



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Integrat
Information Provider (IP) (if any)	Magic SMS
Service Type	Unsolicited SMS
Source of Complaints	Public
Complaint Number	#0132

Complaint

The Complaint was submitted to the WASPA Secretariat on 23 January 2006, stating simply that the Complainant had received

“Unsolicited spam sms' to promote various specials at Roxy bar”.

SP Response

The SP responded on 5 February 2006, in the following terms:

“The Company Magic SMS as per the below response, were acting on behalf of one of their customers, who were sending the messages. These messages were according to them and the owners of the database Provider, Roxy's, not unsolicited, and the cell number was obtained through the below process. (See email below)

Neither Integrat, nor the customer, can confirm that the user's number was not entered incorrectly, but in this severe case the user has the option to request to be removed from the database through the provided mechanisms as described below. “

The e-mail referred to in this response is reproduced below:

“MagicSMS offers this service to a client. We send out sms messages to a database provided by and on behalf of Roxy's Rythm Bar in Melville, Jhb. Roxy's is a well-known and well-respected entertainment club that has been operational for more than 20 years. They have been letting their patrons know about special events happening on Mondays and Fridays by means of sms messages, since July 2005.

Their database gets built up and grows in the following manner: When visiting the club, people get offered the opportunity to put their mobile number on the mailing list database. This allowed Roxy's to grow their database from around 350 mobile numbers to more than 6000 mobile numbers. Soon, people visiting the Roxy's website will also be allowed to do the same.

In order to be removed from the database, people can either tell the person at the door who collects the mobile numbers that they wish to be removed, they can contact Roxy's by phone, fax or email and ask to be removed, ask any Roxy's staff member to assist them in getting removed or reply to the sms requesting to be removed.

The Complainants number was removed from the database.

Sections of the Code considered

The following sections of version 3.2 of the WASPA Code of Conduct were considered:

‘2.19. “Spam” means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.’

“5.1.5. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.”

“5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:
(a) the recipient has requested the message;

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- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
 - (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so."

"5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose."

Decision

Section 5 of the Code mandates that WASPA members utilise an opt-in system with regard to obtaining MSISDN numbers as targets for commercial messages. Failure to obtain consent, either expressly given or implied from a direct and recent commercial relationship, prior to sending a commercial SMS constitutes, *prima facie*, a breach of the Code.

Section 5.3.1 further requires that the member SP take reasonable measures to ensure that their facilities are not used by others for the sending of spam. As discussed below such reasonable measures include taking steps to ensure that the clients of the SP's clients (i.e. Roxy's in this situation) are aware of the need to comply with the Code's requirements.

In the Report in respect of Complaint #0045¹ the Adjudicator held as follows:

"The Adjudicator accepted that an SP cannot check every MSISDN that is sent an SMS message using its system, however it is ultimately the SP who is responsible for the actions of its clients. Certain SP's deal with this by contractually binding their clients to the WASPA Code of Conduct, contractually obligating their clients to pay fines that may be levied on the WASPA member, or even taking a security deposit or withholding revenue (if the service generates revenue) to cover possible fines. The responsibility for enforcing compliance with the WASPA Code of Conduct on the SP's clients rests with the SP and not with WASPA.

¹ See <http://www.waspa.org.za/code/download/0045.pdf>

In particular, the Adjudicator referred to Section 5.3.1. of the WASPA Code of Conduct and enquired whether the SP had taken “reasonable measures” to ensure that their facilities are not used by third parties for the transmission of spam. The Adjudicator accepted that the SP had informed its own clients of their obligations in terms of the Code, but had not done so in respect of the clients of its clients. Having regard to the business conducted by the SP, the Adjudicator was of the view that this oversight was not reasonable in the circumstances.

(my emphasis)

In the light of the response provided by the SP I am unable to find that, in the circumstances, reasonable measures were not taken. The possibility exists of an honest error having occurred through the incorrect entering of a number or some other chain of events (and this appears to have been catered for through the provision of a number of methods to opt-out).

Accordingly I am unable to find a breach of either section 5.2.1 or 5.3.1 of the Code and it follows that the Complaint cannot be upheld.

The SP is, however, requested to take cognisance of this Report and to review its practices with regard to ensuring that its clients and their clients (with whom the SP may have no direct relationship) understand the manner in which the opt-in system mandated by the Code is to be implemented.