



REPORT OF THE ADJUDICATOR

Complaint reference number:	10736
WASPA member(s):	Sybase 365 (SP) / Venista (IP)
Membership number(s):	0069 / 1088
Complainant:	Competitor
Type of complaint:	Spam
Date complaint was lodged:	2010-10-06
Date of the alleged offence:	Approximately 2010-10-06
Relevant version of the Code:	9.0
Clauses considered:	2.8, 3.9.2, 5.2.1
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	Not applicable
Related cases considered:	None

Complaint

On 6 October 2010 the Complainant alleged that his wife received a service indicator on her mobile phone containing a URL. He stated that his wife had never used these services, had not had a prior commercial relationship with the sender and had not given permission to receiving same.

Service provider's response

On 14 October 2010, the IP responded that the relevant MSISDN belonged to a database of numbers acquired from Atlas Premium Brands (Fast Gain Development Limited) on the recommendation of Sybase 365. The IP also stated that it has a guarantee that all MSISDN's had opted in to receiving marketing messages from third parties.

The IP advised that it had removed the number from its database and apologised for any inconvenience caused.

In reply, the Complainant requested on 28 October 2010 that the matter to go to formal adjudication. He stated that he did not believe that the purchasing of a database was legal and allowed another company to send out spam. He also requested further information on who Atlas Premium Brands (Fast Gain Development Limited) was.

On 28 October 2010 the IP replied to the Complainant's request for further information regarding Atlas Premium Brands by referring to the Complainant to a website for Atlas and providing their street address in London, United Kingdom.

On 19 November 2010, the SP distanced itself from the response of the IP and stated that it had not suggested to the IP that it buy a database from Atlas. The SP alleged that the referral to Atlas was for the purposes of collaborating on content offerings. The SP stated that it had no prior knowledge that the IP had purchased a database from Atlas.

Sections of the Code considered

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 (within the last six months) 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.***

Decision

The Complainant is wrong in his view that purchasing of databases is illegal. Where a consumer gives his or her consent to a database compiler that his or her information may be shared with direct marketers, no law is breached when that data is sold or when the consumer receives a message for the data purchaser. The law is presently in a state of flux regarding direct marketing and the type of purpose-specific consent that must be given to avoid prosecution for spam (see section 11 of the newly enacted Consumer Protection Act and the draft provisions of the Protection of Personal Information Bill). However, these new legal developments are not relevant for the purposes of this complaint which arose in October 2010.

The dispute in the present matter comes down to this: the Complainant alleges that the message was unsolicited and the IP alleges that the consumer had provided a form of consent which was sufficient to permit the receipt of the message concerned in terms of section 5.2.1(c) of the Code which provides as follows:

Any commercial message is considered unsolicited (and hence spam) unless:

- (a)...***
- (b)....; or***
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's express consent to do so.***

For any consent requirement to be meaningful and enforceable, the receipt of consent needs to be auditable. Wherever "express consent" is required in terms of

the Code, the party required to obtain such consent should retain full particulars that evidence the giving of consent. Alternatively, where a complaint of spam is made, a party able to obtain evidence of consent should obtain and produce same in response to the complaint.

The IP is not expected to individually and proactively verify whether express consent was actually given in respect of each and every consumer contained on the database that it purchased from Atlas. However, the IP could easily, and therefore should, on the receipt of a formal spam complaint, request the database provider to provide information that would practically verify whether such consent was actually given. If the IP does not produce this information, then how else can the veracity of a warranty that consent was obtained ever be established? Furthermore, if such information cannot be produced, then how would such a warranty ever be enforceable by the IP itself?

In response to the complainant's allegation that no consent was given to the receipt of the message, the IP's mere counter allegation that consent was given is not practically helpful in determining the true facts on a balance of probabilities. The counter allegation is unsubstantiated by any actual evidence.

In terms of section 2.8. of the Code, 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**". There is no dispute in this matter as to whether the relevant message was a commercial message and I have proceeded on the basis that it was.

In terms of section 5.2.1 a commercial message is considered unsolicited (and hence spam) **unless** one of the exemptions in sub-sections (a) to (c) applies.

It appears from the wording and construction of section 5.2.1 that the onus of proving that a commercial message falls within one of the exemption categories lies with the message originator. As it is the message originator who must allege that the exemption applies, it is the message originator who must produce evidence substantiating that allegation. Furthermore, viewed from an alternative perspective, it would be impossible for a consumer to positively demonstrate that consent was not given, therefore the onus of establishing that consent was given must reasonably fall on the party practically able to positively discharge the onus. In terms of section 2.8, a promotional message is rebuttably presumed to be spam unless an exemption is established.

In the present matter, the complainant has alleged that a commercial message was received without consent ever being given to its receipt. The IP has alleged in response that consent was given and points to an alleged guarantee given to it by a database provider from whom it obtained the consumer's details. I find the mere reference to an alleged guarantee given by a UK based third party to be insufficient for the purposes of discharging the onus of rebutting the complainant's allegation on a balance of probabilities.

I therefore uphold the complaint of a breach of section 5.2.1.

Sanctions

Section 3.9.2 of the Code provides that a member shall be liable for any breach of the Code resulting from the actions or omissions of a service provider making use of its facilities to provide any services governed by the Code.

The SP is accordingly required to pay a fine of R5 000 to WASPA within 5 days of the delivery of this report.