



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Blink Mobile
Information Provider (IP) (if any)	
Service Type	Subscription service
Source of Complaints	WASPA Monitor
Complaint Number	6886
Date received	25 June 2009
Code of Conduct version	7.4

Complaint

The complainant states that the SP sent an unsolicited commercial email containing a link to its "Love Test website. The following complaints were raised:

1. The recipient did not give permission to receive such emails;
2. The "Love Test" is a quiz that is being used as a marketing tool in order to sell subscription services.

The relevant link is:

<http://celldorado.com/ZA/ADS/1959628553/index.php?trackid=301224497>

The complainant believes this to be a serious contravention of the code which could not be resolved informally.

SP's response

The SP has stated that the marketing email sent was only sent to persons who had actively given permission to receive commercial offers from them. These people are not customers of the SP but have signed-up to receive marketing emails through one of its web campaigns. The SP denied that it sends out spam emails.

The SP attached a screen shot of the relevant web campaign. By signing up for a chance to win an Apple iPhone, participants also sign up to receive commercial offers, as is specifically pointed out on the attached webpage. In article 14 of the terms and conditions of this promotion, it is specifically mentioned that by entering the competition, the participants agree to receive future correspondence.

The articles states:

“By entering the competition you agree to receive future correspondence from us. We may use your personal information to inform you about services and promotions and to contact you about programs, products, features or services in which we believe you may be interested, or for other purposes disclosed from time to time. We may also share your personally identifiable information with other third party marketers and business partners who may contact you regarding their products and services and who may want to offer you opportunities to purchase products or services that we believe may be of interest to you. If you would like to opt-out of communications from us or if you want to opt-out of communications from a third party marketers or business partners, you can send an e-mail to info.za@thisilike.net or you can call us at the telephone number 0800 980 963 and state whether you want your information removed from our database, if you want to opt-out of communications from us or if you want to opt-out of communications from third party marketers or business partners. Deleting your information or otherwise opting-out of receipt of communications from the sponsor or third parties will delete the data only in our database for purposes of managing future communications from the sponsor and third parties. These deletions will not delete information already collected that may have already been shared with third parties. You will need to contact third parties that may contact you directly to delete your personal information that they may be using to contact you.”

In every marketing email sent out, the SP specifically points out the option to unsubscribe from these marketing emails, by using the following link in the email:

“If you don’t want to receive these offers, click here”.

The SP therefore denies that it has breached the code by sending out these marketing emails.

The SP states further that its “Love Test” content is not a quiz that is being used as marketing tool in order to sell subscription services. The “Love Test” is a game that is the first item of one of the SP’s subscription services, and is marketed as such.

The questions a customer answers on the web pages before signing up are example questions of the “Love Test”. Once the customer signs up, he or she will get the full “Love Test” on their phone, and other games that are part of this subscription service.

The game “Love Test” is downloaded to a customer’s phone and can be played as much as one likes. The SP denies that customers are entering a competition or quiz by signing up for this subscription service.

Sections of the Code considered

Section 2 – definitions:

2.8 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.

2.9. A **“competition service”** is any competition or game with prizes or entry mechanism into a draw. Where an auction or a reverse auction has the characteristics of a competition service, it is considered to be a competition service.

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

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. For SMS and MMS communications, 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 should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

5.1.4. For SMS and MMS communications, a message recipient must be able to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). If replying 'STOP' as set out in 5.1.3 will result in a charge greater than the lowest tariffed rate available, then instructions for the lowest tariffed rate opt-out must be included in every message sent to the customer.

5.1.5. Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.

5.1.6. Where the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the service provider must honour the opt-out request as if the word 'STOP' had been used.

5.1.7. 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.

5.1.8. 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 (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.

5.2.2. 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.

11. Subscription services

11.1. Manner of subscription

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.

11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

11.1.3. An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed.

11.1.5. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

Decision

The SP will not be contravening section 5.3.1 if it is sending marketing emails to recipients who expressly opted-in to receive further marketing communications by entering the SP's iPhone competition.

There is no evidence before me whether the complainant did or did not enter the iPhone competition and I am therefore unable to make a finding in this regard. The SP is warned to ensure that it has a list of all entrants to its iPhone competition which can be reconciled with a list of recipients to whom further marketing emails are sent.

I am also satisfied that the "Love Test" promotion does not contravene section 11.1.2 if it is offered as an example of the content that a user will receive if they subscribe to the SP's subscription service. This is not a situation of service bundling as the content item is part of the service and not as a stand-alone item.

There is no further evidence before me that the promotion of the service in question contravenes the code in any other way.

The complaint is accordingly dismissed.