



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	TMobileSA
Information Provider (IP): (if applicable)	Sive Mobile
Service Type:	Commercial Communications
Complainant:	Competitor
Complaint Number:	10746 & 10747
Code version:	Code v 9.0 and Ad Rules v 2.3
Date of Report:	14 December 2010

1. Complaints 10746 and 10747 both relate to the same SP and IP as well as the same promotional competition, and consequently they will be treated together. As the documents in complaint 10747 set out the position more comprehensively, the facts of this complaint will be expounded first.

Facts of Complaint 10747

2. The Member was apparently acting as the SP for an IP referred to in the documentation as "SIVE Mobile". The IP was sending out bulk SMSes through the SP so as to publicise a certain promotional competition. The IP is not a member of WASPA.
3. On the 4th of October 2010 the Complainant, the employee of a competitor and member of WASPA, lodged the following complainant against the Member:

Date : 2616-10-04

waspa_Service : TMobileSA

Description : I have just received the following spam message, soliciting response to a premium rate short code:

"Stand a chance to win a Golf GTI sms keyword GTI to 47005. The more U sms the better Ur chance. For infor visit: www.sivemobile.com. SMS @ R2. Ts and Cs apply"

Originating number: +27820648440

The www.smscode.co.za website seems to be down so I am not sure which WASP 47005 belongs to.

I have had no prior commercial relationship with www.sivemobile.com whatsoever. The message therefore does not comply with WASPA code clause 5.2.1.

I would like to get information on where the sender obtained my number as required by the ECT Act and the WASPA code clause 5.1.7:

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.

Regards

[removed]

Dear Lorraine

I received two more of the same message:

The delivery times were: 16h34, 15h59 and 15h10.

Neither the shortcode 47005 nor the longcode 27820048440 appear on www.smscode.co.za

4. The complaint was sent to the Member per email by the WASPA Secretariat on the 6th of October. The Member responded the same day to the effect that it had shut down the competition that was being run by the IP "until it is approved". The WASPA Secretariat responded to this by repeating the Complainant's request for the SP to advise where his personal information (in this case his MSISDN) was obtained from. The Member suggested that the Secretariat request this information from the IP directly, but the Secretariat pointed out that as the IP was not a member of WASPA, it was not able to request this information directly. The Member then advised that it had put the query to the owner of the IP and was waiting for a response.
5. The Complainant received the same SMS on the 7th of October. The Member was advised of this and undertook to provide feedback. Later the same day the Member's CEO emailed the Secretariat to the effect that he had requested the IP to shut down its campaign until further notice, and that he had suspended the IP's short code.
6. A few hours later, the Member again emailed the Secretariat, this time with the news that the IP had admitted that its bulk SMS system had malfunctioned, resulting in multiple SMSes being sent to single MSISDNs. The IP had also agreed to stop the campaign. In response, the WASPA Secretariat again asked if the Member had found out where the IP got the Complainant's MSISDN from, to which the Member responded that it was still waiting for a reply.
7. Finally, on the 14th of October, and after further prodding from the Secretariat, the Member advised that the IP had told it that the IP had "received the number from

the following retail shop: Mac & Bean, edgars, Woolworths and etc.”, and that the IP was searching for the exact source.

8. The Complainant was not satisfied with this response and advised that he had never given his number to any of the companies listed. He cited section 5.2.1 (c) of the WASPA Code of Conduct and advised that as the number was provided by a 3rd party, the Member would need to show proof of explicit consent.
9. The Complainant's view was communicated to the Member on the 18th, and the Member advised that it was meeting with the IP that afternoon regarding the matter.
10. After more pressing by the WASPA Secretariat, the Member advised on the 2nd of November that the IP had refused to furnish them with the required information.
11. On receiving word of the Member's response, the Complainant on the 4th requested that the matter proceed to adjudication.

Facts of Complaint 10746

12. The Complainant in this matter is also employed by a competitor and WASP member. He lodged the following complaint on the 5th of October 2010:

WASPName: sivemobile.com

OtherID: 47005, +27820048440, sivemobile.com

Code_Breached: Received unsolicited SMS:

"Stand a change to win a golf GTi sms keyword GTI to 47005. The more U sms the better UR chance. For info visit sivemobile.com. SMS R2. tcs apply"

Detailed_Description_Complaint: Received unsolicited SMS:

"Stand a change to win a golf GTi sms keyword GTI to 47605. The more U sms the better UR chance. For info visit sivemobile.com. SMS R2. tcs apply"

www.smscode.co.za is giving Invalid Host error - couldn't lookup

Please note I've received this message 3 times today already - 14:26, 15:03 and 15:27...

13. It is apparent both that the content of the SMS in question is the same as that in complaint 10747, but that this Complainant also received multiple instances of the SMS.
14. The complaint was sent to the Member on the 7th, but despite the WASPA Secretariat sending the Member a reminder on the 14th of October, no response was ever received.

Portion of the Code Considered

15. The conduct complained of took place on the 4th and 5th of October 2010, and consequently the complaints are both subject to version 9.0 of the WASPA Code of Conduct, the following provisions of which are pertinent here:

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct

3.9.2. Where any information provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider.

...

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.

Decision

16. Given that the IP is not a member of WASPA, this complaint is in respect of the Member's conduct in its role as SP only.

Failure to Provide Source of Personal Information

17. The Member forwarded the IP's response to the Complainant's request for information in complaint 10747. The information provided, that the Complainant's personal information had been provided by one of several retailers was not sufficient to satisfy the requirements of section 5.1.7. Not only was the information nowhere near precise enough, listing as it did some of the largest retailers in South Africa, but it was not even a closed list. Moreover, the Complainant advised that he had never given his number to any of the three companies listed.
18. In the instant complaints, the "message originator" as set out in section 5.1.7 is the IP, not the Member. The IP is not a member of WASPA. It is clear that there is no obligation directly imposed by the Code of Conduct on the Member to provide the information required. The question to be answered then is whether the Member can be held liable for the IP's failure to render information as required in that section.
19. The provisions of section 3.9.2 of the Code of Conduct impose liability on members for the acts and omissions of information providers. In this matter, the "message originator" and the "information provider" are one and the same. The provisions of section 5.1.7 have clearly been breached by the IP, and the Member is consequently to be held liable for that breach.
20. The Adjudicator is mindful that it is often not equitable to hold Members liable in this way, but in this case the Member could reasonably have taken steps to ensure that the IP complied with the provisions of the Code of Conduct.

Transmission of Spam

21. It has not shown in either complaint that the messages concerned fell under one of the exceptions set out in section 5.2.1, and the Adjudicator thus finds that they constitute spam as contemplated.
22. Section 5.3.1 of the Code of Conduct forbids two discrete acts on the part of members: sending or promoting the sending of spam and not taking reasonable steps to ensure that their networks are used for the sending of spam. It is clear that in this instance the messages in question originated with the IP, and the Member has not been accused of promoting its transmission. Consequently we must examine the second leg.
23. There is nothing in the documentation provided to the Adjudicator to indicate what steps, if any, the Member took to prevent the transmission of spam over its network. Were this adjudication in respect of a single incident of spam, one might be tempted to say that failures occasionally happen with the best of systems, and that there is nothing to indicate that the Member's acts were not reasonable. However because two separate Complainants received the same spam message emanating from the IP, the Adjudicator believes that the facts speak for themselves, and that the Member has clearly not taken "reasonable measures" as required in section 5.3.1. Consequently the Member has infringed section 5.3.1 of the WASPA Code of Conduct.

Sanction

24. The Member's record with WASPA is generally a good one, and this has been taken into account in determining sanctions.
25. The Adjudicator imposes the following sanctions in respect of the Member's infringement of section 5.1.7 of the Code of Conduct in complaint 10747:
- 25.1. the Member is given a formal reprimand; and
- 25.2. the Member is fined the amount of R 2 000.
26. The Adjudicator imposes the following sanctions in respect of the Member's infringement of section 5.3.1 of the Code of Conduct in both complaints:
- 26.1. the Member is given a formal reprimand; and
- 26.2. the Member is fined the amount of R 10 000.

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