

WASPA Appeals Panel

Complaint 22492

REPORT OF THE APPEALS PANEL

Date of report: 17 March 2015

WASPA Member: US Cellcom

Complaint Number: 22492

Applicable versions: 12.4

Background

1. The Complainant alleged that he had received an unsolicited sms on 13 November 2013 from US Cellcom ("the WASP") saying "click to view <http://mte.me/5l9h> and complete the activation. He never asked for the first sms or replied to it. He then received a second sms saying "click to view <http://mte.me/5l9X> and complete the activation. ppics.net/r7/day/for help call 011 966 8141. He replied to this message with the word 'STOP'. He then received a message \"Welcome: Your Private Picture subscription has been activated. www.ppics.net r7/day, support 011 966 8141. To unsubscribe sms stop to 44361\".
2. From the logs provided by the WASP on 23 January 2014 it seems that two activation messages were sent to the Complainant's phone. The logs also show that this was in response to the WASP's WAP online campaign. This fact is denied by the Complainant. The logs go on to show that the service was activated online by the word "OK" on the same day, but that it was deactivated on the same day by the word "STOP". There is no indication that the Complainant was billed at any time.

3. The WASP also indicated that the complaint was lodged by a competitor (Hela Networks) whereas the complainant is an individual who is an employee of the competitor. No further information as to the nature of the competitive relationship that exists has been provided. Nevertheless, due to this fact the complaint and the facts provided need to be approached with caution.
4. In the initial response sent by the WASP it is stated in regard to the subscription and registration process for the TopPhoto service that "STEP 1: User clicks on the link in the free promotional message received from service provider." This is significant as it contradicts the WASP's later contentions in the appeal document that it did not send an unsolicited message. The WASP also never satisfactorily explained where and how they obtained the Complainant's number. From other adjudications it is also clear that the WASP did use sms campaigns to market its services during the relevant period (August to November 2013) (see Complaint 22466 where reference is made to a free promotion message; and Complaint 22254 where the WASPA Media Monitor complained about an unsolicited sms marketing message).
5. The Complainant also indicated in his complaint that there was non-compliance with the subscription provisions of the WASPA Code in that he was automatically subscribed despite using the word "STOP" in response to the marketing message. His intention was to have the marketing messages stopped.
6. The WASP provided logs indicating that the subscription had taken place by the Complainant Clicking online on a link styled "Click on the link: <http://mte.me/519h>. Although the WASP provided some screenshots of its webpages it did not provide a screenshot of this so-called WAP online campaign. The message as presented seems more like an sms message than a webpage. There is also no indication of how the WASP obtained the Complainant's telephone number in this process. After clicking on this link the Complainant was sent an sms stating: "Click to view <http://mte.me/519X> and complete the activation ppics.net/r7/day/for help call 0119668141". A second such message was sent a few minutes later. There is no indication why this second message was sent or how it was activated. The logs then indicate that clicking on the activation button on the website ("OK") would activate the service. It then shows that a welcome message was sent by sms: "Welcome: Your Private Picture subscription has been

activated. www.ppics.net r7/day, Support 0119668141. To unsubscribe sms stop to 44361. The logs then show that a Stop message was received and a confirmation of the stop was sent. Disconcertingly show another subscription and stop on the same day.

7. The following sections of the WASPA Code which were considered remained relevant according to him/her:

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.

6.2.10. Pricing on any promotional material must use one of the following generally accepted formats for prices in Rands: "Rx" or "Rx.xx".

11.2.5. If a subscription service is initiated by a customer sending an SMS to the service provider, then a separate confirmation message must then be sent to the customer's mobile handset. Only once the customer has followed the activation instructions in the confirmation message can they be subscribed to the subscription service.

11.3.1. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either:

(a) contain a PIN which is then confirmed or validated on the web page, or

(b) contain the name of the service, an explanation of the confirmation process, and a URL with a unique identifier, which, when clicked, validates the handset number.

Adjudicator's Findings

8. The Adjudicator found that the WASP had failed to provide any proof that the Complainant had consented to receiving marketing material or how his phone number had been obtained. He also found that there was an admission to a free message having been sent to the Complainant without any consent.
9. He/she accordingly held that there was a breach of Clause 5.2.1.
10. The Adjudicator held that both Clause 11.2.5 and 11.3.1 envisage an active cross-checking process with the double opt-in provided for. Both processes requires that after the commencement of the subscription process, an sms will be sent to the consumer with the relevant instructions. He/she held that this did not occur in this instance as is apparent from the logs.
11. He/she accordingly held that there was a breach of Clause 11.2.5 and 11 .3.1.
12. Finally the Adjudicator held that there was an infringement of Clause 6.2.10 because the as the message used a lower case 'r' for the price instead of the capital 'R' required in the Code. This breach was regarded as similar to a breach in matters 22466 and 22635 in accordance with the double jeopardy rule. Accordingly no further sanction was imposed.
13. The WASP raises certain language barriers that it experiences as an apparent excuse for non-compliance with certain of the Code provisions. This excuse rings hollow as this company, according to its website (and as implied by its name) is a United States Company with its seat in New York (according to its website). Furthermore, where a company trades in a foreign country it is incumbent on that company to familiarize itself with the trading conditions and languages. In this case all documentation is in English which should not be foreign to a US company. This consideration is therefore disregarded.

Appeal

14. The WASP has denied that it sent an unsolicited sms to the Complainant relying on the logs provided by it to show that the communications were initiated by the Complainant in response to its web based promotion.

15. 'There does not seem to be any appeal against the findings and sanctions imposed in regard to the infringement of sections 11.2.5, 11.3.1 and 6.2.10

Deliberations and finding

16. The Adjudicator only considered section 5.2.1 in regard to the spam complaint which deals with the identification of spam. It contains no positive or negative duties that are placed on WASPs. Rather the duties are contained in section 5.3 which deals with the prevention of spam. It reads as follows:

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.

In our view, nothing turns on this apparent inaccuracy as the complaint made to the WASP clearly indicated the nature of the complaint even if the wrong section was quoted. The WASP also did not raise this issue in its appeal.

17. Although the WASP denies that it sent an unsolicited sms to the Complainant, the facts as presented clearly indicates that the first communication was the free sms as admitted by the WASP in its initial reply to the complaint. Although the logs later provided seem to contradict this, they must be considered in the light of the earlier admission and the failure of the WASP to clearly indicate how and when the Complainant's telephone number was obtained. From Complaint 22254 it seems that the WASP was making use of the services of Global Link, a South African based company that obtains consent to marketing and collates marketing lists which it sells.
18. As no appeal was lodged against the findings on the infringement of Sections 11.2.5 and 11.3.1 these findings are confirmed. We regard the compliance with the double opt-in provisions of the Code as extremely serious as these provisions are specifically aimed at ensuring that there is actual consensus between the consumer and the WASP about subscribing to a subscription service. In this case the consumer was subscribed apparently after entering 'STOP' to the message and only a confirmation message was sent in response.

19. If the subscription service was initiated by the Complainant entering his mobile number on the website, the WASP is required to send a separate confirmation message to the consumer's mobile handset in order to prove the number entered matches the customer's mobile handset. The message must either contain a PIN which is then confirmed on the web page or must contain the name of the service and explanation of the confirmation process and a URL with a unique identifier which when clicked validates the handset. No such confirmation message was sent to the Complainant according to the logs provided by the WASP. The only message sent was the welcome message which did not contain a PIN nor the URL with a unique identifier. The WASP on its own records clearly did not comply with these requirements.
20. The non-compliance with section 6.2.10 is also viewed as serious. The purpose of this provision is to ensure that there is a clear indication of the monetary commitment the consumer is about to make. The failure in this instance to use the capital 'R' to indicate the price seems to indicate an intent to mislead or hide the fact. The transgression is ameliorated by the fact that the landing site does contain the indication that this is a subscription service and there the correct format is used.
21. **The appeal panel confirms the findings of the Adjudicator on all counts except that the finding on an infringement of Section 5.2.1 is amended to a finding of an infringement of Section 5.3 read with Section 5.2.1.**

Sanctions

22. The Adjudicator imposed a fine of R100,000 for the infringement of Section 5.2.1. We agree that this should be regarded as a serious infringement, but as this is a first infringement of this nature by the WASP, the fine is amended to read 'a fine of R100,000 of which R75,000 is suspended for one year on condition that the WASP does not infringe section 5.2.1 within this period'.
23. In regard to the infringement of sections 11.2.5, 11.3.1 and 6.2.10 we have already indicated that we do not consider the alleged language barrier as a sufficient excuse. These are serious infringements as they undermine these easy to follow provisions designed for the protection of consumers. However,

as these infringements occurred at the same time as the infringements in Complaints 22466 and 22635 they must be regarded as the same breach and the sanctions imposed in those Adjudications are regarded as sufficient to include these infringements taking the double jeopardy rule into consideration.

24. As the WASP has been partially successful in its appeal, 50% of the appeal fee may be refunded.