



REPORT OF THE ADJUDICATOR

WASPA Member	Opera Interactive
Information Provider (IP) (if any)	n/a
Service Type	SMS
Source of Complaints	Public
Complaint Number	7123
Date lodged	23 July 2009
Code of Conduct version	7.4

Complaint

The Complainant alleged that he had received SMS communications from the WASPA member which did not include the prescribed STOP opt-out mechanism.

"I have via Vodacom traced the offending sender, viz. Opera Telkom, who I believe operate out of Midrand (011-3582000) and requested them to terminate their transmission of SMS's. In this case the content is porn sent from +27820048640902. My complaint is not so much the content but that there is no STOP or opt out notification on their messages. How many others are being targeted and their accounts being docked for an unwanted SMS? I have contacted Opera Telecom who have indicated they will cease sending."

The WASPA member, in response, provided a WAP Push message sent to the Complainant.

'As you can see from the second page there is opt-out details: "To stop text STOP to 31902." This was explained to the user, and he has indicated that he is satisfied with our resolution.'

But the Complainant, when provided with this response, indicated that the statement made by the member was "fundamentally untrue" and that no such communication took place.

"To recap: I periodically received SMS's with web links (which happened to be pornographic). These messages have and I repeat, have no opt out clause attached. Via Vodacom I traced the sender (Opera Interactive) and on communicating with them managed to "unsubscribe".

I should further add that their excuse for not appending a STOP or UNSUBSCRIBE was that they rely content on behalf of content providers and are therefore not responsible. This is ducking the issue and as a signatory to WASPA Opera Interactive should ensure that content providers adhere to acceptable practice.

I will be satisfied if Opera Interactive give an undertaking that they will ensure all advertising type SMS's have the opt out clause."

Sections of the Code considered

The following sections of version 7.4 of the WASPA Code of Conduct were considered in the drafting of this Adjudication:

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.

Decision

1. The version of events as advanced by the Complainant is accepted.
2. Section 5.1 of the Code has been interpreted by the WASPA Appeals Panel to require that unsubscribe instructions should be included in SMS messages - see http://www.waspa.org.za/code/download/4968_appeal.pdf ("On the SP's own version, the

SMS notification did not include an unsubscribe mechanism. This is a contravention of section 5.1.”).

3. The inclusion of the instructions in the WAP message to the Complainant is acknowledged but not sufficient. The mechanism must be set out in the actual SMS without the need to access the WAP link.
 4. No submissions were made by the member regarding non-liability of content aggregators. These would, in any event, have been dismissed.
 5. It is evident from the effort required from the complainant to trace the WASPA member, that the SMS received did not set out a telephone number which could be used to opt out.
 6. The complaint is accordingly upheld and the member found to have breached section 5.1.2 of the WASPA Code of Conduct.
 7. In assessing an appropriate sanction the Adjudicator considered the following:
 - a. The expressed satisfaction of the complainant with the giving of an undertaking from the member regarding future compliance;
 - b. Relevant precedent, in particular the appeal in respect of Adjudication 4968 as cited above;
 - c. The apparent lack of any significant number of complaints relating to breaches of section 5.1.2 as has been found to have occurred in this matter.
 - d. The fact that the WAP pages did provide the required contact number and opt-out instructions.
 8. The member is ordered to ensure that third party information providers acting through it provide an opt-out mechanism in SMS messages to distribution lists which the member provides WAP services to and to confirm to the WASPA Secretariat that it has taken the necessary steps in this regard.
 9. The member is fined the sum of R15 000, payment of R10 000 of which is suspended for a period of six (6) months from date of notification of the member of this Adjudication subject to the member or a third party information provider acting through it not being found to have breached section 5.1.2 of the Code of Conduct or its future equivalent during that period. The balance of R5 000 is payable to the WASPA Secretariat within five (5) days of receipt of the relevant invoice.
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