



REPORT OF THE ADJUDICATOR

Complaint reference number:	16511
WASPA member(s):	Strike Media
Membership number(s):	0014
Complainant:	Public
Type of complaint:	Spam
Date complaint was lodged:	2012-02-23
Date of the alleged offence:	10 February 2012
Relevant version of the Code:	11.6
Clauses considered:	Clause 3.9.1; 3.9.2; 3.9.3; 3.9.4; 5.2.1; 5.2.2; 5.2.3; 5.3.1; 5.3.2.
Relevant version of the Ad. Rules:	Not applicable

Related cases considered:

Complaint

The Complainant complains that he unsubscribed from all of the Service Provider's marketing messages and yet continues to get spam messages.

Service provider's response

The Service provider stated that the message received by the Complainant, although sent using their infrastructure was not from them but from an Information Provider (SMS Smart) that uses their infrastructure.

Sections of the Code considered

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 or the Advertising Rules.

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. 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.

3.9.4. 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. Identification of spam

5.2.1. Any direct marketing message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a prior commercial relationship with the message originator and has been given a reasonable opportunity to object to direct marketing communications
 - (i) at the time when the information was collected; and
 - (ii) on the occasion of each communication with the recipient; 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. Any commercial message is considered unsolicited after a valid opt-out request.

5.2.3. 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

The Service Provider communicated that the message in question was in fact sent by an information provider with whom they have contracted.

In terms of the Code of Conduct, although a Service Provider is liable for breaches of the WASPA Code by information providers using their facilities, in the case of spam, and as set out in clauses 3.9.2, 3.9.3, 3.9.4, 5.1.10 and 5.3.1 of the Code, if the Service Provider took the step of binding the information provider in contract to comply with the WASPA template agreement, they will be deemed to have taken all reasonable measures as required by the Code and as such not be liable for spam sent by the information provider.

The Service Provider did enter into an agreement compliant with the WASPA template with the information provider requiring them to adhere to the WASPA Code.

In this instance and based on the facts before me I find the Service Provider not to be in breach of the Code but would suggest, if they have not already done so, that should the information provider continue to send spam that they contractually oblige the information provider to register as a WASPA member as a requirement of utilising the Service Provider's facilities so the information provider can be sanctioned by WASPA.

Sanctions

None