

WASPA appeals panel
Complaint 10736

REPORT OF THE APPEALS PANEL

Date: 21 November 2011

Service Provider: SYBASE

Information Provider (IP): VENISTA

Complaint Number: 10736

Applicable versions: 9.0

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 04 October 2010 against the IP.

1.2 The SP is a full member of WASPA.

1.3 The Complaint relates to an alleged unsolicited message.

1.4 The complaints, the findings of the Adjudicator, the SP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

2. CLAUSES OF THE CODE CONSIDERED

2.1 The following clauses of the Code were considered:

5.1.7. 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.

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.

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.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR (Please note that this extract is a verbatim copy of the Adjudicator's Report)

3.1 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 from the data purchaser.

3.2 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).

3.3 However, these new legal developments are not relevant for the purposes of this complaint which arose in October 2010.

3.4 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: (c) the organisation supplying the originator with the recipient's contact information has the recipient's express consent to do so.***

3.5 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.

3.6 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.

3.7 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.

3.8 If the IP does not produce this information, then how else can the veracity of a warranty that consent was obtained ever be established?

3.9 Furthermore, if such information cannot be produced, then how would such a warranty ever be enforceable by the IP itself?

3.10 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.

3.11 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**”.

3.12 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.

3.13 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.

3.14 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.

3.15 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.

3.16 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.

3.17 In the present matter, the complainant has alleged that a commercial message was received without consent ever being given to its receipt.

3.18 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.

3.19 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.

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

3.21 Sanctions

3.21.1 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.

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

4. GROUNDS OF APPEAL

4.1 Grounds of appeal for complaint 10736

4.1.1 The Adjudicator made its decision to uphold the complaint based on the evidence placed before it, and that a vital part of that evidence - the verification obtained from the database provider - for whatever reason, was missing.

4.2 Some aspects of the Appeal will be reproduced here in full:

4.2.1 The adjudicator decided that the complaint's belief was erroneous:

4.2.1.1 "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.”

4.2.2 Having dismissed the validity of the complainant’s claim, the Adjudicator then proceeded to weigh the evidence we submitted to WASPA in order to determine whether or not the complainant’s wife had consented to receive promotional material from third parties:

4.2.2.1 “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.**”

4.2.2.2 “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.**”

4.2.2.3 “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.**”

- 4.2.3 In fact we did, as the Adjudicator prescribes above, contact the database provider and obtain full verifying information; including the very personal information (date of birth, hobbies, etc) which the claimant's wife provided at the time she consented to direct marketing. This verification was submitted to WASPA in our initial response.
- 4.2.4 Verification that the complainant himself (our business competitor) was unable to dispute, leaving him with no option but to continue his complaint on the sole basis that the purchasing of this information was illegal.
- 4.2.5 A basis that the Adjudicator dismissed as invalid.
- 4.2.6 It is abundantly clear from the above statements, made by the Adjudicator, along with various other references made to the information we supplied, that the Adjudicator was not in possession of this crucial verifying evidence as provided by us, the IP, when compiling this report.
- 4.2.7 The adjudicator concludes its report with this reasoning:
- 4.2.7.1 "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."**
- 4.2.7.2 From this conclusion alone, it is indisputable that the Adjudicator made its decision to uphold the complaint based on the evidence placed before it, and that a vital part of that evidence - the

verification obtained from the database provider - for whatever reason, was missing.

4.2.8 The Appellant then also produced further “evidence” of the information obtained as support of proof for consent.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 Version 9.0 of the Code, in use from 31 March 2010 to 13 October 2010, applies.

5.2 Decision

5.2.1 After having read the initial complaint, the IP’s response, the subsequent adjudication and the Appeal by the IP, the Appeals Panel is aware of new evidence that have been submitted by the IP (Appellant).

5.2.2 The evidence presented assumes to indicate that the IP’s database provider (Atlas) in this matter did in fact obtain the Complainant’s opt-in to market to third parties which allegedly indicates explicit consent on behalf of the Complainant.

5.2.3 It is however difficult to establish if the alleged consent, obtained through the database provider extended to include marketing of any nature by third parties, such as the IP in this matter.

5.2.4 Without having seen an actual copy of the opt-in (either a telephone script or some form of real evidence – like a signature for example – which could be viewed apart from merely stating that consent has been obtained by reproducing certain information pertaining to the Complainant), the Panel only has the Appellant’s and / or database provider’s word in the form of an email, available as proof of such alleged consent.

5.2.5 The Panel is also not in agreement with the Appellant's assumption referred to in paragraphs 4.2.2 to 4.2.5 that the Adjudicator continued on the balance of evidence after it dismissed the validity of the Complaint

5.2.6 Although the Complainant raised the issue that he thought the selling of a database was illegal, and the Adjudicator's subsequent ruling that such sale is not necessarily illegal, the Complainant most certainly did not base his entire Complaint on the illegality of the database.

5.2.7 The Complainant, in his response indicated that he was not aware of the database provider and did not think that a database (over and above the legality thereof) could be utilised for SPAM.

5.2.8 The Complainant's Complaint is therefore one of SPAM, which is deemed to be a valid Complaint by this Panel.

5.2.9 It was on this assumption that the Adjudicator weighed in the evidence in front of him or her.

5.2.10 The validity of the Complaint was therefore never dismissed.

5.2.11 The Adjudicator in paragraph 3.1 stated that 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 from the data purchaser.

5.2.12 It is therefore clear that such legality could only be established once consent is established and hence the weighing up of evidence.

5.2.13 Notwithstanding the above, the Adjudicator also made it clear in paragraph 3.3 that the various laws applying to the legality is irrelevant and went on to state as referenced in paragraph 3.4 that 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. (Own emphasis added – Panel)

5.2.14 The Panel will therefore turn its attention to the evidence supplied to validate the “explicit consent” and the Adjudicator’s inference drawn on evidence presented.

5.2.15 The Panel refers to its paragraph 5.2.4 and persists in its arguing that such evidence does not purport or claim sufficient proof of “explicit consent”.

5.2.16 Although the Appellant’s action might have satisfied section 5.1.7 of the relevant version of the Code, the source of information and provision thereof to the Complainant in itself, is not sufficient in the opinion of this Panel to render proof of “explicit consent” and subsequent compliance with section 5.2.1 (c).

6. The finding of the Appeals Panel is:

6.1 The Panel concurs with the decision reached by the Adjudicator.

6.2 The Sanctions are considered extremely reasonable.

6.3 The Appeal is overturned.

The cost of appeal is non-refundable.