



REPORT OF THE ADJUDICATOR

Complaint reference number: 12547

WASPA member(s): Nashua Mobile

Membership number(s): 0013

Complainant: Competitor

Type of complaint: Spam

Date complaint was lodged: 4 April 2011

Date of the alleged offence: 1 April 2011

Relevant version of the Code: 10.0

Clauses considered: 3.9.1, 3.9.2, 3.9.3, 5.1.1, 5.2.1, 5.3.1

Relevant version of the Ad. Rules: Not applicable

Clauses considered: Not applicable

Related cases considered: Not applicable

Complaint and Response

1. This complaint relates to the transmission of spam by an IP using the SP's WASP portal to do so. Several complaints have been made by different persons concerning SMSes apparently relating to the same campaign.
2. The IP is according to the member a company called "Bayport Cellular" According to the WASPA membership list available on the WASPA website, the IP is not a member of WASPA.
3. The complainant works for or is otherwise associated with a competitor of the member, and wishes to remain anonymous.
4. The complaint was lodged with WASPA on 7 April 2011 in the following terms:
 - Code_Breached: SPAM/unsolicited SMS
 - No WASP name
 - No WASP contact

No pricepoint in shortcode reply request

Against electronic communication act - never requested nor gave permission for contact

Detailed_Description_Complaint: Received unsolicited sms on 1st April 2011 stating: Permanently employed for 6 months? Get a blackberry+additional phone airtime on contract SMS WAM to 32681 to apply reply STOP to opt out. Blacklisted welcome

5. The complaint was forwarded to the member on 4 April 2011 by the WASPA Secretariat. On 13 April, the Secretariat followed up with the member, which responded on 14 April. In its response, the member advised that it could identify the IP in question as "Bayport Cellular" but that it did not have the complainant's MSISDN, and could consequently not block or unsubscribe the complainant from further SMS messages. The member consequently requested that the secretariat obtained the complainant's MSISDN.
6. The secretariat immediately requested this information from the complainant, who provided it the following day.
7. On 15 April, the member advised that the IP had suspended all marketing SMSes, pending the outcome of this and other complaints relating to the campaign in question.
8. The WASPA Secretariat forwarded this news to the complainant and also requested whether the member had not resolved this complaint to his satisfaction. The complainant was unclear in his response, but seemed to be of the view that the matter was not resolved.
9. Despite the member's protestations that the complainant had been contacted and the matter resolved, the WASPA Secretariat on 28 April advised the member that the complaint had not been resolved and that it would be proceeding to adjudication.
10. The adjudicator requested the Secretariat to request further information from the member in the following terms:

Can the member provide a copy of documentation whereby it bound the information provider to ensure compliance with the WASPA Code of Conduct as required by section 3.9.1 thereof?

If the member has signed a template agreement with the IP as set out in section 3.9.3, can it provide a copy?

Can the member set out the measures it takes to prevent its facilities from being used by information providers for the purpose of sending spam as contemplated in section 5.3.1?
11. The member's response to the first request was to send a copy of its standard terms and conditions to the Secretariat. This document appeared to the adjudicator to be its standard cellular services contract, and not to relate specifically to the provision of Wasp services to IPs. The adjudicator directed the secretariat to confirm with the member that it had provided the correct document. The member assured the secretariat that it had, and that the services referred to in this document are "...the SMS Gateway product which is the bearer of the SMSs to the four Networks."

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12. The terms and conditions make no reference to unsolicited communications, but clause 3.10 thereof binds the member's customer to the WASPA Code of Conduct, and the member's Acceptable Use Policy.
 13. The member's AUP is available on the member's website, but does not mention spam SMS specifically, the most relevant sections being:

Laws and Regulations

2. Transmission, distribution or storage of any material on or through the infrastructure in violation of any applicable law or regulation is prohibited.

Email use

1. It is explicitly prohibited to send unsolicited bulk mail messages ("junk mail" or "spam") of any kind (commercial advertising, political tracts, announcements, etc). This is strongly objected to by most Internet users and the repercussions against the offending party and Nashua Mobile can often result in disruption of service to other users connected to Nashua Mobile.

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8. In the event that the user engages in any one or more of the above practices, which shall be determined at Nashua Mobile's sole discretion and whose decision shall be final, then Nashua Mobile shall be entitled to:

- Terminate, without notice...

14. The WASPA Code of Conduct of course deals with unsolicited communications in some detail.
15. The member's response to the second request was to refer the adjudicator to its standard terms, which the adjudicator takes to mean that it did not sign a separate template agreement with the IP.
16. As to the third request, the member, after some prodding, advised that given the sheer number of SMSes that pass through its SMS gateway from hundreds of customers, it has no capacity to monitor traffic for possible spam, and relies on its customers to comply with its terms and conditions.

Sections of the Code considered

17. The conduct complained of took place during April 2011, and consequently version 10.0 of the code of conduct is relevant to this complaint.
18. The complainant works for a member of WASPA, and should consequently have been able to identify the relevant sections of the code of conduct relating to this complaint. Nonetheless, he has given sufficient information to determine that the following sections are relevant:

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.

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

19. Let us deal with the alleged infringing quality of the message itself first. There seems to be no doubt that the SMS was unsolicited, and that it constituted a commercial message. Consequently the message constitutes spam as contemplated in section 5.2.1 of the Code.
20. Were the IP the subject of this complaint, there would be little doubt that it had infringed section 5.3.1 of the code of conduct, and it would be sanctioned accordingly. However, it is the member's conduct that is at issue here.
21. There are two separate issues to decide in this adjudication. Firstly, is the member liable in any way for the IP's misconduct as determined by sections 3.9.1, 3.9.2 and 3.9.3 of the Code of Conduct? A second and unrelated question is whether the member took reasonable steps to ensure that its facilities were not used by the IP in sending spam.

Member's Liability for the IP's Infringement (section 3.9.2)

22. Section 3.9.1 of the Code of Conduct requires that members should bind IPs to ensure that they do not contravene the provisions of the Code of Conduct. In this case the member has made the IP agree to the terms of the WASPA Code of Conduct in its standard terms and conditions. Failure to adhere to any of these policies constitutes a breach of contract. The relevant provisions are tucked away in the small print and it seems doubtful that the IP's attention was drawn to it, but the member has nonetheless complied with the provisions of section 3.9.1.
23. Section 3.9.2 applies specifically to the situation in this case, where the IP is not a member of WASPA, but uses the member's facilities to conduct an activity governed by the Code of Conduct. In such a case the member has a

duty to ensure that the IP is made aware of the relevant sections of the Code of Conduct, and the member remains liable for any breach of the code as a result of the actions or omissions of the IP.

24. Section 3.9.3 in its turn qualifies section 3.9.2. If the member has obtained the IP's signature on the WASPA Template Agreement (a template agreement between SPs and IPs that is made available by WASPA), then the member will be deemed to have taken all reasonable steps to bring the provisions of the WASPA Code of Conduct to the IP's attention. This will then be counted as a mitigating factor in determining the member's liability in respect of the IP's breach.
25. Note that signature of such a document would be a mitigating factor, and will not necessarily exclude such liability.
26. In the event, the only document that the IP signed was the member's standard terms and conditions, not the template agreement. The adjudicator examined the standard terms to determine if it at least contained the material clauses of the template agreement, but sadly it does not. Such material clauses would include the requirement that the IP become a member of WASPA should the member require, and the member's right to retain funds due to the IP in the event of WASPA complaints. The member can hence not rely on the provision of section 3.9.3 to avoid liability for the IP's actions in this instance.
27. There is no indication that the member has made any effort to bring the provisions of the WASPA Code of Conduct to the attention of the IP beyond expecting it to read the standard terms and conditions, see the reference to the WASPA Code of Conduct and read that. Certainly the member would have been expected to advise the secretariat of any further steps taken after receiving the questions put to it at the request of the adjudicator.
28. There are no other mitigating factors set out in section 3.9.2 that can affect the adjudicator's decision.
29. Given the fact of the infringement of section 5.3.1 of the Code of Conduct by the IP, the member is accordingly held liable under section 3.9.2 for the IP's actions which infringed section 5.3.1 of the Code of Conduct.

Spam (section 5.3.1)

30. The message complained of has been determined to be spam. Did the member take reasonable steps to prevent its systems from being used to send spam?
31. The member by its own admission does not monitor traffic through its SMS gateway or take any measures to actively prevent spam other than to make use of its facilities subject to the WASPA Code of Conduct and its AUP. The AUP does not address SMS spam directly, and appears to deal only with spam transmitted by email.
32. This complaint involves the same member and IP as complaint number 12585. In that matter it is apparent that the spam SMSes were sent as a result of a mistake by the IP. Consequently the adjudicator cannot see what steps the member could have taken in this instance to prevent its facilities

from being used in this way. The member has not breached section 5.3.1 of the Code of Conduct.

Sanctions

33. Notwithstanding the member's breach of section 3.9.2, the adjudicator is mindful of recent revisions made in version 11.0 of the WASPA Code of Conduct which insert a new section 3.9.3 in the following terms:

3.9.3. Notwithstanding clause 3.9.2, where an information provider makes use of a member's facilities for the sending of spam or fails to comply with the provisions of 5.1.10, the member shall not be liable for any such breach unless the member failed to take the reasonable measures contemplated and provided for in 5.3.1.

34. While section 11.0 does not apply to this adjudication and the adjudicator could impose a sanction in respect of the member's breach, it would be unjust to do so where the code has changed as described. Moreover, the member's record of code infringements is by no means a poor one. Consequently no sanction is imposed on the member.

35. The adjudicator does however make the following recommendations to the member:

35.1. Either have IP clients sign the WASPA Template agreement or incorporate its terms into a specific WASP agreement;

35.2. Change the AUP to refer to spam in any form, not just email.

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