



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Mira Networks
Information Provider (IP) (if any)	SMS.ac
Service Type	Unsolicited MMS & SMS
Source of Complaints	Public
Complaint Number	#0325 & #0342
Date Received	#0325 – 5 June 2006 #0342 – 22 June 2006
Code Version	4.3

Complaint

The Complainant initiated a Complaint under reference number #0325 after receiving daily messages asking her to join a contact and dating service for more than six months. The Complainant believed these messages to be unsolicited.

Thereafter, the Complainant indicated, the SP contacted her with an apology. She subsequently became aware of the fact that each time she received an MMS or SMS she was charged R1.75 and initiated a further Complaint under reference number #0342.

The Complainant alleges further that the unsubscribe service advertised by the SP did not function, the charges were not disclosed and that her out of pocket expense was R287 per month.

On 25 June 2006 the SP sent the Complainant an e-mail requesting that she provide it with the number on which the messages were being received. On 13 July 2006 the Complainant indicated to the WASPA Secretariat that she was no longer receiving the unwanted MMS and SMS messages. The e-mail and subsequent

correspondence did not, however, resolve the issue of the compensation claimed by the Complainant and the Complaint requested that the Secretariat “escalate” the matter to a formal complaint.

SP Response

On 17 July 2006 the SP responded by setting out the registration information allegedly provided in respect of the mobile number owned by the Complainant.

This information indicates that the Complainant’s mobile number was subscribed to the service by her husband on 22 December 2004 and that opt-in billing had not been select.

The SP described the relevant service as follows:

“The Client has been deregistered from a services called SMS.ac. The companies' web site is www.sms.ac.

This is a web based service where a user would complete the online application and only once the user has received and enters a unique pin number that is sent to the specific phone number the user entered is the service activated.”

And further:

“The ‘activation code’ is the 5 digit unique code number sent to the user’s mobile phone in order to receive “8 Daily Free Messages”, and to Opt-In to Mobile Billing.”

The SP indicated that it would gladly work out a compensation solution for the client if the fact and details of registration were disputed.

The SP then provided further log information which indicated that the “activation code” referred to above was sent to the Complainant’s mobile number on 22 December 2004 and the service was activated shortly thereafter.

Investigation

At the request of the Independent Adjudicator the WASPA Secretariat requested further submissions from the Complainant with specific reference to the registration information allegedly provided.

The Complainant's husband initially responded to the effect that he was confused as to how his wife's details had been obtained by the SP. Further confusion arose from the fact that, while the registration and activation were allegedly effected on 22 December 2004, the offending messages had only been received since around or about July or August 2005.

Thereafter, at the request of the Complainant's husband, the Secretariat provided details of the website through which the registration and activation was allegedly effected. This appeared to have the effect of jogging the Complainant's husband's memory, and the following further clarification was received.

"I remember this vaguely and am sure that because they advertise 'free text messages' I erroneously thought this meant free sms messages, or the ability to logon and send an sms free. The only way I can imagine that I used my wife's number is because I probably wanted to be connected to her and be able to communicate by using the "free message" system. I remember that soon afterwards I realised that I would have to pay and/or that in fact it was a "friends" site and I can also remember cancelling. The only mystery is why my own number is not registered: I have not received one single message from them.

I have tried in vain to access the site, but all I get is: 'We are busy, try again.' This has been over a 24 hour period now.

I want to challenge them and ask them to show me my signup details and password as well as the cell phone numbers I used to register. I hope I can access the site soon."

On 14 September 2006, after prompting from the Secretariat, the Complainant's husband confirmed that he had been in further contact with the SP but that resolution of the matter was proving difficult.

"I have been able to ascertain the following:

1. The sms site clearly advertises "free text messages". I obviously took this to mean that some or all of my smssing would be "free". I can only assume that I enrolled my wife and her number in order to benefit from what I thought would be a free service.

2. I am unable to confirm with her why a. I never received any messages from anyone (least of all inviting me to chat with them), and b. why these messages would be sent to my wife only; and then c. why this 'service' offering free romance, started only sometime in the middle of last year, when I had signed up at the beginning.

3. It is unclear as to when I personally resigned. I seem to remember realised what the site was about, and cancelled immediately.

I still intend to correspond with the person and to find out who is responsible for requesting these messages, how and where I was told anyone would be charged."

The Adjudicator has reviewed the sms.ac website.

Sections of the Code considered

2.10. A "contact and dating" service is any service intended to enable people previously unacquainted with each other to make initial contact and arrange to meet in person.

3.1. Professional and lawful conduct

3.1.1. 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.

4.1. Provision of information to customers

4.1.1. Members are committed to honest and fair dealing with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

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.

5.2. Identification of spam

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

10.1 Provision of information

10.1.1. Contact and dating services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must required the customer to actively confirm their continued participation.

10.3 Removal and deactivation of service

10.3.1. When so requested by a customer, the provider of a contact and dating service must ensure that the customer's details are removed from the service at the earliest opportunity and in all cases within 24 hours.

Decision

The facts of the matter are somewhat perplexing, a situation not helped by the vagueness of the details supplied by or through the Complainant.

The factual position in respect of the following matters is particularly obscure:

- The Complainant's husband has not provided details of his own number and it accordingly remains unclear as to whether this number was used to register for the service.
- The apparent gap between registration for the service and the actual commencement thereof.
- The date on which the Complainant tried to stop the service.

What is clear is that the messages received were not unsolicited. This much appears from the later correspondence of the Complainant's husband and from the records submitted by the SP which indicate that the number 27828710607, belonging to the Complainant was used to register for the service on 22 December 2004.

This means that Complaint #0325, which alleged the messages received by the Complainant were unsolicited, cannot, on the information provided, be upheld.

This leaves the question of compensation and the failure of the opt-out facility as raised under Complaint #0342.

The Complainant raises a monthly cost of R287 over six months for a total of R1 722.00. This does not appear to be a precise figure.

As noted above there is no indication of the date on which the Complainant tried to unsubscribe. Furthermore the SP has failed to respond in any manner to this allegation. It seems more than logical that the Complainant would have attempted to use the unsubscribe facility and in the absence of a response from the SP it is difficult not to uphold the Complaint in this respect.

The SP has in its Response indicated that it would gladly work out a compensation solution for the client if the fact and details of registration were disputed. As it is impossible to establish any factual findings against the Service Provider on the information provided it is the Adjudicator's hope that the parties can resolve the matter between themselves.

In the circumstances the following order, intended to create a framework for the resolution of the matter between the parties, is made in respect of Complaint #0342:

- The SP is issued with a reprimand in respect of the breach of section 5.1.2 of the Code.
- The SP is ordered to do a proper internal investigation of the matter to determine, *inter alia*, the amount billed to the Complainant and the period over which this occurred and to correspond at a senior management level with the Complainant and/or her husband in order to clarify the facts of the matter;
- The SP is required to finalise this matter through an offer of compensation to the Complainant reached on the basis of the process outlined in the preceding paragraph. The offer for compensation should be guided by, amongst others, the following factors:
 - Complaint #0342, in which the Complainant indicated that she had tried unsuccessfully to stop the service, was received on 22 June and the failed attempt was obviously made before this date. The minimum compensation should therefore be calculated from 1 June to the date on which the service was finally terminated.
 - The fact that the service was unwanted as against whether any outgoing messages were sent from the Complainant's phone, i.e. whether any use was made of the service through the Complainant's phone.
- Such offer of compensation shall set out the basis on which the offer is made and shall be delivered to the Complainant in writing within 15 working days of receipt of this Report. A copy thereof shall be lodged with the WASPA Secretariat. The Secretariat may issue a further complaint of non-compliance with this Report in the event that this is not done.

In conclusion and with reference to the duty imposed by section 4.1 of the Code requiring WASPA members to at all times conduct themselves in a professional manner in their dealings with the public, sufficient facts to support an adverse finding are not revealed.

Note:

The investigation and further submissions from the Complainant's husband reveal a number of potential further complaints, for example that the marketing on the SP's

sms.ac website was misleading insofar as he believed that he would be entitled to send free SMS messages by joining up and did not realise it was a contact service.

The SP has not, however, had an opportunity to respond to any allegations contained in later correspondence submitted by the Complainant's husband. Should the Complainant wish to pursue these matters further a separate complaint would need to be lodged.