



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	HR Computek
Service Type:	SMS
Source of Complaint:	Competitor
Complainant:	Cindy Scheepers
Complaint Number:	10968
Date Received:	09 December 2010
Code Version:	10
Advertising Rules Version:	Not applicable

Complaint

The complaint was submitted through the WASPA online lodgement facility by Cindy Scheepers, for and on behalf of a message recipient who was “spammed”. Ms Scheepers noted her affiliation as a person employed by or otherwise associated with a certain other WASP, Integrat .

The salient aspects of the complaint are as follows:

- (i) The complainant avers that the SP is in violation of clause 5.1.7 of the WASPA Code of Conduct (*version 10*) in that:

the message originator is required upon request of a recipient of message, to, within a reasonable period of time identify the source from which the recipient's personal information was obtained; and the SP failed to secure such source information from the SP's client, the information provider (IP);

- (ii) Further, the complainant asserts that message recipient was "spammed"; and
- (iii) Further, the complainant submits that the practices of the SP vis-à-vis the SP's relationship with the Information Provider permitted the Information Provider's "free reign in our market without due diligence."

The complainant did not provide any further details relating to the nature or content of the message received by the message recipient.

The complainant raised however, additional concerns regarding the source of the data, indicating that it appears to have been "stolen". Whilst the complainant does not have proof to such effect, the complainant points out that, despite prior request, no information to the contrary has been received from the SP or the Information Provider.

The formal complaint was sent to the complainant on the 04th of November 2010, in accordance with section 14.3 of the WASPA Code of Conduct. The contents of the formal complaint included a recommendation from WASPA that the SP include as much of the following information as possible: logs pertaining to the message, information on how the service is/ was advertised; copy of the advertisement/ marketing material, statistics on the number of entries/ users of the service in question.

Service provider's response

The SP responded to the complaint on the 22nd of November by indicating that:

- (i) *The SP's client, the Information Provider was in use of a "test account" allocated to the Information Provider by the SP;*
 - (ii) *the Information Provider is based in the United Kingdom;*
 - (iii) *the SP did not have access to the Information Provider's data; and*
 - (iv) *the SP's relationship with the Information Provider was (subsequently) suspended and that the relevant account was closed.*
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Complainant's Reply:

The complainant responded on 22 November 2010 to WASPA's query on the satisfactory resolution of the complaint by the SP by providing as follows:

- (i) *more generally that the matter was not resolved;*
 - (ii) *that the complainant referred to the details of another complaint which has not yet been adjudicated;*
and
 - (iii) *more generally however the information received from the SP is "suspicious" and that the complainant was desirous of this matter being further investigated and adjudicated upon.*
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Sections of the Code considered

In order to determine whether the SP is in violation of the Code of the Conduct, reference has been made to relevant sections:

2. Definitions

- 2.13 An **“information provider”** is any person on whose behalf a wireless application service provider may provide a service and includes message originators.
- 2.23 **“Spam”** means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.
- 2.25 **“WASPA template agreement”** refers to a template agreement between a WASP/ aggregator and an information provider client as made available to WASPA's members.

3.9. Information providers

- 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.
- 3.9.3. A WASPA member shall, by obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider.
- 3.9.4. The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.
- 3.9.5. The member must act in accordance with the WASPA complaints and appeal process and if appropriate, suspend or terminate the services of any information provider.

4.2. Privacy and confidentiality

- 4.2.1. WASPA and its members must respect the constitutional right of consumers to personal privacy and privacy of communications.
- 4.2.2. Members must respect the confidentiality of customers' personal information and will not sell or distribute such information to any other party without the explicit consent of the customer, except where required to do so by law.

5.2. Identification of spam

- 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. Prevention of spam

- 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

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her.

With reference to (i) the complaint, (ii) the SP's response to the complaint, (iii) the complainant's reply and (iv) the sections of the Code considered:

On the issue of securing the source of the message recipient's contact information from the SP's client, the Information Provider, the SP has not, in my assessment, demonstrated that the SP has done everything in its power or authority to secure such source information.

The SP's submission pertaining to a "test account" interpreted, by me, as a trial account for which no monies are paid by the IP for the SP's services, does not, in my view detract from the SP's responsibilities in respect of its relationships with Information Providers as set out in 3.9 of the Code of Conduct. The SP is required to: (i) 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; and (ii) 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.

Further the SP, as per 3.9.2 of the Code of Conduct remains responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider

Whilst I note that the Information Provider's engagement with the SP was duly suspended, I have no evidence of the SP entering into a WASPA template agreement, a measure which would have considered a "diligent measure" and contrary to the complainant's contention otherwise.

On the issue of whether the message recipient was "spammed", the SP's response to the complaint does not attempt in any manner to dispute that the SP's client, the Information Provider did send an unsolicited commercial communication to the message recipient which makes the determination on whether the message recipient was spammed plain.

Further, I find that, in its engagement with the Information Provider, in the absence of instituting the necessary diligent measures, the SP has not taken reasonable measures to ensure that their facilities are not used by others for the purpose of sending spam.

In summation, I find the SP in violation of 3.9, 5.2 and 5.3 of the Code of Conduct.

I further draw the SP's attention to section 4.2 of the Code of Conduct pertaining to the SP's obligations to respect the privacy and confidentiality of customer's personal information. The SP's is urged to consider such obligations in its future engagements and ensure the institution of compatible business practices.

Sanctions

The SP is fined an amount of R 30 000.00 payable to the WASPA Secretariat within ten (10) days of receipt of this report.