



REPORT OF THE ADJUDICATOR

WASPA Member:	US Cellcom
Service Type:	Subscription
Complainant:	WASPA Monitor
Complaint Number:	22254
Code Version:	12.4
Advertising Rules Version:	Not applicable

Complaint

The original cover letter to the complaint reflects the Media Monitor's conclusions and reads as follows:

A Commercial Message was received on the media monitor's mobile phone. This number has never been used for testing purposes, nor ever used to download content in a private capacity.

Following the receipt of the SMS, the Tester ran a test on a test phone and attempted entry into the subscription service.

Problems areas therefore are:

The commercial message received is considered SPAM and a relationship with [number removed] needs to be proven.

The DOI message must be reworded as suggested to make DOI more effective and replace the term TXT with SMS.

This message currently inspires fear, as should a spouse see this on their significant other's mobile, it could cause unrest in their relationship.

The auto subscription on [number removed] needs to be clarified.

TEST PHONE: No welcome message was received.

TEST PHONE: No termination of service notification was received.

In addition, the attachment from the Media Monitor raised certain other issues. I will canvas the full complaint as set out in the attachment below.

In the time leading up to the adjudication, but after the WASP's response, the Media Monitor also:

- [Requested proof of consent to receive the commercial message
- [Requested sight of the logs
- [Added clauses to the complaint

On 5 February 2014 the Monitor said:

I am happy to try avoid an adjudication, as I understand that this service was shut down by an emergency panel.

Therefore, all I am waiting for is the following, and then we will consider closing this complaint:

1. Provide the Consent I supposedly gave to receive the commercial sms received on [redacted]
(ILONKA GRAY PERSONAL PHONE)
2. An explanation as to why I was subscribed to this service - I HAVE NEVER subscribed to ANY service on my personal phone.

On 18 February 2014 the Monitor said:

Please proceed to adjudication on this complaint.

I have exhausted my efforts in trying to get a clear answer to a clear ques_on.

What I needed, was proof of my consent, which I have not received.

US Cellcom have again provided me with the name of the company who holds my informa_on, when I clearly asked for proof of opt-in to receive such information.

This is therefore a spam complaint.

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.
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WASP's response

The WASP responded to the points raised in the Monitor's original complaint and addressed, to some extent, the later points. I will discuss this matter in full below.

Sections of the Code considered

The following clauses were cited originally:

3.7.1. Members will not provide any services or promotional material that: . . .

(c) induces an unacceptable sense of fear or anxiety;

8.1.1. Any adult service must be clearly indicated as such in any promotional material and advertisements.

10.2.2. Providers of contact and dating services must take reasonable steps to ensure that no children use the services.

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

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 - 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.

5.1.11. Upon request of the recipient of a direct marketing message, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained, and provide proof that the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as subscription services. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

11.2.6. The confirmation message sent in response to a subscription request (such as that described in 11.2.5, or triggered by entering a mobile number on a web site) must include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].

11.5.1. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message should not be mistaken for an advert or marketing message. The customer may not be charged for this message.

11.9.10. When a customer has requested that they be unsubscribed from a service, an unsubscribe notification must be sent to that customer, and must use the following text format, flow and wording:

You've been unsubscribed from [service name].

or

You've been unsubscribed from [service name]. To resubscribe [service activation instructions]. You'll then be resubscribed at [cost of service and frequency of billing].

The following clauses were subsequently added:

3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

Sections of the Advertising Rules considered

ABBREVIATIONS

Indication Correct Abbreviation Wrong Abbreviation

Message SMS Sms or msg or MSG or msgs or
txt or txts

Decision

This matter has been a frustrating one to consider, and I wish to draw all parties attention to certain procedural issues that concern me, even though the subsequent events render them irrelevant to the actual decision:

- [Because of the ongoing correspondence in this matter, it is impossible to determine which behaviours have been remedied and which have not. For meaningful adjudications, the Monitor must not enter into extended back and forth discussions with the WASP.
- [I am not convinced that all the Monitor's concerns were put to the WASP. This is of course another reason that complaints should not be supplemented and changed. In particular, the new clauses were 'slipped in' at formal adjudication stage and the WASP's attention was *ex facie* never drawn to them.
- [I believe that the WASP has made reasonable attempts to respond. At stages, I was confused so it is not surprising that their responses were not always on point. I understand that this matter was personal for the Monitor, involving as it did her own phone number. However, the Monitor must refrain from making observations that are beyond the scope of the contents of her reports.

This all having been said, it appears to me that despite the 57 documents before me, there is only one issue that is still “live” at the time of this formal adjudication and that is the question the Monitor raises in her mail of 18 February 2014, a question which was put to the WASP on a number of occasions. It is apparent to me that this is the only issue proceeding to formal adjudication.

The question is whether the Monitor consented to receipt of marketing communications.

The relevant clause reads:

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

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- c. the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

The WASP explained:

US Cellcom is a service provider making use of various advertising channels to promote and advertise TopPhoto as a subscription service to the South African market. One of these marketing channels is bulk messaging provided by www.globalists.eu. The number in question [redacted] was part of the database provided by this marketing company.

The WASP does not appear, from the material before me, able to provide any proof of consent from this company. Clause 5.2.1 (c) therefore does not appear to be met and the WASP is in breach of this clause.

While I understand that the original “wrong” may have been committed by the marketing company, there remains a duty on WASPs who buy databases to ensure that the database is legally compiled and that the requirements of the WASPA Code are met.

Sanctions

While I understand the WASP's frustration in the manner in which communication has been handled in this matter, I am also disturbed by its willingness to simply rely on a bought database as a defence to an allegation of unsolicited spam. This is a serious issue that requires the full attention of the WASP and cannot simply be shrugged off.

I therefore impose a fine of R100 000 on the WASP.

I also advise the WASP to acquaint itself with the pending data collection laws in South Africa.