



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Cellsmart
Information Provider (IP) (if any)	Mr Delivery
Service Type	Commercial mail
Source of Complaints	Public
Complaint Number	#1004
Date received	8 February 2007
Code of Conduct version	4.7

Complaint

The Complainant alleges breaches of sections 5.1.3, 5.1.4 and 5.2.1 of the WASPA Code of Conduct stemming from the receipt of the following SMS:

"\Spot the new Mr Delivery Clover cars and SMS your name and the registration to 33988. You could win a brand new Yaris. www.mrdelivery.com \"

The Complainant specifically denied

- requesting the message;
- having a recent commercial relationship with the IP
- giving his consent to the IP for the use of his mobile number for marketing campaigns.

While the Complaint is straightforward there was difficulty in identifying the correct SP.

SP Response

The SP acknowledged that it had control of the short code used but denied that it was in any way responsible for the sending of the offending SMS -

“This complaint has been lodged against us in error. We were mandated by Joe Public to setup a campaign on behalf of Clover SA. There was collaboration between Clover and Mr Delivery, in terms of prizes etc. Our campaign did not include unsolicited SMS of any kind. Mr Delivery decided, on their own steam, to send out a bulk SMS, through another wasp / sub-wasp to promote the campaign further.”

A representative of the SP went so far as to personally attempt to trace the parties responsible for sending the SMS -

“Mr Delivery gave me contact details for "their software guys" who are apparently responsible for sending out the messages.”

“The software guys”, it appears, were IT technicians employed by or contracted to M Delivery. Attempts to contact them were unsuccessful.

Sections of the Code considered

The following sections of version 4.7 of the WASPA Code of Conduct were considered:

2.8. A “**commercial message**” is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.

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 cost more than one rand.

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.

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.

13.5. Information provider notices

13.5.1. If the adjudicator has determined that an information provider is operating in breach of the Code of Conduct, and the adjudicator is of the reasonable opinion that the information provider may persist in such breach, whether through the member against whom the complaint was lodged or another member, the adjudicator may instruct the secretariat to issue a notice to WASPA's members.

13.5.2. The notice referred to in 13.5.1 must clearly identify the information provider and the relevant breach or breaches of the Code of Conduct, and must specify a date from which the notice applies.

13.5.3. Any member permitting the information provider to operate in breach of the Code of Conduct (in the same or substantially similar manner to that identified in the notice referred to in 13.5.1), after the date specified in the notice, will be automatically in breach of the same part or parts of the Code of Conduct as the information provider. Such members will be subject to sanctions determined by the adjudicator in accordance with section 13.4, read in conjunction with section 13.3.11.

Decision

The version of the Complainant is accepted. The SMS is both commercial and of an unsolicited character and there has accordingly been a breach of section 5.3.1.

There is furthermore a patent breach of section 5.1.3, there being no question as to the feasibility of compliance.

Having found a breach of section 5.1.3 I am unable to simultaneously find a breach of section 5.1.4. The mechanism referred to in the latter section cannot properly be held to refer to a telephone call or series of calls but rather to the STOP mechanism contemplated in 5.1.3.

The version of the SP is also accepted and it is found that the SP was in no way culpable in respect of the breaches set out above. Its efforts in attempting to clear its name were exemplary.

It appears, rather, that the IP has of its own initiative undertaken SMS marketing making unauthorised use of the SP's short code, most likely in ignorance of the existence of the WASPA Code of Conduct. The IP is not a member of WASPA and therefore not subject to its enforcement jurisdiction, but the Code of Conduct is applicable as a result of such use of the SP's short code.

It is my reasonable belief that the IP may persist in such breaches, whether through the SP or a third party WASP.

In the circumstances the only sanction available to the Adjudicator is to instruct the Secretariat to issue a Section 13.5 Notice in the following terms:

"To all WASPA Members

Notice issued in terms of section 13.5 of version 4.7 of the WASPA Code of Conduct

Name of IP: Mr Delivery

Complaint #1004

Sections of Code of Conduct: 5.1.3, 5.3.1 read with 5.2.1

Date of issue: [Secretariat to insert date on which sent to members]

The IP in the above Complaint was found to have breached sections 5.1.3 and 5.3.1 read with 5.2.1 of version 4.7 of the Code of Conduct.

The Adjudicator is of the reasonable opinion that the IP may persist in such breach, whether through the member against whom the Complaint was lodged or another member.

WASPA members' attention is drawn to the provisions of section 13.5.3. of the Code of Conduct:

“13.5.3. Any member permitting the information provider to operate in breach of the Code of Conduct (in the same or substantially similar manner to that identified in the notice referred to in 13.5.1), after the date specified in the notice, will be automatically in breach of the same part or parts of the Code of Conduct as the information provider. Such members will be subject to sanctions determined by the adjudicator in accordance with section 13.4, read in conjunction with section 13.3.11”

Please direct any enquiries regarding this notice to complaints@waspa.org.za.”

It is accepted that the result is not wholly satisfactory but, in adjudicating complaints, Independent Adjudicators for WASPA are bound to follow the provisions of the prevailing version of the Code of Conduct and have no jurisdiction to impose any finding or sanction on third parties which are not WASPA members or where there is no contractual or causal link between the breaching conduct of the third party and the conduct of any relevant WASPA member.

Within the four corners of the Code of Conduct all that can be achieved is to limit the potential for the IP to act in this manner in the future.

In closing the Complainant's attention is drawn to the provisions of section 45 of the Electronic Communications and Transactions Act No 25 of 2002¹.

¹ Available from http://www.internet.org.za/ect_act.html