

The Junk Fax Prevention Act (JFPA) of 2005, Pub L. No. 109-21, 119 Stat. 359 (2005), was passed by the United States Congress and signed into law by President George W. Bush on July 9, 2005. The law amends the Communications Act of 1934, significantly altering some aspects of prior amendments made by the Telephone Consumer Protection Act of 1991 and the CAN-SPAM Act of 2003 as they relate to the issue of junk fax.

History of Junk fax Legislation

Congress first addressed the issue of junk faxes in the Telephone Consumer Protection Act of 1991, or TCPA. Although this legislation dealt broadly with larger issues of nuisance telemarketing tactics, it included provisions making it illegal for any person to send an unsolicited advertisement to a fax machine. 47 U.S.C. 227(b)(1)(C). The law further authorized the recipient of a fax sent in violation of the statute (or a regulation promulgated under the statute) to sue the sender in state court to enjoin further violation, recover for actual monetary loss from such a violation or \$500 in statutory damages for each violation (whichever is greater), or both. 47 U.S.C. 227(b)(3). The law also allows the court, in its discretion, to treble these damages if it finds the plaintiff violated the statute "willfully" or "knowingly".

After the bill was enacted, many companies that continued to send junk faxes were sued, often for substantial sums. The most well-known sender of junk faxes, fax.com, was repeatedly sued by government agencies and private individuals. Most notably, the company found itself faced with a \$2.2 trillion suit filed by anti-junk fax crusader Steve Kirsch. The company was eventually forced out of business. As a result, many companies moved across the border into Canada or Mexico, or set up operations overseas to continue broadcasting into the United States.

To counter this, Congress made a small but significant amendment to the statute in the CAN-SPAM Act of 2003 (Public Law No. 108-187). This amendment made it illegal to not only send such junk faxes from within the United States, but also to send them into the United States from outside the country.

The FCC also promulgated regulations under the TCPA. Most of these regulations were designed to reduce the liability of senders of junk faxes. For instance, the FCC created an exemption for fax broadcasters similar to the "common carrier" exceptions created for telephone companies, 47 C.F.R. 64.1200, and an exemption for advertisements sent to recipients with whom the sender had an existing business relationship ("EBR"). While many defendants in junk fax suits attempted to rely on these regulations, they were almost uniformly unsuccessful because courts repeatedly ruled that the FCC had been without statutory authority to create such exceptions. *For examples, see Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d 1085 (W.D. Texas 2000); *Covington & Burling v. Int'l Marketing and Research, Inc.*, 2003 D.C. Super. LEXIS 29, *8-11; *Accounting Outsourcing, L.L.C. v. Verizon Wireless Personal Communications, L.P.*, 329 F. Supp. 2d 789 (M.D. La Aug. 5, 2004); *Rodriguez v. United States*, 480 US 522 (1987); and *Altman v. Inside Edge, Inc.*, 2004 TCPA Rep 1291, *2 (Mo. Cir. Aug. 2, 2004).

The Junk Fax Prevention Act of 2005 made small but significant changes to the TCPA. Most notably, it amended the statute to legislate the EBR exemption previously promulgated by the FCC. However, the bill was not amended to authorize the FCC's so-called "common carrier" exemption.

Effect of the Junk Fax Prevention Act of 2005

Under the Junk Fax Prevention Act of 2005, the sender of an unsolicited advertisement sent to a person's fax machine is still liable for a minimum of \$500 per page, and damages may also be trebled at the court's discretion upon a finding that the violation was willful or knowing. A "willful" violation is simply one that is "volitional", while a "knowing" violation is one that occurs when the senders actually knew "or should have known" that he was potentially breaking a law, even without specific knowledge of the law.

The statute is one of strict liability; even if one sends an unsolicited advertisement by fax by accident, minimal liability of \$500 per page attaches. The only real defense for the sender is that the transmission was protected by the EBR exception created by the Junk fax Prevention Act of 2005. To qualify the sender:

1. must already have an EBR with the recipient;
2. must have received the recipient's fax number voluntarily from the recipient *in the context of the EBR*;
3. must include opt-out information clearly and conspicuously on the first page of the fax; and
4. the sender must honor all opt-out requests within a reasonable period of time (not to exceed thirty days).

Failure to comply with all of these requirements leaves the sender liable for a violation of the statute, and unable to claim protection under this exception.