



REPORT OF THE ADJUDICATOR

WASPA Member (SP): MiraNetworks
Information Provider (IP): Optionads.co.za
Service Type: Commercial
Source of Complaints: Consumers
Complaint Number: 0205 & 0207

Complaint

Two complaints were received from members of the public regarding SMS advertisements for subscriptions to FINWEEK magazine. Both complainants alleged the messages to be unsolicited commercial messages (i.e. "spam"). Furthermore, one of the complainants alleged that the commercial message did not contain an appropriate mechanism to allow the recipient to remove his or her name from the sender's database as there was no reply route other than via the premium rate SMS service charged at R3 per SMS.

SP Response

The SP responded that the message was sent out on behalf of an IP using a database supplied by a third party (SmartCast) who had advised the IP that the database was an "opt-in" database. The SP stated that it could not control third party companies that function independently of the SP and advised that its repeated attempts to contact the third party (SmartCast) had been unsuccessful.

Decision

Although the SP advised that the information provider was told by the database supplier that the database of names was an opt-in database, this averment has not been verified by the database supplier and, in my assessment, the probabilities favour the view that the complainants had, in fact, not consented to communications from FINWEEK, nor had they any prior relationship with FINWEEK.

Section 5.3.1 of the WASPA Code of Conduct provides that members must take reasonable measures to ensure that their facilities are not used by others for the sending of "spam". The SP did not provide details of any measures that it takes to ensure that its facilities are not used for the sending of "spam". To the extent that it has failed to take such reasonable measures, it could be held to be in breach of section 5.3.1 of the Code. I have not found it necessary to make a factual

determination on this point as section 3.9 of the WASPA Code, in any event, provides that all members must bind any information provider with whom they contract for the provision of services to ensure that no service contravenes the Code of Conduct. SP's can contractually oblige their clients to make payment of any fines that may be levied against the WASPA member or even take a security deposit or withhold revenue to cover possible fines. It is therefore unsatisfactory for the SP to respond that it has no control over third parties making use of its facilities for it is within its control to implement appropriate safeguards and mechanisms to ensure that unsolicited commercial messages are not sent using its services.

The SP did not dispute that the messages did not contain an appropriate non-premium rated mechanism by which a recipient could remove himself or herself from the sender's database. The messages in question therefore contravene sections 5.1.2; 5.1.3 and 5.1.4 of the WASPA Code of Conduct which provide as follows:

“5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

5.1.3. Where feasible, persons receiving commercial messages should be able to remove themselves from the database of a message originator using no more than two words, one of which must be 'STOP'.

5.1.4. Any mechanism for allowing a recipient to remove him or herself from a database must not be premium rated.”

The complaints are accordingly upheld.

Sanctions

The SP is formally reprimanded and directed to make a copy of this adjudication available to the IP. The SP is directed to ensure that the names and contact details of the complainants are removed from the IP's database.

In terms of section 3.9.2 of the WASPA Code of Conduct, a member must suspend or terminate the services of any information provider that provides a service in contravention of the Code. It is noted, however, that these two complaints are the first complaints of unsolicited commercial messages to be lodged against the SP. The SP is directed to cease the provision any services to the IP for a period of 14 days from the date of this adjudication, which sanction is to be suspended for a period of twelve months provided that no further complaints of unsolicited commercial messages are upheld against the SP in respect of messages sent in that twelve month period on behalf of the same IP.