

REPORT OF THE ADJUDICATOR

WASPA Member (SP): Strike Media

Information Provider

(IP): Homemark
(if applicable)

Service Type: Spam – competition

Complainant: Member of the public

Complaint Number: 0326

Adjudicator: Kerron Edmunson

Code version: Code v4.3 and Ad Rules v1.6

Complaint

The complaint has been submitted through the formal process by WASPA on behalf of the complainant.

The complainant herself referred initially to refers to section 3.1.2 of the Code (members are committed to lawful conduct at all times) and so to the dti definition of an “unlawful business practise” and section 45 of the Electronic Communications and Transaction Act 25 of 2002 (“ECT Act”) which deals with unsolicited commercial communications.

The complainant received an SMS from the IP which said “congratulations, you have won a 19-piece knife set. Excl postage and packaging R65.00.” The complainant had no prior commercial or other relationship with Homemark. On contacting them directly on the number included in the SMS they were “rude and arrogant” and would not divulge where they had obtained her details from save to say “they probably got them from one of her friends”.

SP Response

There seems to be some confusion on the part of the SP as to who has responsibility for the sending of the messages. The SP sent a lengthy response comprising 9 points in which they commit themselves to the industry and to proper use of mobile communications via their services and systems. The SP also states that its response is without prejudice.

Since WASPA is not the only forum in which a complaint can be brought or a response given, I have assumed that the SP would nonetheless like its response to

be considered in the context of its membership of and therefore its obligations to, WASPA, regardless of its "without prejudice" nature. I suggest that WASPA confirm this with the SP prior to publishing this finding.

The SP response is as follows:

1. "Strike Media provides amongst other things a website to its customers where they may upload SMS messages to be sent to their own client databases. We do not provide the MSISDN of target subscribers to our customers.
2. Strike Media has never made an offer of any kind to anyone that is in any way related to <http://www.dti.gov.za/ccrd/CosumerAlertMailOrderSelling.htm> and suggests that this is an issue between our client and the complainant and should not involve Strike Media or WASPA in any way.
3. The customer in question is Homemark who have a huge annual marketing budget and insist that the subscriber in question is a bona fine record in their customer database either by referral or past purchase history and according to Homemark are able to provide the source of the subscribers details and we have requested details in this regard from Homemark.
4. A mechanism to be removed from the Homemark customer database is provided by our customer.
5. Our customers simply visit our website purchase credits and can commence with sending out SMS. Upon purchase they are bound by our terms and conditions of service which amongst other details, insists that our system is not used for the sending of unsolicited SMS messages and binds the user to the WASPA Code of Conduct.
6. Homemark has been made aware of this complaint and assures us that the subscriber will be contacted and be removed from their mailing list.
7. As a result of the SMS message the complainant was not disadvantaged in anyway (sic).
8. Strike Media has no malicious intent in providing its facilities and services and abides by the WASPA Code of Conduct and the ECT Act."

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.
2. Section 3.1 (professional and lawful conduct) provides at 3.1.1 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" and at 3.1.2 that "members are committed to lawful conduct at all times."
3. 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 where required to do so by law" (sections 4.2.1 and 4.2.2).

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4. The definition of “spam” is “unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.”
5. 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 and 5.3.
 - a. **5.1.1:** “all commercial messages must contain a valid originating number and/or the name or identifier of the message originator.”
 - b. **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’ ”.
 - c. **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. **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. **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. **5.3.2:** “members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.”

ECT Act

This Act is intended to provide for the facilitation and regulation of electronic communications and transactions, amongst other things which include the prevention of abuse of information systems. Chapter VII is entitled “Consumer Protection” and it is within this chapter that section 45 falls.

An “information system service” is defined in the ECT Act as including “the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service.” A WASP is considered to be providing an information system service and may incur liability for their own and third party content which they provide.

Section 45 is intended to address “unsolicited goods, services and communications”. Section 45(1) provides that:

“Any person who sends unsolicited commercial communications to consumers must provide the consumer – (a) with the option to cancel his or her subscription to the mailing list of that person; and (b) with the identifying particulars of the source from which that person obtained the consumer’s personal information, on request of the consumer.”

Section 45(3) provides that:

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“Any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).”

The Code was created to address the concerns of this Act within the wireless application services arena. The Code contains its own consumer protection provisions and particularly provisions concerned with spamming which I have set out above. WASPA is not empowered to enforce the ECT Act.

Decision

The following points are of over-riding consideration:

- 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
- WASPA will take into account members' conduct in relation to the application of other legislation including the ECT Act and dti consumer protection provisions as these are contained in relevant laws in making its findings

Turning to the provisions of the Code which are relevant to this complaint:

1. **5.1.1:** “*all commercial messages must contain a valid originating number and/or the name or identifier of the message originator*” – this would seem to have been the case as the complainant was able to contact the IP.
2. **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’*” – it would appear that there was no mechanism in the SMS sent to the complainant allowing her to remove herself from the database of the message originator.
3. **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*” – the SP has at date of writing this adjudication, not provided any information from the IP as to how they came to have the complainant's details in their database.
4. **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*” – the SP by its own admission had no prior recent or commercial relationship with the complainant and as neither (a) nor (b) apply on the SP's version, (c) must apply for the SP to comply with this section of the Code. There is no evidence presented by the SP in this regard.
5. **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*” – whilst the SP may require its IPs to comply with terms and conditions, it would appear from the facts presented and the SP's response, that the SP has not policed the

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sending of communications from its facilities sufficiently to prevent the sending of spam. The SP will of course, have commercial contractual remedies in terms of its contract with the IP for the breach of the Code.

6. **5.3.2:** *“members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks”* – I cannot comment on this in detail save to say that as a general rule, the SP should require a prompt and helpful response from its IPs in relation to complaints of this nature.

In summary, the complaint is upheld in relation to sections 5.1.3, 5.1.5, 5.2.1, 5.3.1 and 5.3.2. of the Code.

Sanction

In terms of section 5 of the Code and by its own admission, I find the SP to be liable for the sending of unsolicited marketing messages by the IP to the complainant. The SP is ordered to pay a fine of R5,000 to WASPA within 5 days of the publication 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 R5,000 to WASPA within 5 days of the publication of this order.