



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Mira Networks.
Information Provider (IP) (if any)	Cell Life
Service Type	n/a
Source of Complaints	Anonymous
Complaint Number	11161
Date received	22 November 2010
Code of Conduct version	9.0

Complaint

The complainant alleges that they have received 3 (three) unsolicited sms messages of a commercial nature. The complainant has requested where the SP obtained their number and states that they don't recall any previous commercial contact with the IP.

The messages in question read as follows:

1. *"a new season of Siyayinqoba Beat It! Is on air on Sundays at 12:30 on SABC 1. Watch it to win big cash prizes every week. Protect yourself. Protect others."*
2. *"Springbok captain and Brothers for Life Ambassador, John Smit, inspired many when he publicly took a HIV test. Read more on brothersforlife.org."*
3. *"watch the great new season of Siyayinqoba Beat It! On Sundays at 12:30 on SABC 1 and stand to WIN R5000 each week! Remember: Protect yourself. Protect others."*

SP's response

The SP responded by advising that the numbers used for this campaign were obtained from Please Call Me lines hosted by Integrat on behalf of Cell Life.

The subscriber is on the list after sending a Please Call Me to the campaign, or a keyword SMS advertised in a campaign partner's media channel, or by physically opting-in.

The SP argues that the messages in question are not of a commercial nature and is rather part of an awareness campaign to help people be more vigilant about their health and their HIV / TB status.

Sections of the Code 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.

2.23. **"Spam"** means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.

5.1. Sending of commercial communications

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

5.1.3. For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

5.1.4. For SMS and MMS communications, a message recipient must be able to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). If replying 'STOP' as set out in 5.1.3 will result in a charge greater than the lowest tariffed rate available, then instructions for the lowest tariffed rate opt-out must be included in every message sent to the customer.

5.1.5. Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.

5.1.6. Where the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the service provider must honour the opt-out request as if the word 'STOP' had been used.

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.

5.1.8. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the upfront description of the service.

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.

5.2.2. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

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.

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

Decision

I appreciate that the television show being promoted by the messages sent to the complainant is in aid of worthy causes. However, the promotional messages explicitly advertise cash prizes for viewers who tune into the show. I therefore disagree with the SP's view that the messages are not of a commercial nature.

The SP has not provided proof that the complainant has requested the message, or that they had 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 that the complainant has given their explicit consent to receive the messages sent.

The SP has therefore contravened section 5.3.1.

The SP has also not provided a facility to allow the complainant to remove him or herself from the message originator's database, so as not to receive any further messages from that message originator.

The SP has contravened sections 5.1.2.

Sanction

The SP is hereby formally warned to amend this campaign to ensure that:

1. No unsolicited messages as defined in section 5.3.1 must be sent to consumers; and
2. The SP must provide a facility to allow message recipients to remove his or herself from the message originator's database, so as not to receive any further messages.