

FCC Rules E-Faxes are Outside the TCPA

Article By:

Jason M. Ingber

Remember how fax machines bleeped; kind of sounded like the internet dial-up tone? Well, the FCC essentially ruled that unless a fax is sent to a machine that makes that noise, the fax will not be considered an actionable fax under the TCPA.

To elaborate, the TCPA as amended by the Junk Fax Protection Act, prohibits any person from sending an unsolicited advertisement to a “telephone facsimile machine.” A “telephone facsimile machine” is defined as “equipment which has the capacity. . . to transcribe text or images from an electronic signal received over telephone line *onto paper*.”

In 2017, Amerifactors filed a petition asking the FCC to clarify that faxes sent to “online fax services” e.g. cloud based services that send faxes and allow users to access faxes as they do an email, are not considered a telephone facsimile machine fax per the FCC. Amerifactors is in middle of defending itself against a class action of which it believes the alleged violations were are mostly faxes sent by, and received from, an online fax service. The FCC ruled that it is clear that such online faxes are not considered a fax under the TCPA, and is outside the statute’s reach.

The FCC reasoned, “the TCPA’s language demonstrates that Congress did not intend the statute’s prohibition to apply to faxes sent to equipment other than a telephone facsimile machine. Specifically, the language of the statute proscribes sending a fax only to a ‘telephone facsimile machine.’ In contrast, Congress made clear that the proscription applies when such a fax is sent from other devices as well—specifically, an unsolicited facsimile advertisement can originate on any of three types of equipment: a ‘telephone facsimile machine,’ a ‘computer,’ or any ‘other device.’” Further, the FCC held that an online fax service is virtually an email, in that consumers can manage it as an email, including the fact that a consumer would have to connect to a printer to print it to paper (as opposed to a fax machine that spits out the fax so long as it is hooked up). Also, the FCC noted a pure fax shifts some of the cost of the advertisement fax from the sender, to the recipient, as well as clog up the machine’s bandwidth, and hinder legitimate business faxes. On the other hand, an online fax does not pose these threats.

So, unless the fax comes through to an old school fax machine, it would skirt the TCPA per this new FCC Order.

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