



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	ViaMedia
Information Provider (IP)	Opportune Trading 117 CC t/a Xcite Mobile
Service Type	Removal from Distribution List
Source of Complaints	Competitor
Complaint Number	#0629
Code of Conduct Version	4.6

Complaint

A complaint was received from a competitor of the SP regarding an SMS message received from the IP, through the SP. The complainant states:

After requesting content from a print ad placed in the Huisgenoot magazine on the 2nd November 2006, I received a marketing message as follows:

Why pay R5 for Top TONES? U can get them for ONLY R1 each. Just SMS TONE to the number 31314 & join da club. U get 5 of the latest TONES each week 4 only R5.

Within the message there is no way to unsubscribe to receiving these marketing messages.

The complainant referred to Clauses 5.1.2 and 5.1.3 of the WASPA Code of Conduct, which provide:

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'.

In addition, the Adjudicator considered the provisions of Clause 11.11 of the WASPA Advertising Rules (which were not referred to by the complainant). This Clause provides:

11.11 DISTRIBUTION LISTS: Indicate If Consumer Automatically Placed On List. // No sexual or sexually suggestive Content in list if the list recipient does not request or expect it. // Provide reasonable opt-out procedure // Sender must have direct and recent association with recipient

- If by requesting any Content or accessing a service, the consumer so doing is automatically placed on a distribution list that will continuously or periodically send that consumer further related or unrelated communications from that Content provider or any other Content provider or advertiser, then the T&C text must explicitly specify in the T&C that updates will be sent until cancelled. [Note that v3.2 of the Code of Conduct specifies that the sender must have a "Direct & Recent" association with the recipient].

Best Practice Suggestion

Display text: "Updates sent until cancelled"

- A sender to a distribution list may not send any Adult Content, nor send advertisements that link to Adult Content, nor send any advertisements that contain Adult themes, Age Restricted Content sexually suggestive Content and language to consumers that have not previously expressly requested such Content or would not reasonably expect to receive such Content.

- The sender to a distribution list must indicate the cost and T&C of access to a service in each and every communication, even the receiver was previously a user of that service. No assumption as to the knowledge of the recipient in respect of the costs and T&C of a service must be made for users who had previously used the service.

- If using SMS as the Access Channel and where has been no communication to a user of that service from either the general participants in that service or the controllers of the service for a minimum of ten (10) calendar days, then any further communication to that user must, at the first communication to that user after the tenth (10th) day, must indicate who the service is provided by and how the user may unsubscribe from the service, and the cost thereof. The cost of this unsubscribe process may not exceed a total of R1 if using SMS as the unsubscribe medium and may not be more than 120 seconds if using IVR or any other voice-based system as the unsubscribe medium.

[This provision will only come into effect on 1 February 2006 to allow for reengineering of IT systems]

- Opt-Out: Any further communication with a consumer in a distribution list must contain a relatively easy and unambiguous method for immediately opting-out of any further communications from that distribution list:
 - o Fax: No premium rated fax lines [eg 0866 fax-2-email type numbers] may be used for the mandatory opt-out procedure.
 - o SMS: The total cost of opting-out from any distribution list using a premium rated SMSs Access Channel may not exceed R1 total cost
 - _ [See also "TOTAL ACCESS REQUIREMENTS" below]
 - _ [See also v3.2 of "WASPA CODE OF CONDUCT"]
 - o IVR (or any other time-based method): Where applicable, any IVR systems used for any opt-out procedure must be designed so that a reasonable user will not need to exceed 120 seconds (from the start of the IVR call or time-based method) for the entire opt-out process.
 - _ [See also "PRICING" below]
 - _ [See also "TOTAL ACCESS REQUIREMENTS" below]

SP Response

The SP provided the following response from the IP:

This is an interesting complaint for two reasons:

1. *The message in question is sent only once, and therefore including instructions on how to opt out would be confusing, and is not necessary*

2. *Neither the Code of Conduct nor the Advertising Rules are clear on this matter.*

This message is what we call a Thank you message. It is sometimes sent immediately after a purchase. It is part and parcel of a content download and the way our service is offered. It usually includes the words thank you and then tells the consumer about other products or service news, however no further communications will be sent to the user and therefore there is nothing to opt out of. Therefore offering an opt out instruction is superfluous. This can be likened to including a thank you letter and a promotional message, in the envelope which contains someone's new policy documents. We've queried this with Mike Silber, he's also not sure of how to call this one.

We do have an opt out mechanism as required by the code. This is triggered if a user sms's OUT to 31314 (50c). This is included in all commercial messages that are sent to our database at any time, when not associated with a user action.

In the Code and the Advertising rules, of the two sections that reference the Opt out mechanism, neither sections 5.1.2 of the Code of Conduct nor 11.2.2. of the Ad Rules, explicitly states that the instructions on how to opt out should be included in the sms message:

5.1. Sending of commercial communications

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.

And

11.2 OBLIGATORY COMPONENTS:

11.2.2 The opt-out facility may not utilize any PSMS Access Codes beyond R1 in total or may not use any premium rated phone or fax numbers whatsoever. Any voice-based opt-out facility must not be more than 120-seconds in total length.

We understand this has recently been acknowledged by the Code Committee and is currently under discussion.

However, should this complaint be upheld, we'd like this response to be a formal complaint against the complainant for more serious 'violation'. The complainant sends commercial communications out of the blue and repeatedly (i.e. not associated with a user action). These don't include an Opt Out instructions and we believe this kind of message should have them. Examples of this type of commercial communication sent by Exactmobile follow. These were not associated with any user activity:

19:15

19/08/2006

Reply YES to this SMS for a new Alarm Tone (e.g. Traffic Cop, Kom Nou Frikkie & .) or Weird Sound (Groen Knoppie, Ticking Bomb & .) from eXactmobile. R5/item

11-Sep-06

Open up a new world by going to www.exactmobile.co.za/now on yr phone. Get instant access to the latest content, Full Track Downloads, Chat NOW! & so much more!

18:41

17-Oct-06

Kry die Robbie Wessels Leeuloop Polyphonic (R5), True Tone (R15) of Full Track Download (R20) deur LEEU terug te SMS na hierdie nommer. Slegs by eXactmobile!

Decision

The Adjudicator noted that the practice (adopted by the IP amongst others) of responding to a complaint by highlighting contraventions of the same alleged breaches by the complainant, is not desirable. However it is understandable, in order to demonstrate that a complaint is brought for ulterior reasons and demonstrates hypocrisy on the part of the complainant. This cannot be a defence to the complaint itself and the IP is correct in indicating that if breaches of the Code of Conduct or Advertising Rules are found, as alleged, then examples of the complainant's own breaches should similarly be investigated.

The Adjudicator noted further that the IP includes the following remark in its response *"We've queried this with Mike Silber, he's also not sure of how to call this one"*. This is only partially correct in that the IP, through the SP, addressed an informal and generic query to this Adjudicator regarding the need for "opt-out" information in single instance "thank you" messages sent by a service provider or information provider. The IP did not address this specific complaint to the Adjudicator and the Adjudicator did not have sight of this complaint until it was assigned by the Secretariat and had only responded to the IP in a generic manner. As such, the Adjudicator was of the view that no conflict of interest exists in his consideration of this complaint and there was no need for him to recuse himself. The Adjudicator noted that his prior uncertainty in dealing with a generic query regarding opt-out instructions is due to a consideration of both the WASPA Code of Conduct and Advertising Rules. In the instant complaint the complainant has only referenced the WASPA Code of Conduct, which allows for a simpler decision.

The WASPA Code of Conduct merely requires the existence of a facility to enable a message recipient to remove him or herself from the database so as not to receive further messages. Furthermore that facility must be capable of being accessed using no more than two words, one of which must be the word "STOP". There is no indication that this facility must be advertised in the message itself. This is not even implied in the WASPA Code of Conduct.

As such, the Adjudicator found that there was no breach of either Clause 5.1.2 or 5.1.3 of the WASPA Code of Conduct.

The complainant submitted various separate complaints regarding the same SP and IP and the same advertisement and the various messages emanating from the complainant's request for content specified in such advertisement. This complaint has been considered separately as it was submitted separately. As the IP raised the confusion in the WASPA Advertising Rules around "opt out" processes, the

Adjudicator considered it opportune to consider this issue further, which may give some guidance to WASPA members and other Adjudicators regarding this issue:

- While the IP's message may be a "thank you" message it nevertheless displays an "access channel" (as defined in the Advertising Rules) and as such is subject to such Advertising Rules. A "thank you message" without reference to an access channel would not be subject to the Advertising Rules and only the rather weak requirement of the WASPA Code of Conduct.
- If a "thank you" message is sent once and triggered by a customer action (such as downloading a content item) and thereafter no further messages are sent, this cannot be regarded as adding the customer to a "distribution list" as a distribution list has the implication of the ongoing distribution of messages to list members. As such there is no need to follow the provisions of Clause 11.11 of the WASPA Advertising Rules.
- In any event, Clause 11.11 of the WASPA Advertising Rules gives a "best practice suggestion that the SMS advertisement should contain the text "Updates sent until cancelled", however this is not obligatory.
- The fourth bullet point of Clause 11.11 of the WASPA Advertising Rules stipulates that an SMS advertisement must contain details of "how the user may unsubscribe from the service". This is a reference to a previous version of the WASPA Code of Conduct and the term "unsubscribe from a service" is no longer used in the WASPA Code of Conduct to avoid confusion with unsubscribing from a subscription service. In any event, the intention is clear; the message must contain details of how the message recipient may remove him or herself from the distribution list. However, this bullet point is only applicable to SMS advertisements which are sent after a ten day hiatus in communications from the general participants in that service or the controllers of the service.
- Based on the legal principle *expressio unius est exclusio alteris*, or that the express mention of one thing excludes all others. This has the effect that where one or more items is specifically listed, then items not on the list are assumed not to be covered by the conditions attached to such listed items. As such, the express requirement that details be provided of the mechanism for a recipient to remove him or herself from a distribution list, only applies to messages sent after the aforementioned ten day hiatus. Messages sent without a ten day hiatus do not require such details to be included.

The IP in its response referred to three SMS messages sent by the complainant to the IP, which the IP alleges "were not associated with any user activity". It is uncertain whether there had been a ten day hiatus between the last user activity or communication and the receipt of the aforementioned messages, referred to in the fourth bullet point of Clause 11.11 of the WASPA Advertising Rules. The Secretariat is instructed to institute a complaint against the complainant in terms of Clause 11.11 of the WASPA Advertising Rules and to request from the IP details of the number on which such messages were received, in order to allow the complainant to respond thereto.