



The Association of Business Media Companies

THE FAX SITUATION

July 2003

In the past week, many American Business Media members have become alarmed about the Federal Communications Commission's newly expanded rules on the faxing of unsolicited advertisements. In summary, those rules will become effective next month and will require that anyone sending a faxed advertisement have **written permission, evidenced by a signature**, from the recipient. This rule will lead many American Business Media members to eliminate what for them is their most efficient way to solicit subscribers, obtain renewals and communicate with readers and others about trade shows and other products. The breadth of the rule is not clear, since the definition of "advertisement" is not always easily applied. The definition is: "any material advertising the commercial availability or quality of any property, goods or services."

American Business Media will be asking the FCC to:

- delay the implementation of the new rules by at least six months;
- rule that expiration notices and renewal forms are not advertisements; and
- decide that "express permission" need not be in writing with a signature.

We are also analyzing the possibility of legislative relief.

Meanwhile, American Business Media members should review their faxing policies in light of what is likely to be enhanced risk of threatened lawsuits. They should consider seeking the required express permission and signature in future communications with subscribers, advertisers and others.

To provide greater detail and to put the new rule and its implications into context, here is where we were, where we are now and where we might be going:

- Since 1991, when Congress passed the Telephone Consumer Protection Act, which dealt primarily with telemarketing, senders of faxed advertisements without the "express permission" of the recipients have been exposed to lawsuits and civil payments of up to \$1,500 per fax.
- Until the past year or so, legal activity was largely confined to those engaged in indiscriminate "blast faxing," in part because an FCC regulation—but importantly not the law itself—provided that ads could be faxed where there is an "established business relationship."
- However, more recently, plaintiffs' lawyers, especially two in St. Louis and one in Cleveland, began to threaten American Business Media members with lawsuits over faxed advertisements, even when the ads were sent to subscribers with whom the publisher clearly had an established business relationship. These lawyers, and others, argued that the established business relationship regulation is unlawful, since the statute itself does not envision it. A dozen or more suits were

threatened against American Business Media members. With one possible exception, they were settled, given the small amount at issue and the potential cost of mounting a defense.

- Last fall, the FCC announced that it would be modifying its regulations and asked for comments on its telemarketing and fax rules. American Business Media filed comments seeking a reaffirmation and strengthening of the established business relationship defense and explaining the problems faced by smaller publishers. On July 3, the FCC issued those new rules, and it found that, in fact, Congress had not authorized the established business relationship defense. As a result, when the new rules become effective some time in August, advertising faxes may be sent only where there is express permission, and the FCC now requires that such permission must be in writing, with a signature.
- It will be nearly impossible for American Business Media members to send *advertising* faxes, at least in the short run. While signatures granting permission can in theory be obtained from subscribers and others, doing so will be difficult, expensive and time-consuming. Although the newly-defined restriction will clearly affect faxes to potential subscribers and advertisers promoting a product, it is unclear whether a notice of subscription expiration with a renewal form is an “advertisement” as defined above.
- It is also not known whether the elimination of the established business relationship defense, combined with the heightened publicity that the new rules have produced, will lead to a greater number of threatened lawsuits than American Business Media members have been facing, even if they continue their present faxing practices.
- American Business Media members should review their faxing policies in light of what is likely to be enhanced risk of threatened lawsuits, and they should consider seeking the required express permission, and signature, in future communications with subscribers, advertisers and others.
- Meanwhile, American Business Media will ask the FCC to remove the requirement that permission to send advertising faxes must be in writing and accompanied by a signature; to rule that a notice stating that a request or subscription is expiring, along with a renewal form, is not an advertisement; and to delay the implementation date for the new fax rules. We are also investigating the possibility of seeking a change in the law as a longer-term solution.