

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
America's Toner
Apparent Liability for Forfeiture
File No. EB- 06-TC-131
NAL/Acct. No. 200832170066
FRN: 0017433186

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: August 26, 2008

Released: August 28, 2008

By the Commission:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL")¹, we find that America's Toner² apparently willfully or repeatedly violated section 227 of the Communications Act of 1934, as amended ("Act"), and the Commission's related rules and orders, by delivering at least fourteen unsolicited advertisements to the telephone facsimile machines of at least twelve consumers.³ Based on the facts and circumstances surrounding these apparent violations, we find that America's Toner is apparently liable for a forfeiture in the amount of \$63,000.

1 See 47 U.S.C. § 503(b)(1). The Commission has the authority under this section of the Act to assess a forfeiture against any person who has "willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act" See also 47 U.S.C. § 503(b)(5) (stating that the Commission has the authority under this section of the Act to assess a forfeiture penalty against any person who does not hold a license, permit, certificate or other authorization issued by the Commission or an applicant for any of those listed instrumentalities so long as such person (A) is first issued a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission nearest to the person's place of residence; and (C) subsequently engages in conduct of the type described in the citation).

2 According to publicly available information, America's Toner is also doing business as American Toner and Fiducia, Inc. Therefore, all references in this NAL to "America's Toner" encompass America's Toner as well as American Toner and Fiducia, Inc. America's Toner has offices at 96 Westmoreland Ave., Suite 13, Addison, IL 60101; 87 Eisenhower Ln S, Lombard, IL 60148-5409; 603 Country Club Drive, Bensenville, IL 60106; and 9919 E. 47th Place, Tulsa, OK 74146-4731. John David is listed as the contact person for America's Toner. Accordingly, all references in this NAL to "America's Toner" also encompass the foregoing individual and all other principals and officers of this entity, as well as the corporate entity itself.

3 See 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3); see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006).

II. BACKGROUND

2. Section 227(b)(1)(C) of the Act makes it “unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.”⁴ The term “unsolicited advertisement” is defined in the Act and the Commission’s rules as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission in writing or otherwise.”⁵ Under the Commission’s Rules, an “established business relationship”⁶ exception permits a party to deliver a message to a consumer if the sender has an established business relationship with the recipient *and* the sender obtained the number of the facsimile machine through the voluntary communication by the recipient, directly to the sender, within the context of the established business relationship, or through a directory, advertisement, or a site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution.⁷

3. On July 21, 2006, in response to one or more consumer complaints alleging that America’s Toner had faxed unsolicited advertisements, the Bureau issued a citation⁸ to America’s Toner, pursuant to section 503(b)(5) of the Act.⁹ The Bureau cited America’s Toner for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements for toner and ink cartridges to a telephone facsimile machine, in violation of section 227 of the Act and the Commission’s related rules and orders. The citation warned America’s Toner that subsequent violations could result in the imposition of monetary forfeitures of up to \$11,000 per violation, and included a copy of the consumer complaints that formed the basis of the citation.¹⁰ The citation informed America’s Toner that within thirty (30) days of the date of the citation, it could either request an interview with Commission staff, or could provide a written statement responding to the citation. America’s Toner responded to the citation. Although not requesting an interview, America’s Toner stated that “[a]ny faxes that were received by consumers other than Americas Toner customer were transmitted in error [sic]” and that the company was promoting to its own customers “via telephone and not by facsimile methods.”¹¹

4. Despite the citation’s warning that subsequent violations could result in the imposition of monetary forfeitures, we have received twelve additional consumer complaints indicating that America’s

⁴ 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3).

⁵ 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200 (f)(13).

⁶ An “established business relationship” is defined as a prior or existing relationship formed by a voluntary two-way communication “with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.” 47 C.F.R. § 64.1200(f)(5).

⁷ See 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64 (a)(3)(i), (ii).

⁸ Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No.EB-06-TC-131, issued to America’s Toner on July 21, 2006.

⁹ See 47 U.S.C. § 503(b)(5) (authorizing the Commission to issue citations to persons who do not hold a license, permit, certificate or other authorization issued by the Commission or an applicant for any of those listed instrumentalities for violations of the Act or of the Commission’s rules and orders).

¹⁰ Commission staff mailed the citation to these addresses: America’s Toner aka American Toner aka Fiducia, Inc., Attn: John David, 96 Westmoreland Ave., Suite 13, Addison, IL 60601; America’s Toner aka American Toner aka Fiducia, Inc., Attn: John David, 87 Eisenhower Ln S, Lombard IL 60148-5409; and America’s Toner aka American Toner aka Fiducia, Inc., Attn: John David, 603 Country Club Drive, Bensenville, IL 60106. See n.2, *supra*.

¹¹ Letter from John David, America’s Toner, to Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, dated Aug. 18, 2006.

Toner continued to engage in such conduct after the citation was issued.¹² We base our action here specifically on twelve complaints filed by consumers establishing that America's Toner continued to send fourteen unsolicited advertisements to telephone facsimile machines after the date of the citation.¹³

5. Section 503(b) of the Act authorizes the Commission to assess a forfeiture of up to \$11,000 for each violation of the Act or of any rule, regulation, or order issued by the Commission under the Act by a non-common carrier or other entity not specifically designated in section 503 of the Act.¹⁴ In exercising such authority, we are to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁵

III. DISCUSSION

A. Violations of the Commission's Rules Restricting Unsolicited Facsimile Advertisements

6. We find that America's Toner apparently violated section 227 of the Act and the Commission's related rules and orders by using a telephone facsimile machine, computer, or other device to send at least fourteen unsolicited advertisements to the twelve consumers identified in the Appendix. This NAL is based on evidence that twelve consumers received unsolicited fax advertisements from America's Toner *after* the Bureau's citation. The facsimile transmissions advertise toner cartridges. Further, according to the complaints, the consumers neither had an established business relationship with America's Toner nor gave America's Toner permission to send the facsimile transmissions.¹⁶ The faxes

¹² See Appendix for a listing of the consumer complaints against America's Toner requesting Commission action.

¹³ Following the issuance of this citation, the Commission continued to receive complaints from multiple consumers alleging that America's Toner faxed unsolicited advertisements to them. These complaints, received after the Commission's citation, resulted in the issuance of two Notices of Apparent Liability for Forfeiture against America's Toner: *America's Toner*, Notice of Apparent Liability for Forfeiture, FCC 08-90, released March 21, 2008 (proposed forfeiture in the amount of \$63,000) and *America's Toner*, Notice of Apparent Liability for Forfeiture, DA 08-1373, released June 10, 2008 (proposed forfeiture in the amount of \$18,000). America's Toner filed replies to each of these NALs. See Letter from John David, America's Toner, to Office of Secretary, dated Apr. 12, 2008 and Letter from John David, America's Toner, to Kris Anne Monteith, Chief, Enforcement Bureau, dated June 20, 2008. We note that evidence of additional instances of unlawful conduct by America's Toner may form the basis of subsequent enforcement action.

¹⁴ Section 503(b)(2)(C) provides for forfeitures up to \$10,000 for each violation in cases not covered by subparagraph (A) or (B), which address forfeitures for violations by licensees and common carriers, among others. See 47 U.S.C. § 503(b). In accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, Pub. L. 104-134, Sec. 31001, 110 Stat. 1321, the Commission implemented an increase of the maximum statutory forfeiture under section 503(b)(2)(C) to \$11,000. See 47 C.F.R. § 1.80(b)(3); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000); see also *Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 19 FCC Rcd 10945 (2004) (amendment of section 1.80(b) to reflect inflation left the forfeiture maximum for this type of violator at \$11,000); *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, FCC 08-154, rel. June 13, 2008 (when effective, forfeiture maximum for this type of violator increased to \$16,000).

¹⁵ 47 U.S.C. § 503(b)(2)(D); *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Report and Order*, 12 FCC Rcd 17087, 17100-01 para. 27 (1997) (*Forfeiture Policy Statement*), *recon. denied*, 15 FCC Rcd 303 (1999).

¹⁶ See, e.g., complaint dated September 5, 2007, from Rick Grossman (stating that he has never done any business with the fax advertiser, never made an inquiry or application to the fax advertiser, and never gave permission for the company to send the fax). The complainants involved in this action are listed in the Appendix.

at issue here therefore fall within the definition of an “unsolicited advertisement.”¹⁷ Based on the entire record, including the consumer complaints, we conclude that America’s Toner apparently violated section 227 of the Act and the Commission’s related rules and orders by sending fourteen unsolicited advertisements to twelve consumers’ facsimile machines.

B. Proposed Forfeiture

7. We find that America’s Toner is apparently liable for a forfeiture in the amount of \$63,000. Although the *Commission’s Forfeiture Policy Statement* does not establish a base forfeiture amount for violating the prohibition against using a telephone facsimile machine to send unsolicited advertisements, the Commission has previously considered \$4,500 per unsolicited fax advertisement to be an appropriate base amount.¹⁸ We apply that base amount to each of the fourteen apparent violations. Thus, a total forfeiture of \$63,000 is proposed. America’s Toner will have the opportunity to submit evidence and arguments in response to this NAL to show that no forfeiture should be imposed or that some lesser amount should be assessed.¹⁹

IV. CONCLUSION AND ORDERING CLAUSES

8. We have determined that America’s Toner apparently violated section 227 of the Act and the Commission’s related rules and orders by using a telephone facsimile machine, computer, or other device to send at least fourteen unsolicited advertisements to the twelve consumers identified in the Appendix. We have further determined that America’s Toner is apparently liable for a forfeiture in the amount of \$63,000.

9. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80 of the Rules, 47 C.F.R. § 1.80, that America’s Toner is hereby NOTIFIED of this APPARENT LIABILITY FOR A FORFEITURE in the amount of \$63,000 for willful or repeated violations of section 227(b)(1)(C) of the Communications Act, 47 U.S.C. § 227(b)(1)(C), sections 64.1200(a)(3) of the Commission’s rules, 47 C.F.R. § 64.1200(a)(3), and the related orders described in the paragraphs above.

10. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission’s rules,²⁰ within thirty (30) days of the release date of this *Notice of Apparent Liability for Forfeiture*, America’s Toner SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

11. Payment of the forfeiture must be made by credit card through the Commission’s Revenue and Receivables Operations Group at (202) 418-1995, or by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by

¹⁷ See 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(13) (definition previously at § 64.1200(f)(10)).

¹⁸ See *Get-Aways, Inc.*, Notice of Apparent Liability For Forfeiture, 15 FCC Rcd 1805 (1999); *Get-Aways, Inc.*, Forfeiture Order, 15 FCC Rcd 4843 (2000); see also *US Notary, Inc.*, Notice of Apparent Liability for Forfeiture, 15 Rcd 16999 (2000); *US Notary, Inc.*, Forfeiture Order, 16 FCC Rcd 18398 (2001); *Tri-Star Marketing, Inc.*, Notice of Apparent Liability For Forfeiture, 15 FCC Rcd 11295 (2000); *Tri-Star Marketing, Inc.*, Forfeiture Order, 15 FCC Rcd 23198 (2000).

¹⁹ See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

²⁰ 47 C.F.R. § 1.80.

overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payments by wire transfer may be made to ABA Number 021030004, receiving bank Federal Reserve Bank of New York, and account number 27000001. Requests for full payment under an installment plan should be sent to: Chief Financial Officer – Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Questions, please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov. America's Toner will also send electronic notification on the date said payment is made to johnny.drake@fcc.gov.

12. The response, if any, must be mailed both to the Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, ATTN: Enforcement Bureau – Telecommunications Consumers Division, and to Colleen Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, and must include the NAL/Acct. No. referenced in the caption.

13. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

14. IT IS FURTHER ORDERED that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by Certified Mail Return Receipt Requested and regular mail to America's Toner, aka American Toner, aka Fiducia, Inc., Attention: John David, 96 Westmoreland Ave., Suite 13, Addison, IL 60601; 87 Eisenhower Ln S, Lombard IL 60148-5409; 603 Country Club Drive, Bensenville, IL 60106; and 9919 E. 47th Place, Tulsa, OK 74146-4731.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Complainants and Violation Dates

| Complainant received facsimile advertisements | Violation Date(s) |
|--|--------------------------|
| Rick Grossman, Learning Express | 9/05/2007 |
| James Maxim, Williams/Transco | 9/05/2007 |
| Joseph Sgroi | 9/05/2007 |
| Michael Banas, Banas & Fickert Insurance Agency | 9/11/2007 (two faxes) |
| John Woodward, Columbus Coffee Company | 9/11/2007, 9/27/2007 |
| John Ley, Southwestern Medical Center at Dallas | 9/13/2007 |
| I. Avery, Kamiak Vineyards, Inc. | 9/26/2007 |
| Lionel Roy | 10/02/2007 |
| Brenda Roberts, At Your Service | 10/16/2007 |
| Leeor Dicker, ESP Int'l Corp. | 10/18/2007 |
| Sean Fleming, Lebanon Public Library | 10/25/2007 |
| Jeremy Chavez, JDC Insurance Services | 10/02/2007 |