

REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Altech Autopage Cellular
Information Provider (IP): (if applicable)	Blue World Agencies CC t/a SMSPortal
Service Type:	Bulk Messaging
Complainant:	Consumer
Complaint Number:	1743
Code version:	Code v5.3 and Ad Rules v1.6

Complaint

1. The history of this complaint is rather a convoluted one, involving a series of stops and starts, uncertainties as to the origin of the messages concerned, and changes of originating number.
2. On the 3rd of August 2007 the Complainant registered a complaint on the WASPA website, the relevant parts of which read as follows:

Affiliations: I am not employed by, or otherwise associated with one of WASPA's Member companies

Affiliation_Information:

Name_WASP: Unknown

OtherID: +27832287420

Code_Breached:

Detailed_Description_Complaint: Weekly unsolicited SMS messages sent to: XXXXXXXXXXXX and XXXXXXXXXXXX

Messages sent from +27832287420.

contact no on messages = 0219794660. Never any answer on line (tried phoning in order to request removal from database).

Tick_as_appropriate: I am unable to determine who the service provider is

3. Following the submission of the complaint, the WASPA Secretariat established that the originating number was part of a package allocated by MTN to the Member.

4. In an e-mail of the 8 August 2007 the Complainant advised WASPA that he had established from the Member that the number in question was allocated to Blue World Agencies CC t/a SMSPortal. The Member's employees told him however that they were unable to assist him but that he should lodge a complaint with WASPA. He was further given a number at which he could apparently contact the IP. He attempted to do so but the number did not work.
5. On the 15th of August 2007 Complainant sent a further e-mail to WASPA advising him that he had received another SMS from the same number as listed in the complaint on that day.
6. On the 24th of August 2007 WASPA referred the complaint to the Member for informal resolution in terms of clause 13.2 of the Code of Conduct.
7. On the 30th of August 2007 the WASPA Secretariat followed up with the Member for a progress report on the resolution of the complaint and on the 3rd of September 2007 received an e-mail from the Member confirming that the messages in question were sent by the IP on behalf of the IP's client "Guru Lounge". The Member advised further that it had been in contact with "Guru Lounge" and had been advised by one Odette that the Complainant had been removed from the relevant distribution list. This communication was forwarded to the Complainant on the same day.
8. On the 7th of September 2007 the Complainant received a further SMS from the IP, this time from the number 083 233 2827 and to the second of the numbers that he lists as his in the complaint.
9. On the 10th of September 2007 the WASPA Secretariat advised the Member by e-mail that the complaint had been escalated to a formal complaint in terms of clause 13.3 of the Code of Conduct. The escalation of the complaint was communicated to the Complainant on the same day.
10. On the 19th of September 2007 the Complainant advised the WASPA Secretariat at he had received two further messages from the IP, one on the 14th of September and one on the 19th of September. Both messages were sent to his second number. The Complainant did not specify the originating number, but we can assume from the context that it was 083 233 2827.
11. On the 20th and 27th of September 2007 and the WASPA Secretariat sent reminders by e-mail to the Member to respond to the complaint, which reminders elicited no response.
12. On the 9th of October 2007 the WASPA Secretariat de-escalated and closed the complaint as it related to the originating number listed in the original complaint, but proceeded to confirm the origin of the number from which subsequent messages had been sent - 083 233 2827.
13. On the 10th of October 2007 the Complainant confirmed by e-mail that the content of the subsequent messages was the same as that in the initial complaint.

14. On the 10th of October 2007 MTN confirmed by e-mail that the second originating number was also assigned to the Member.

Complainant's Response

15. On the 19th of October 2007 the Member forwarded responses by the IP to several related complaints, including this one. The response by the IP to this complaint was apparently a generic response to several complaints:
 - 15.1. The response set out the technical measures put in place by the IP to allow for users to unsubscribe from their services. The upshot of these measures is that incoming replies containing the words "stop", "delete", "remove", and "unsubscribe" are noted, and the corresponding user's mobile number is removed from the relevant mailing list. The IP also has a global "blacklist" of numbers that SMSs are not to be sent to under any circumstances.
 - 15.2. The IP advised that the Complainant had "...a 'relationship' (store card, cellphone account or opted into a mailing list)..." with Guru Lounge. No proof of that relationship was forthcoming however.
 - 15.3. The IP assured further that the Complainant would receive no further SMSs from it.
 - 15.4. It appears from a schedule of mobile numbers to which messages had been sent and received, which was provided by the IP in its response that no SMS was sent to the IP by the Complainant requesting removal from a distribution list. Moreover, it is apparent from the complaint itself that the Complainant attempted to phone the IP to have his details removed from their mailing list, but never sent an SMS to it requesting to be unsubscribed.
16. The above submission was accompanied by a request for guidance by the Member's Commercial Legal Manager, who asked whether it will be feasible to forward the IP's response to the Complainant in the hope that the undertaking that no further SMSs would be received from the IP would satisfy the Member.
17. On the 25th of October the WASPA Secretariat responded to the Member, advising it that as the complaint had been escalated to a formal complaint, WASPA would be obliged to hand the matter to independent adjudicator for review should it not receive confirmation that the complaint had been satisfactorily resolved.
18. The Member responded on the same day advising that an attempt would be made to contact the Complainant and resolve the matter, and immediately forwarded the IP's response to the Complainant.

Complainant's Reply

19. On the 29th of October 2007 the Complainant responded and rejected the IP's response on the following grounds:
 - 19.1. He had never had any contact with the IP's client (Guru Lounge) and did not sign up for their distribution list.

- 19.2. He tried to contact Guru Lounge on several occasions by telephone to have his details removed from the distribution list. Messages left for their marketing manager to contact him were not returned.
- 19.3. There was no indication given in the body of the SMSs concerned as to how to unsubscribe.
- 19.4. It should be noted that the Complainant did not wish to respond by SMS in any event, as he was concerned that this would constitute proof that the number was in use and thus lead to continued receipt of unsolicited messages.
- 19.5. The Complainant attempted to contact the IP with his complaint, but was given the run-around and was unsuccessful in resolving the complaint through his own endeavours with them.
- 19.6. The IP never gave an explanation to the Complainant for how both his work and private mobile numbers were added to the distribution list in question.
- 20. On the 30th of October the WASPA Secretariat again contacted the Member for a report on progress in resolving the complaint, and forwarded the Complainant's response to the Member.
- 21. On the 6th of November 2007 the Member e-mailed the Complainant with an undertaking from the IP, which unfortunately related to complaint 2074 and not this complaint.
- 22. There is no further correspondence on record.

Portion of the Code Considered

- 23. While no clauses of the WASPA Code of Conduct are cited in the complaint, it is trite that Members of the public cannot be expected to quote chapter and verse of the Code of Conduct. The adjudicator is thus competent to decide what aspects of the code are likely to have been infringed in any particular complaint.
- 24. This matter revolves around the sending of unsolicited commercial emails as set out in clause 5 of the WASPA Code of Conduct:

5. Commercial communications

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. Any mechanism for allowing a recipient to remove him or herself from a database must not cost more than one rand.

5.1.4. Notwithstanding 5.1.3, for SMS and MMS communications:

- (a) 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 must be included at the start of any messaging service, for example: "reply STOP to opt out".
- (b) Recipients of premium rate or non-replyable messages must have the option to opt out at a cost of R1 or less. This opt-out instruction must be included in every commercial premium rate or non-replyable message, for example. "sms STOP to 32xxx to opt out".

5.1.5. 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.

5.1.6. 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 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.

25. On examination of the facts, the clauses of particular concern in this matter appear to be:

25.1. **5.1.4 (a)** in that there was allegedly no unsubscribe instruction in the SMS messages concerned and that the Complainant apparently had difficulty removing himself from the IP's distribution list,

25.2. **5.1.5** in that the source where the IP obtained the Complainant's personal information from may not have been adequately identified,

25.3. **5.3.1** in that the commercial messages in question may have amounted to spam, and

25.4. **5.3.2** in that the Member may not have dealt with the complaint of spam in an expeditious fashion.

Finding

26. **Clause 5.1.4(a)**: it is unfortunate that no copy of the offending SMSs was provided by the Complainant. The IP's version is that it has a mechanism in place that would certainly support the procedure prescribed in clause 5.1.4(a) of the Code of Conduct. However, the IP is silent as to whether the SMSs in question actually contained the instructions as contemplated in clause 5.1.4(a). On the Complainant's version, no such instructions were given in the SMSs.
27. On balance then, I am inclined to believe that unsubscribe instructions were not included in the SMSs in question, and I can accordingly find that an infringement of clause 5.1.4 (a) has taken place. This conclusion is strengthened by the fact that complaints 1986 and 2090, adjudicated simultaneously with this complaint, also involve breaches of this clause – the breach thus seems to be systemic.
28. As an aside, the fact that the IP took some time to remove the Complainant from its distribution list once the Member became involved in the dispute is largely a result of the Complainant having two numbers on the distribution list and the confusion that resulted from that.
29. **Clause 5.1.5**: despite a request on the part of the Complainant in his e-mail of the 29th of October 2007 (forwarded to the Member on the 30th of October 2007) as to where the IP's client obtained the Complainant's personal information, no indication was given beyond the very generic answer contained in the IP's response of the 25th of October 2007. In the ordinary course such a lack of response would certainly constitute a breach of this clause. Unfortunately, given the complexity of the "e-mail trail" it is difficult to determine whether such a response was ever in fact given. Under the circumstances I am forced to give the IP the benefit of doubt in that it may have replied, which reply is not on the record. I accordingly find that this clause has not been breached.
30. **Clause 5.3.1**: as set out above, clause 5.2.1 defines spam as any commercial communication where the recipient has not requested such a communication, does not have a "direct and recent prior commercial relationship" with the message originator or where the recipient's contact information has not been supplied to the message originator with the recipient's consent.
31. It does not appear from the facts that any of these three grounds have been established. The Complainant's version is certainly that he did not opt into the receipt of SMSs under any of the three grounds above; the generic response given by the IP certainly does not go any distance in establishing that it can rely on any

of these three grounds in respect of the Complainant in particular. There is thus no doubt that the messages in question constitute spam.

32. The next question the is to determine whether the SP took adequate measures to prevent the sending of spam as required by the Code of Conduct. This is always a difficult enquiry to undertake, but given that spam was also sent by the same IP around the same time in complaints 1986 and 2090, *res ipse loquitur* - the clause has clearly been infringed in this case, a conclusion that is strengthened by reference to paragraph 34 of this report.
33. **Clause 5.3.2:** this clause places a duty upon Members of WASPA to deal expeditiously with any complaint of spam emanating from their networks. It is clear from the WASPA Secretary's correspondence with the Complainant that the Member's employees were anything but helpful in this regard. The Member was furthermore tardy in responding to the Secretariat's requests for feedback, and it was only on the 19th of October, some 2 ½ months after the initial complaint, that a response of any substance was finally received from the Member. It is apparent however that from this date the Member made an effort to deal with the matter. Nonetheless, the Member is found to have breached the provisions of this clause.

Sanctions

34. I note the decision of the adjudicator in complaint number 936, involving the same Member and IP, and also involving the sending of unsolicited commercial messages. The adjudicator found breaches of clauses 5.1.2 and 5.3.1, issued the Member with a formal reprimand and ordered it to suspend its service to the IP until such time as it was in compliance with the provisions of the Code of Conduct, especially clause 5.
35. This matter also deals with the unsubscribe facility (5.1.4 (a) in the instant complaint rather than 5.1.2) and with 5.3.1 of the Code of Conduct. The report in complaint number 936 was issued on the 6th of March 2007. I have no knowledge as to whether the suspension order by the adjudicator in that matter was actually carried out, and **the WASPA Secretariat is directed to investigate this aspect with a view to initiating a further complaint.**
36. The fact that the present complaint stems from similar facts to those of complaint 936, arising from a relationship between the same Member and IP, is a substantial aggregating factor. Spam is moreover the bane of the industry and should be dealt with firmly. Consequently, the following sanctions are imposed:
 - 36.1. If it were shown that clause 5.1.2 had been breached, a heavy fine would have been levied. As it is, a fine of R 2 500 is imposed upon the Member for the breach of clause 5.1.4 (a) of the WASPA Code of Conduct.
 - 36.2. A fine of R 5 000 is imposed upon the Member for its breach of clause 5.3.1 of the WASPA Code of Conduct.
 - 36.3. The Member is issued with a formal reprimand for its breach of Clause 5.3.2.

- 36.4. The Member is ordered to suspend its services to the IP for a period of at least 14 days or until such time as it has satisfied itself that the IP is in compliance with the provisions of clauses 5.1.4 (a) and 5.3.1, whichever is the longer period. Once the IP has complied the Member will immediately confirm its opinion that the IP is in compliance with the WASPA Secretariat in writing. This suspension is to run simultaneously with those imposed in complaints 1986 and 2090, unless the decisions in those other complaints are appealed.
- 36.5. The WASPA Secretariat is ordered to notify all WASPA Members of the suspension set out above and to advise that if any of them offer services to the IP during the period of such suspension it will constitute a breach of the WASPA Code of Conduct.