

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

In the Matter of)	
)	
21 st Century Fax(es) Ltd.)	File No. EB-00-TC-174
a.k.a. 20 th Century Fax (es))	
)	NAL/Acct. No. X3217-009
Apparent Liability for Forfeiture)	FRN: 0006-0863-83

FORFEITURE ORDER

Adopted: January 9, 2002 Released: January 11, 2002

By the Commission:

I. INTRODUCTION

1. In this Order, we issue a monetary forfeiture in the amount of \$1,107,500 against 21st Century Fax(es) Limited (21st Century)¹ for willfully or repeatedly violating section 227 of the Communications Act of 1934, as amended (the Act), and the Commission's rules and orders.² 21st Century sent unsolicited advertisements to telephone facsimile machines on 152 separate occasions.

II. BACKGROUND

2. On March 8, 2000, the Commission staff issued a citation to 21st Century, pursuant to section 503(b)(5) of the Act.³ The staff cited 21st Century for allegedly using a telephone facsimile machine, computer, or other device to send unsolicited advertisements to another telephone facsimile machine, in violation of section 227(b)(1)(C) of the Act and the Commission's rules and orders. Despite the citation's warning that subsequent violations could result in the imposition of monetary forfeitures, the Commission received several consumer letters stating that 21st Century had continued to engage in such conduct after receiving the citation. On December 7, 2000 the Commission released a Notice of Apparent Liability for Forfeiture against 21st Century that proposed a forfeiture amount of

¹ 21st Century Fax (es) Ltd. lists several addresses on its faxes including 532 LaGuardia Place, PMB 201, New York, New York 10012 and 331 West 57th Street, New York, NY 10019. The company, through its British solicitors, has acknowledged having staff at 138 West Houston Street, New York, NY 10012. *See* Letter from Magrath & Co., Solicitors, to Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, at 2, dated March 16, 2000 (Magrath Letter).

² *See* 47 U.S.C. § 227; 47 C.F.R. § 64.1200(a)(3); *see also* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd 8752, 8779, ¶ 54 (1995) (TCPA Report and Order) (stating that section 227 of the Act prohibits the use of telephone facsimile machines to send unsolicited advertisements).

³ Letter from Kurt A. Schroeder to 21st Century Fax(es) Ltd. *et. al* dated March 8, 2000 (Citation); *see also* 47 U.S.C. § 503(b)(5) (authorizing the Commission to issue citations to non-common carriers for violations of the Act or of the Commission's rules and orders).

\$1,107,500 for 152 separate violations.⁴ Commission rules provide that a cited party must either respond to the *NAL* or pay the full amount of the proposed forfeiture within 30 days of issuance of an *NAL*.⁵ On December 14, 2000, 21st Century Fax responded to the *NAL*.⁶

III. DISCUSSION

3. The Commission may impose a forfeiture penalty upon any person who it determines, by a preponderance of the evidence, to have willfully or repeatedly failed to comply with any of the provisions of the Act, or any rule or order issued by the Commission under the Act.⁷ In its Response, 21st Century argues: (1) that it is not subject to the Telephone Consumer Protection Act (TCPA) because its faxes are sent from the United Kingdom (UK) or, alternatively, because the company itself is located in the UK; and (2) that the TCPA violates the First Amendment to the United States Constitution. We have reviewed and investigated the information provided by 21st Century to determine whether a forfeiture penalty is warranted by a preponderance of the evidence. As discussed below, we reject 21st Century's arguments and issue a monetary forfeiture in the amount of \$1,107,500 against the company.

A. Applicability of the TCPA to Foreign Entities and Faxes Sent from Foreign Locations

4. The TCPA prohibits "any person within the United States" from sending unsolicited fax advertisements.⁸ 21st Century argues that it has not violated the TCPA both because its faxes originate in the UK and because the TCPA does not apply to faxes that originate outside the United States.⁹ 21st Century also suggests that even if its faxes were sent from the United States, it is not liable under the TCPA because it is foreign-owned, registered, and located.¹⁰ As proof of its assertion that its faxes are sent from overseas, 21st Century provided long distance telephone invoices and telephone bills on CD-ROMs dating from July through September 2000. 21st Century states that this evidence shows that its fax calls originate in the UK.¹¹ 21st Century points to language in the TCPA that prohibits "any person within the United States" from sending unsolicited facsimile advertisements and claims that the Commission may not enforce the TCPA and issue a monetary

⁴ See 21st Century Fax, *Notice of Apparent Liability For Forfeiture*, FCC 00-425 (released December 7, 2000) (*NAL*).

⁵ 47 C.F.R. § 1.80.

⁶ See Letter from Gordon Ritchie, 21st Century Faxes Ltd., to Catherine Seidel, Chief, Telecommunications Consumers Division, Enforcement Bureau, dated December 10, 2000 (Response).

⁷ 47 U.S.C. § 503. See, e.g., *Tuscola Broadcasting Co., Memorandum Opinion and Order*, 76 FCC 2d 367, 371 (1980) (applying preponderance of the evidence standard in reviewing Bureau level forfeiture order). Cf. 47 U.S.C. § 312(d) (assigning burden of proof in hearings to Commission).

⁸ 47 U.S.C. § 227(b)(1)(C).

⁹ Response at 2-3.

¹⁰ Response at 3 ("[W]e could actually have fax broadcasting machines in the US as long as we ourselves were in the UK, which we are.")

¹¹ *Id.* at 2-3.

forfeiture against the company because its faxes were not sent by a “person within the United States.”¹²

5. We disagree with 21st Century’s arguments. The TCPA provides that

It shall be unlawful for any person within the United States

. . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.”¹³

We believe that this statutory language covers faxes sent to the United States from foreign points so long as the company has a presence within the United States. In this regard, the phrase “within the United States” modifies “any person”¹⁴ and thus specifies the location of the “person” that engages in prohibited faxing rather than the originating and terminating points of the faxes themselves. Congress could have written the statute to say that the device used to send the fax must be located in the United States, as 21st Century would read the language, but it did not. Rather, consistent with the private right of action permitted in state court to enforce the statute, 47 U.S.C. § 227(b)(3), Congress focused on the violator having a presence in the United States such that the state courts would have personal jurisdiction. Interpreting the statute to cover international faxes if the person doing the faxing has a presence in the United States is consistent with the broad jurisdictional scope of the Communications Act which was adopted for the purpose of regulating “all interstate and foreign communication by wire or radio”¹⁵ Accordingly, we conclude that the TCPA prohibits the faxing of unsolicited advertisements either to or from the United States by any entity that is located “within the United States.” Moreover, the term “person” in Section 227(b)(1) includes the individual who actually performs the faxing as well as the corporate entity on whose behalf he or she is acting.¹⁶

6. Contrary to 21st Century’s suggestion, its status as a foreign-registered and controlled company with its principal place of business in the UK does not preclude a finding that the company also is “within the United States.” The U.S. Supreme Court has determined that certain minimum contacts and activities that are systematic and continuous establish an entity’s presence within a locality for jurisdictional purposes.¹⁷ 21st Century admits that it has agents, employees, and offices in

¹² *Id.*

¹³ 47 U.S.C. § 227(b)(1)(C).

¹⁴ Section 3 of the Act defines “person” as “an individual, partnership, association, joint-stock company, trust, or corporation.” 47 U.S.C. § 153(32). We find that 21st Century is a “person” within this definition.

¹⁵ 47 U.S.C. § 151. *See also* 47 U.S.C. § 152(a) (“The provisions of this act shall apply to all interstate and foreign communications by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States. . . .”). The TCPA also covers intrastate communications. 47 U.S.C. § 152(b); 47 U.S.C. § 227(e), (f).

¹⁶ *See fn. 14, supra.* Furthermore, section 217 of the Act provides that “[i]n construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier *or user*, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier *or user* as well as that of the person.” 47 U.S.C. § 217 (emphasis added).

¹⁷ *See International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) (*International Shoe*) (finding that a company incorporated in Delaware with its principal place of business in Missouri was subject to

the United States and that it regularly faxes advertisements or “polls” to United States consumers.¹⁸ Consumers who choose to respond to 21 Century’s “polls” lodge their responses by calling interstate 900 numbers operated by 21st Century.¹⁹ In addition, 21st Century’s faxes offer recipients two means to remove their fax numbers from the company’s distribution list:²⁰ a New York City telephone number and an 800 number that is operated by ICN Corporation, which is located in Delray Beach, Florida.²¹ For over two years, 21st Century has solicited business by sending faxes throughout the United States. Its conduct within the United States makes it foreseeable that it may be subject to suits and enforcement actions under the TCPA. 21st Century has continuous contacts with United States consumers, and these contacts, along with its staff, establish its presence within the country. As such, 21st Century is “within the United States,” and Section 227 of the Act is applicable to it.

B. First Amendment Issue

7. 21st Century also contends that the TCPA violates the free speech guarantee of the First Amendment to the United States Constitution.²² The company argues that unsolicited fax advertisements are less intrusive than other forms of advertisements such as telephone calls and direct mail and that the cost of receiving an unsolicited fax advertisement should not be placed above First Amendment rights.²³ 21st Century Fax also states that unsolicited fax advertisements produce more complaints because of the cost to the recipient, which 21st Century estimates at 2 cents per fax. The company states that the “TCPA legislation as regards the advertising fax is denying the majority what they want and giving in to the stingy minority purely because they shout louder than the majority over this matter of 2 cents.”²⁴

jurisdiction of Washington State because of its significant and continuous activities within the state); *see also Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 605-18 (1990); *Kernan v. Kurz-Hastings*, 175 F.3d 236, 242-4 (2d. Cir. 1999) (*Kernan*). In *Kernan*, the court found it was reasonable and consistent with due process to subject a foreign manufacturing company that was organized under the laws of Japan and did not transact or solicit business in New York, to personal jurisdiction in New York. The court found that the company had sufficient minimum contacts with New York to support jurisdiction, stating that the due process clause “permits a state to exercise personal jurisdiction over a non-resident defendant with whom it has ‘certain minimum contacts ... such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’” 175 F.3d at 242 (citing *Calder v. Jones*, 465 U.S. 783, 788 (1984) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) and *International Shoe*, 326 U.S. 310, 316 (1945))).

¹⁸ See Response at 2-3; Magrath Letter at 2. At the company’s request, the Commission staff held a teleconference with 21st Century’s New York City staff on March 28, 2000.

¹⁹ See NAL at ¶ 10.

²⁰ As we have noted previously, some consumers have continued to receive 21st Century’s faxes after following instructions for removing their fax numbers and even after receiving a message that no more faxes would be sent. NAL at ¶ 5.

²¹ See Citation at 4; NAL at n. 11.

²² Response at 4-5.

²³ *Id.*

²⁴ *Id.*

8. Federal courts have previously considered similar arguments. The Court of Appeals for the Ninth Circuit, for example, has determined that the TCPA does not violate the First Amendment's protection of commercial speech.²⁵ Moreover, administrative agencies are to presume that the statutes that Congress directs them to implement are constitutional.²⁶ Accordingly, we reject 21st Century's arguments in this regard.

IV. CONCLUSION

9. After reviewing the information filed by 21st Century Fax in its Response, we find that it has failed to identify facts or circumstances that persuade us that there is any basis for reducing or rescinding the forfeiture proposed in the NAL. We therefore issue a monetary forfeiture in the amount of \$1,107,500 against 21st Century Fax(es) Limited for willfully or repeatedly violating section 227(b)(1)(C) of the Act and the Commission's rules and orders.²⁷

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to section 503(b)(5) of the Act, as amended, 47 U.S.C. § 503(b)(5), and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that 21st Century Fax(es) Limited IS LIABLE FOR A MONETARY FORFEITURE in the amount of \$1,107,500 for willful or repeated violations of section 227(b)(1)(C) of the Act, 47 U.S.C. § 227(b)(1)(C), section 64.1200(a)(3) of the Commission's rules, 47 C.F.R. § 64.1200(a)(3), and the related orders.

11. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's Rules within 30 days of the release of this Order.²⁸ If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to section 504(a) of the Act.²⁹ Payment may be made to the Commission's Credit and Debt Management Center by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment MUST INCLUDE the FCC Registration Number (FRN) referenced above, and also should note the NAL/Acct. No. referenced above.

²⁵ See *Destination Ventures v. FCC*, 46 F.3d 54, 55-57 (9th Cir. 1995). The Court determined that the TCPA's ban on unsolicited fax advertisements does not violate the advertiser's First Amendment rights given that the TCPA restrictions reasonably fit the government's interest in preventing the shifting of advertisement costs to consumers. See also *Kenro, Inc. v. Fax Daily, Inc.*, 962 F.Supp. 1162, 1167-69 (S.D. Ind. 1997). The Court determined in *Kenro* that the TCPA's ban on unsolicited fax advertisements is narrowly tailored to achieve the government's intended purpose and does not violate the First Amendment guarantee of commercial free speech.

²⁶ *Johnson v. Robison*, 415 U.S. 361, 368 (1974) quoting *Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdictions of administrative agencies.")

²⁷ See 47 U.S.C. § 227; 47 C.F.R. § 64.1200(a)(3); see also *TCPA Report and Order*, 7 FCC Rcd 8752, 8779 ¶ 54 (1995).

²⁸ 47 C.F.R. § 1.80(f)(4).

²⁹ 47 U.S.C. § 504(a).

12. IT IS FURTHER ORDERED that a copy of this Forfeiture Order SHALL BE SENT by certified mail to Gordon Ritchie, 21st Century Fax(es) Limited, 20 Bourne Court, Southend Road, Woodford Green, Essex, IG8 8HD.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary