Other Events that Occurred 1992 – 2002

The advent of new technologies combined with consumer preferences drastically altered: the nature of facsimile; the enhanced fax service bureau industry; the costs and fees involved in the transmission and receipt of faxes; and the needs/requirements of the TCPA as it relates to fax.

1) New Technologies

In the mid-1990s, the emergence of the world wide web on the Internet and with it, the speed, low cost, ease of use and ubiquitous use of email has had a devastating effect on all facets of the facsimile industry. Facsimile machines, hardware, software and services have all, to varying degrees, been in decline in the US for several years. The decline in the numbers of pages faxed annually in the US, is so severe, that the few market researchers who remain in the facsimile industry are perhaps too embarrassed to release any new data.

Simply put: *Do you send/receive more faxes today than you did five years ago? Do you expect to send/receive more faxes in two years, than you do today?*

Furthermore, the advances in fax servers, unified messaging and specifically the subset service: fax-to-email (which permits inbound faxes to be received as email attachments in email boxes) have caused some of the original issues surrounding the TCPA and unsolicited faxes; specifically, *the cost to receive a fax* factor, obsolete.

2) Consumer Preference

Consumers have chosen and their decision has dramatically hastened the demise of facsimile. For most applications, whether point-to-point or point-to-multi-point, email trumps fax. And unfortunately, for the facsimile industry, nothing is going to change this reality.

3) Forecasts Proved Incorrect

Revisiting the forecasts in section II, with the harsh reality of today:

- 1) 1992: At least 189 Fax Service Bureaus existed in the US.
Forecast: By 1997: Over 500 Fax Service Bureaus in the US
2002 REALITY: Approximately 25 Fax Service Bureaus exist in the US
- 2) 1992: Total US Fax Broadcasting Service Bureau Revenue: \$41.5M
Forecast: By 1997: Total US Fax Broadcasting Service Bureau Revenue: \$610M
(69.2% Cumulative Annual Growth Rate)
2002 REALITY: Total US Fax Broadcasting Service Bureau Revenue: \$300M
(Xpedite division of Ptek Holdings accounts for \$150M of total)
- 3) 1992: All Major Common Carriers and all 7 Regional Bell Operating Companies provided enhanced fax services and fax broadcasting
2002 REALITY: No Major US Carrier provides enhanced fax services
ILECs provide few fax services, combined account for under 10% market share
- 4) 1992: 30% of all faxes are for intra-company communications
2002 REALITY: Virtually zero faxes are sent for intra-company communications

4) Costs to Receive a Fax

A major contributing factor to the inclusion of fax prohibitions in the TCPA was the issue of the cost to the recipient to receive an unsolicited facsimile advertisement.

Thanks in large part to the FCC and deregulation, the overall cost of sending a fax whether intraLATA or internationally is today a fraction of what it was a decade ago. The same decrease has occurred in the cost of receiving a fax, albeit for other reasons.

In 1992, more than $\frac{3}{4}$ of the fax machines installed in the US required, then expensive thermal transfer fax paper. (The paper that one side is shiny and comes in a roll.) Advances in fax machine and inkjet technology, coupled with market competition have lowered the cost of plain-paper fax machines (those utilizing ordinary, inexpensive printer or photocopy paper) from over \$2,000 in 1992 to under \$100 today. Plain-paper-based fax machines today account for over 90% of the machines sold in the US and have become such a commodity, that it is hard to locate the older-technology thermal fax machines in retail stores.

In addition, advances in ink and toner technology coupled with intense competition in the ink, toner and plain paper industries have dramatically decreased the incremental cost of receiving a fax. In 1992 the cost per page to receive a fax was estimated to be between \$0.10-\$0.15 (10-15 cents). Today, the same expense has shrunk to between \$0.02-\$0.03 (2-3 cents) per page. These same forces will no doubt continue to lower the cost per page to receive a fax, in the future.

Furthermore, as touched upon above, in the last 10 years, more than 500,000 fax servers, supporting millions of computer desktops have been installed in the US. These

fax servers permit recipients of faxes to view their faxes, directly on their desktop, before choosing whether to print them out. Thus individuals who receive unsolicited faxed advertisements, or any fax for that matter, can choose to save, file and/or delete their faxes without printing them out. Thus the incremental cost to receive the fax through a fax server is \$0.00 (zero.)

Finally, the same is true with fax-to-email technology. Of all of the subsets of Unified Communications or Unified Messaging, the single largest utilized subset (or individual method of combined communications) is fax-to-email. (That is: having faxes arrive as email attachments, in an email box.)

If a consumer so chooses, the cost to receive a fax, and in fact, the cost of the telephone line and fax machine itself can all be eliminated. A NASDAQ listed company, J2 Global Communications, offers a 100% free fax-to-email service for any consumer who wants it. To date, over 4 million consumers are receiving their faxes in their email boxes, with no cost to them, whatsoever. (J2 also provides a host of other services, for which they charge a monthly subscription fee.) Thus, with J2's fax-to-email service, the incremental cost to receive a fax, whether unsolicited or not, is \$0.00 (zero.)

5) TCPA Requirements Regarding Fax

As we have seen, many events have occurred in the ten years since the TCPA was written:

- A) The emergence of fast and reliable Internet email with attachments has supplanted fax in all but a few respects.
- B) The fax service bureau industry has become much smaller and less significant than originally estimated.
- C) A substantial decrease in the cost fax toner, ink and paper. Therefore negating the issue of *"the cost of the recipient to receive an unsolicited fax."*
- D) The substantial installation of fax servers, (permitting faxes to either be viewed on one's desktop or sent to one's email box,) negates the incremental cost of receiving a fax.
- E) Services like J2 Global Communication's free fax-to-email service, entirely eliminate the costs for consumers to receive faxes, whether unsolicited or not.

Technology, the market and most importantly, consumers, have spoken and fax is the loser. Unsolicited facsimile advertisements are no longer the great threat they were feared to be in 1990-1992. Perhaps the best evidence of this fact, is the massive consumer outcry against unsolicited commercial email (UCE) or spam, versus the relative whimper regarding unsolicited (or junk) fax.

A similar comparison can be made by the nuisance of telemarketing versus that of unsolicited faxed advertisements. Witnessed by, to date, the comments received on the FCC's own Electronic Comment Filing System regarding comments on this very law. Over 90% of which appeared to be anti-telemarketing, with practically no mention of the issues surrounding fax.

That is not to say, *junk fax is not a problem to be addressed*. Simply, that compared to telemarketing and spam, unsolicited fax advertising is quite minor, effecting far fewer consumers. (There is approximately 1 fax machine installed in the US for every 10 consumers.)

However, I do believe changes and remedies are in order.

V. Professional Opinions and Remedies

1) Opening Opinions

As a respected fax technology and services consultant, the following are my opinions:

- A) Unsolicited advertisements and offers via fax, can be a nuisance.
- B) Consumers should have a way to easily opt-out of facsimile number databases and/or stop the unsolicited faxes from being transmitted to their fax number.
- C) Individuals and/or businesses that do not adhere to laws, should be punished.
- D) The immergence of a cottage industry of class action law suits against small businesses was not part of Congress's intent when it passed the TCPA.
- E) A balance must be struck between the First Amendment rights of all Americans, the needs of business and industry and the public's interest and convenience.**

2) Professional Opinions on the Fax Sections of the TCPA of 1991

A) It is unfortunate that in a 33+ page law on Telemarketing, one short paragraph (54) is inserted regarding facsimile. And that one sentence: "*The TCPA further prohibits the use of telephone facsimile machines to send unsolicited facsimile advertisements.*" is so poorly written and defined. Though it may appear straight-forward, I ask you to return to the six examples of fax broadcasts I described in Section III.

B) The definitions provided for *Telephone Facsimile Machine*, *Unsolicited Advertisement* and *Established Business Relationship* are either outdated, inaccurate, or worded to describe Telemarketing situations and completely inappropriate for facsimile communications.

C) The possibility of the law being manipulated into massive class action law suits appears not to have ever been considered by the authors. Frivolous suits have been brought in numerous states and jurisdictions across the country. Suing small business owners for millions of dollars because some consumers *may* have received one unsolicited faxed advertisement is certainly NOT within the spirit of the law's Enforcement paragraphs.

D) There are serious Constitutional issues regarding the First Amendment and the TCPA, as evidenced by the ruling in the United States District Court for the Eastern District of Missouri, Eastern Division. Case No. 4:00CV933 SNL ("MO v ABF")

3) Professional Opinions and Recommendations on Changes to the TCPA 1991

It is a fact that facsimile and the fax broadcasting industry have been and will continue to shrink dramatically. Secondly, it is also true, that due to technological changes, consumer preferences and new and free services available today, a primary reason facsimile prohibitions were originally included in the TCPA, (*the cost to the recipient to receive a fax*) has diminished substantially to 2-3 cents, and will continue to fall. Thirdly, as my examples describe, there are common instances where fax broadcasting (though possibly a violation of the law as it is written) are not only necessary, but are preferred by both the senders and recipients.

I suspect, with its limited resources, the Commission must have better uses for its time than to devote a great deal of effort to an industry and problem both clearly on the decline and no longer the tremendous burden it was perceived to become in 1992; especially with consumers obviously more concerned about telemarketing and unsolicited commercial email issues.

Therefore, it is my Professional Opinion that the Commission should simply remove the sentence: "*The TCPA further prohibits the use of telephone facsimile machines to send unsolicited facsimile advertisements.*" from the Act all together. This will:

- A) Stop turning the individuals and small businesses that send common and necessary fax broadcasts, (like the examples described above,) into criminals;
- B) End the Constitutional disagreement that is headed for the Supreme Court;
- C) End the onslaught of frivolous class action lawsuits sweeping the nation;

D) Take an anachronistic, outdated and obsolete law off of the books.

I realize this is a somewhat controversial suggestion and there will be fears of a massive onslaught of new unsolicited faxes transmitted across the country. Simply, this will not occur. Those individuals and business that, in 1992 paid \$0.10 - \$0.20 (10 to 20 cents) to send those faxes, now spend less than \$0.01 (1 cent) to send an email. The problem of unsolicited advertisements has simply migrated to another, more cost effective communications medium. It will not come back to the more expensive method: fax.

4) Further Professional Opinions and Recommendations on Changes to the TCPA

I appreciate that simply removing said sentence from the Act will not stop the current transmission of unsolicited advertisements via fax, irregardless of the reasons outlined above. If immediate action is required, I believe it is the Consumer and NOT the FCC or government that should decide what can be transmitted from and received to the consumer's fax machine, fax modem, fax server, or fax-to-email service, etc.

Therefore, I recommend, in conjunction with, the removal of the sentence (as described in paragraph V. 3), the immediate installation and operation of a national, non-company-specific: Do-Not-Fax Database. After a consumer enters a fax number into this Database, the number would be saved, batched and sent to all Fax Service Bureaus, Database and List Brokers/Compilers, Corporations and other Entities who subscribe to the service, to remove the fax number from their internal fax databases.

This national Do Not Fax Database should:

A) Be administered by a private entity, approved by representatives of the fax industry and the Commission. (However, it should not be the Direct Marketing Association (DMA.) Though the DMA administers a similar database, it, as an organization and its members are often at odds with the enhanced facsimile service bureau industry.)

B) The design and installation of the Database should be initially funded by the industry and the government. However, after an initial phase, the database should become a self-funding entity.

C) The Database should allow for various methods of fax number opt-out, including: fax, postal mail, toll-free telephone and web interface.

D) Because fax numbers change, once a fax number is entered into the Database it should remain on the DO Not Fax list for a period of two years.

E) Once the Database is tested and operational, a nationwide, ongoing, industry funded public relations and notification campaign should be launched.

I believe, to alleviate the immediate concerns of consumers and with proper funding and cooperation from all parties, a small scale Do Not Fax Database could be live in approximately 60 days. The large, redundant, "carrier grade" solution, ready for a nationwide rollout and public relations campaign could be live in as little as six months.

Finally, if the industry is going to be permitted to police itself, the penalty for noncompliance with a consumer's request for fax removal, needs to be high. Assuming my above recommendations are taken as described, I further recommend a tripling of the damages per incident from \$500 to \$1,500 per fax for unsolicited faxed advertisements sent to fax numbers properly registered in the national Do Not Fax Database. The Private Right of Action could remain as written in the original Act.

5) Conclusions

It is my professional opinion that the combination of:

- A) The removal of the poorly written and defined sentence;
- B) The creation of the national Do Not Fax Database;
- C) The tripling of the per incident/fax damage reward,

is the best possible outcome for consumers, the fax industry and the Commission. I believe it is a fair balance between the First Amendment rights of all Americans, the needs of business and industry and the public's interest and convenience.

If I can be of further assistance regarding this matter, please contact me directly.

Respectfully,

Maury S. Kauffman
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CC: Commissioners: 5
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