

WASPA Member (SP)	Marketel
Information Provider (IP)	N/A
Service Type	Unsolicited SMS & Unlawful conduct
Source of Complaint	Bill Rogers
Complaint Number	#4535
Code of Conduct Version	5.7
Date of Adjudication	07/09/2008

Complaint

The Complainant raised the following complaint: "I received this unsolicited - and frankly unwanted - sms from an unknown source. It goes as follows: Hi! I'm Lisa. I'm a Hot Hustler girl horney for you! SMS GO to 42653 so we can get it on. PS: Ill show u my private pics. R30/sms. Opt out sms STOP to 31335. It came from the number 084000121300"

SP Response

The Response provided by the SP is reproduced in full:

"The promotional message was sent out to those who replied to a previous campaign run by the information provider. So we are comfortable that we have not sent unsolicited communications. Also, we received the abovementioned replies during April and May as per the logs attached.

What is happening here is that the information provider is marketing a new service to those who have responded to ads in their magazine as recently as April. It is an invitation to use the service.

If the recipient sent the word GO to 42653 the very first message they would receive is an automated message sent by our system with the words: "You have accessed an ADULT ONLY (+18) sms chat service. Each SMS will cost you R10. Replies sent to you are free"

Further to this:

- provider has 48 hours to reply. After 48 hours replies are blocked
 - provider does further age verification within the chat.”
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Sections of the Code considered

The following sections of version 5.7 of the Code of Conduct were considered:

2.9. 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.

2.16. A “message originator” is the entity sending a commercial message and can be any person with a commercial arrangement with a WASP to send commercial messages, or a WASP directly.

2.22. “Spam” means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.

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.

5.3.1. 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.

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Explicit confirmation of a user’s age must be obtained prior to the delivery of an adult content service.

8.1.4. Marketing messages (including commercial communications) may no longer be sent to a customer of an adult service if that customer has not made use of the service during the preceding three months. This is to prevent the accidental marketing of such services to children as a result of a recycled telephone number.

Decision

In adjudicating a matter, the Adjudicator has to rely on the information provided to him/her.

It is regretful that the SP in this matter has not made any real effort in providing more evidence to support its claims.

The Adjudicator is of the opinion that although the SP provided proof in the form of its logs, it failed to substantiate any terms and conditions that could have accompanied the advertisement in the magazine.

In adjudicating whether a commercial message is spam, one has to take caution when analyzing the following section of the Code of Conduct:

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.

It is clear that the Complainant in this matter has indeed not requested the message.

It also appears that the Complainant did not give his / her **explicit** consent.

The SP might argue that the Complainant had a direct and recent prior relationship with the SP / IP and would reasonably expect to receive marketing communications from the originator.

This is where the Adjudicator strongly disagrees. The Adjudicator is of the opinion that there was **no recent** relationship and that in this case there was **no reasonable expectation** by the Complainant to receive any marketing communications. The Adjudicator further refers to the WASPA Advertising Rules' section 5.3.8 with regard to distribution lists:

- If by requesting any Content or accessing a service, the consumer so doing is automatically placed on a distribution list that will continuously or periodically send that consumer further related or unrelated

communications from that Content provider or any other Content provider or advertiser, then the T&C text must explicitly specify in the T&C that updates will be sent until cancelled.

In the absence of any Terms and Conditions or proof thereof, the Adjudicator in considering all of the above, is of the strong opinion that none of the exclusions as are stated in section 5.2.1 of the Code of Conduct were fulfilled.

The Complaint with regards to unsolicited messages is upheld.

With regards to sections 8.1.3 and 8.1.4 of the Code of Conduct the Adjudicator has taken the timeline in consideration as well as the verification system suggested by the SP in this matter. The Adjudicator is satisfied that none of these sections have been breached.

However, WASPA Advertising Rules' section 5.3.8 with regard to distribution lists states the following:

- A sender to a distribution list may not send any Adult Content, nor send advertisements that link to Adult Content, nor send any advertisements that contain Adult themes, Age Restricted Content sexually suggestive Content and language to consumers that have not previously **expressly requested** such Content or would not **reasonably expect** to receive such Content.

The Adjudicator does not feel that the SP fulfilled this criterion and finds the SP in breach of the Advertising Rules.

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of section 5.3.1 of the Code of Conduct and 5.3.8 of the WASPA Advertising Rules;

The SP is fined the sum of R5 000, 00 payable to the WASPA Secretariat within five (5) days of notification hereof.

The SP is further ordered to amend its advertising in order to comply with the WASPA Advertising rules before further placement and subsequently instructed to withdraw any current advertisements which are not complying with the said rules (including the disputed advertisement in this matter).
