

REPORT OF THE ADJUDICATOR

WASPA Member (SP): Initially eXactmobile (Pty) Ltd but later Wireless Warriors (for simplicity I have referred to eXactmobile as the SP as it has responded to the complaint)

Information Provider (IP): AdultClub and Wireless Warriors
(if applicable)

Service Type: Spam

Source of Complaints: Member of the public

Complaint Number: 0273 (as amended)

Adjudicator: Kerron Edmunson

Complaint

A complaint was received from a member of the public by telephone on 30 March 2006 in which he stated that he had not subscribed to an adult service but nonetheless received bulk SMSs and attempts to 'unsubscribe' had been unsuccessful.

The complainant stated that he has attempted to contact AdultClub, but there was no reply to their number, and asked to be 'unsubscribed' immediately and to know how his number was in their system as he did not 'subscribe' to the service. The complainant also asked WASPA to lodge a formal complaint.

SP Response

A response was received from the SP on 7 April 2006, which I have split into relevant sections for ease of reading:

1. *Status of SP*
"eXactmobile and Wireless Warriors currently act as the WASP for [these] Information Provider."
2. *Subscribing to services*
"The subscriber initiated the transactions by sending an SMS with the keyword XXX to 36611 on 14/6/2005 as well as sending SEXY to 36116 on the 5th Jan 2006. The following is a list of SMS that the subscriber has sent to the first service:....[list of dates, times and message content – all dates for messages are 14 June 2005 except for a message to unsubscribe which was sent on 27 February 2006]"

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The subscriber was sent bulk messages from this service on 6 Jan 2006 the user was sent a bulk SMS inviting the user to access content via the shortcode 36116. On 17 Jan 2006 the user was sent a bulk SMS inviting the user to access content via the shortcode 36116. On 27 Feb 2006 the user was [a] bulk SMS inviting the user to access content via the shortcode 36185.”

3. *Terminating services*

“On 27 Feb 2006 the user sen[d] an SMS containing the word “STOP” which resulted in the user being removed from future communications. The subscriber also sent the following SMS to the second service...[list of dates, times and message content including 3 SMSs to 31230 on each of 25 February 2006 (FN STOP), 30 March 2006 and 31 March 2006 (both AC STOP)]....

Then on 27/02/2006 he sent FN STOP to 31230 which is the stop for one of the services. The user has been unsubscribed to this service. As he was a member of 2 services from 2 different companies, he was not unsubscribed from the second service.”

4. *Identifying services*

“The subscriber has therefore participated in 2 different services, although they were using the same short code. This number is shared between a number of content providers....The subscriber has now been unsubscribed from all these services.”

Consideration of the WASPA Code

1. The General provisions of the Code have application in all cases in relation to matters dealt with by WASPA, and provide a good platform on which to base most adjudications. Section 3.1.1 provides that: “Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.” Sections 3.7.1(b) and 4.2 (privacy and confidentiality) are relevant in this case too, and provide that “Members will not provide any services or promotional material that:... results in any unreasonable invasion of privacy” (section 3.7.1(b)) and “WASPA and its members must respect the constitutional right of consumers to personal privacy and privacy of communications” and “members must respect the confidentiality of customers’ personal information and will not sell or distribute such information to any other party without the explicit consent of the customer, except when required to do so by law” (sections 4.2.1 and 4.2.2).
2. With this in mind, I considered definition of “information provider” which is “any person on whose behalf a wireless application service provider may provide a service, and includes message originators”. A “wireless application service provider” is “any person engaged in the provision of a mobile service, including premium-rated services, who signs a WASP contract with a network operator for bearer services enabling the provision of such services.” It would appear that both Wireless Warriors and Adult Club were at one point IPs, but that Wireless Warriors is now itself an SP. I will deal with the difficulty in assessing the relationships between the parties later in this adjudication.

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3. Finally I considered the definition of “spam” which means “unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.”
4. Turning to the sections dealing with commercial communications, it is relevant to consider section 5.1 (sending of commercial communications) and particularly sections 5.1.1, 5.1.3, 5.1.5, 5.2.1, 5.2.2, 5.3 and 11.3.3
 - a. Section 5.1.1: “all commercial messages must contain a valid originating number and/or the name or identifier of the message originator.”
 - b. Section 5.1.3: “where feasible, customers should be able to unsubscribe from any subscription service using no more than two words, one of which must be ‘STOP’ ”.
 - c. Section 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.”
 - d. Section 5.2.1: “any commercial message is considered unsolicited (and hence spam) unless: (a) the recipient has requested the message; (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.”
 - e. Section 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.”
 - f. Section 5.3.2: “members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.”

Decision

There are various issues raised in this matter:

- In order to correctly apply any sanction if an adverse finding is made, it is important to consider who the relevant parties are to whom a sanction might apply.
- The right to privacy is a constitutionally protected right and any invasion of it should be taken seriously, in every forum.
- The WASPA Code specifically prohibits spam and regards a breach of this seriously.
- The WASPA Code requires transparency in dealing with consumers.

It would appear from the facts of this matter that although the words “unsubscribe” and “subscribe” are used throughout the complaint and the response, the service is not in fact a subscription service. Nonetheless since both parties assume that it has the same effect once a customer signs up, I have dealt with it on the basis that a request to be “unsubscribed” should be adhered to. I have referred to the content to be downloaded in this case as “perishable” as it appears to be limited to a one-off choice which is not renewable alternatively is not renewed on a frequent basis without again dialling the relevant code.

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The complaint itself deals more narrowly with the fact that (i) the complainant wishes to be unsubscribed, (ii) from a service which he did not subscribe to, (iii) wishes to know how his number is in the 'system', and (iv) cannot reach the AdultClub number as there is no reply.

I have considered each matter separately with reference to the complaint and response, and then considered the matter in general in the following table:

Issue raised in complaint	Relevant section/s of the Code	Finding
The complainant wishes to be unsubscribed	5.1.3	The SP confirms that the complainant has been 'unsubscribed' from all services.
From a service he did not subscribe to	5.2.1, 5.3.1, 5.3.2	<p>The SP has indicated that the complainant subscribed to the service by sending text messages to the relevant shortcode on 14 June 2005. The complaint indicates that the complainant did not subscribe to the services but unfortunately the complainant cannot be reached to respond.</p> <p>From the records of the SP, the complainant did send messages to 36611 on 14 June 2005 and to 36116 on 5 January 2006. However, it would appear that in fact the IP (or SP) was sending unsolicited messages to the complainant from 36185 and a mobile number, and on the respondent's version, the complainant had not himself sent a message to these numbers.</p>
Wishes to find out how his number is in the 'system'	5.1.1, 5.1.5, 5.2.1, 5.3.1 and 5.3.2	<p>The SP has indicated that the complainant subscribed to the service by sending text messages to the relevant shortcode (36611) on 14 June 2005.</p> <p>Certain messages were sent to the complainant (the one complained of in particular) from an ordinary mobile phone number and not from the number apparently associated with the service.</p> <p>By its own admission, the SP sent various bulk messages to the complainant for 6 months in relation to 36611 after the complainant allegedly sent the first message to the IP, and not in response to a "direct and recent prior commercial relationship".</p>
Cannot reach the AdultClub number as	5.2.1 and 5.3.2	The SP acknowledges receipt of the complaint and has unsubscribed the

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there is no reply		complainant from "all services".
Issues of general concern	Relevant section/s of the Code	Finding
Who are the relevant parties?	5.1.1, 5.1.5, 5.2.1, 5.3.1 and 5.3.2	<p>I understand that eXactmobile formerly provided technical infrastructure for the IP Wireless Warriors, although this entity has now become a WASP in its own right. Bulk SMSs originated from Wireless Warriors. Unsolicited SMSs originated from a mobile number.</p> <p>36611 is a shared short code owned by the SP and the SP differentiates between IPs using this shortcode by virtue of the keyword used – eg FN and AC, and can track and control content going to a specific mobile number from that shortcode. If however, the SP has given control of the shortcode to an IP, then the IP is responsible for the control of the shortcode and management of the subscriber database for purposes of sending content.</p> <p>In this case, it would appear that the SP has control of the shortcode as they have admitted to unsubscribing the complainant from all services following receipt of the complaint.</p>
Sending commercial communications by using different shortcodes	5.1.1, 5.2.1 and 5.3.1	<p>It is clear that to receive perishable content, a consumer must send a message to the relevant shortcode. In this instance, on the respondent's version the complainant sent messages to 36611 on 14 June 2005 and 36116 on 5 January 2006. The messages sent to the complainant were therefore in all likelihood, marketing messages.</p> <p>However the complainant received SMSs from a mobile number some time prior to his complaint referring to 36611, from 36116 on 6 January 2006, from 36116 on 17 January 2006, from 36185 on 27 February 2006.</p> <p>The complainant sent unsubscribe messages to 31230 on 25 February and 27 February (FN), and on 30 March and 31 March 2006 (AC).</p> <p>It would also appear that in fact the IP was sending unsolicited marketing messages to the complainant from 36185.</p>

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Unsolicited marketing messages	As above.	By its own admission, the SP sent various bulk messages to the complainant 6 months after the complainant allegedly sent the first message to the IP, and not in response to a "direct and recent prior commercial relationship". In addition, the IP was sending unsolicited messages to the complainant from 36185 since this was not a service to which the complainant had sent a message himself.
Right to privacy	section 3	Sending unsolicited messages is in breach of this provision

Sanction

In terms of section 5.3.1 of the Code and by its own admission, I find the SP to be liable for the sending of unsolicited marketing messages to the complainant where no recent prior relationship existed, and the SP is ordered to pay a fine of R5,000 within 5 days of the making of this order.

The effect of the unsolicited marketing messages is also to breach sections 3.7.1 and 4.2 of the Code and the SP is ordered to pay a further fine of R10,000 within 5 days of the making of this order.

Following an approach by the SP and Wireless Warriors, I have agreed to consider amending this report so as to reflect that Wireless Warriors was the SP responsible for the IP at the time of the complaint and Wireless Warriors is therefore liable for the sanctions I have imposed. The sanction will therefore applied to Wireless Warriors, not to eXactmobile, on the condition expressed below.

Given the importance of the identity of parties in this adjudication and generally in relation to liability under the Code, this amendment will be considered on condition that eXactmobile, the SP and respondent in this matter, and Wireless Warriors, submit the following detail to WASPA in terms of section 13.3 of the Code, within 2 days of the publication of this finding:

- i) a detailed diagrammatic explanation of the eXactmobile corporate structure, including its owner shareholders, affiliates, and subsidiary companies (as these terms are described in the Companies Act);
- ii) a detailed diagrammatic explanation of the Wireless Warriors corporate structure, including its owner shareholders, affiliates, and subsidiary companies (as these terms are described in the Companies Act);
- iii) details of any joint venture, mutual investment, partnership, agency, trust or other relationship between eXactmobile and Wireless Warriors or any companies which are owned in common or are affiliates of both or either;
- iv) details of any joint or common directorships, flows of money between the parties resulting from contractual or other relationships, flows of money between joint or common directors or trustees of both parties; and contractual obligations between the parties generally.