

Before the
Federal Communications Commission
Washington, DC

In the matter of

Petition of Bijora, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(4)(iv) and/or for Waiver

CG Docket No. 02-278
CG Docket No. 05-338

**REPLY COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)¹**

CCIA respectfully submits these reply comments in support of the Petition for Declaratory Ruling filed by Bijora, Inc.² The Federal Communications Commission (“The Commission”) should clarify that the opt-out requirements for facsimiles under 47 C.F.R. § 64.1200(a)(4)(iv) do not apply to Short Message Services (“SMS”). There is neither sufficient statutory basis nor evidence of legislative intent to allow for such a broad interpretation of the law, which would improperly widen the scope of liability for a lack of opt-out notices via a new technology with strictly limited capacity.

I. Summary

Petitioner currently faces a Telephone Consumer Protection Act (“TCPA”) class action for text messages that were sent to customers without an opt-out notice, and asks the Commission to clarify that the absence of the opt-out notices does not lead to liability for

¹ CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. Together, CCIA’s members employ more than 600,000 people and generate annual revenues in excess of \$465 billion. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries. A list of CCIA’s members is available online at <http://www.ccianet.org/members>.

² Bijora, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 05-338 (filed Oct. 7, 2014) (“Bijora Petition” or “Petition”).

Petitioner under the junk fax provisions of § 64.1200(a)(4)(iv).³ The Commission should act favorably upon this Petition and clarify that SMS should not be treated in the same manner as facsimiles for purposes of opt-out notice liability.

Companies need certainty that the terms of the TCPA will not be retroactively re-interpreted to include technically impossible applications to emerging technologies not contemplated by the statute. Retroactive re-interpretation of the TCPA's opt-out notice provisions would stifle innovation and impede businesses' ability to communicate with their customers. The Commission should not allow such a broad overinterpretation of the law. As stated by the Internet Association's comments, "[t]his reclassification of an SMS text message as a fax is simply a novel theory . . . with no basis in Congressional intent or FCC rulemaking."⁴ Clarification would also reduce uncertainty and eliminate incentives for opportunistic litigants.⁵

II. SMS is not, and should, be included in the facsimile opt-out requirements under 47 C.F.R. § 64.1200(a)(4)(iv).

The statute is clear that the liability imposed by the opt-out order is directed at facsimile transmissions under 47 C.F.R. § 64.1200(a)(4)(iv).⁶ There is nothing in the legislative or administrative records that would suggest Congress or the Commission has sought to subject

³ Bijora Petition at 1-2.

⁴ *In the Matter of Bijora, Petition for Declaratory Ruling*, CG Docket No. 05-338, Comments of Internet Association (filed Nov. 21, 2014) ("Internet Association Comments") at 11.

⁵ As previously stated by CCIA through comments in an adjacent TCPA docket, there has been a meteoric rise in TCPA litigation recently. With damages of \$500-\$1,500 per violation under 47 U.S.C. § 227(b)(3) available to litigants, allowing for inconsistent and overbroad interpretations will do nothing but encourage "TCPA trolls". See *In the Matter of Consumer Banker's Association Petition for Declaratory Ruling*, CG Docket No. 02-278, Comments of CCIA (filed Nov. 17, 2014).

⁶ 47 C.F.R. § 64.1200(a)(4)(iv) "No person or entity may: (4) Use a telephone facsimile machine, computer, or other devices to send an unsolicited advertisement to a telephone facsimile machine, unless — . . . (iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section."

SMS messages to the facsimile opt-out requirements. In fact, the Commission itself has classified SMS messages as “calls”.⁷

Permitting an interpretation of the TCPA that equates a facsimile with an SMS message would make the law unconstitutionally overbroad. As detailed in the Internet Association’s comments, this would essentially eliminate SMS as a useful communications channel.⁸ It is clearly impractical for SMS messages to include opt-out language within every text sent. Most SMS systems have character restrictions of approximately 140-160 characters, which would in most cases be taken up by the inclusion of the lengthy opt-out notice requirements in 47 C.F.R. § 64.1200(a)(4). Instead, many companies provide their own form of opt-out instructions in a structure that best fits the SMS technology.⁹ However, these companies would still be liable for each message sent with these notices because they do not adhere to the strict requirements that apply to facsimile opt-out requirements.¹⁰ Requiring that SMS users include the statutory opt-out language meant for facsimiles would effectively prohibit protected speech. Such restrictions on speech must be narrowly tailored to a substantial government interest,¹¹ and the expansion of provisions in the TCPA to essentially eliminate an entire avenue of communication is beyond what is reasonably necessary to accomplish the TCPA’s consumer protection goals.

It is clear that Congress did not intend to expand the opt-out requirements to text messages and require the impossible when it implemented the Junk Fax Prevention Act to amend the TCPA. If the Commission seeks to impose liability equal to that of § 64.1200(a)(4) on SMS

⁷ Internet Association Comments at 3 (citing the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Report and Order 3 July 2003, FCC 03-153 (“We affirm that under the TCPA, it is unlawful to make any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number ... This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.”)).

⁸ *Id.* at 9.

⁹ *Id.* at 5.

¹⁰ 47 C.F.R. § 64.1200 (a)(4)(iii).

¹¹ See *City of Erie v. Pap’s A.M.*, 529, U.S. 277, 296 (2000).

messaging, it is essential that it provide adequate and substantive notice to companies of the Commission's intent to adopt such requirements to allow both industry and consumers to proceed on certain terms.

III. Conclusion

CCIA respectfully requests that the Commission act on Bijora's Petition and clarify that the provisions in 47 C.F.R. § 64.1200(a)(4) do not apply to SMS messages.

Respectfully submitted,

/s/ Catherine R. Sloan
Catherine R. Sloan
Vice President, Government Relations
Computer & Communications Industry Association
900 17th Street NW, Suite 1100
Washington, DC 20006
(202) 783-0070 ext. 108
csloan@ccianet.org

November 25, 2014