



REPORT OF THE ADJUDICATOR

WASPA Member	AMV Holdings
Service Type	Distribution list / Promotional
Source of Complaints	Public
Complaint Number	5974
Date lodged	9 March 2009
Code of Conduct version	6.2

Complaint

This complaint is an escalation of an unresolved unsubscribe request originally filed by the WASPA Secretariat in response a complaint from a consumer who alleged that he was receiving unsolicited SMS messages from the WASPA member containing WAP links to adult content.

The member was requested to take steps to unsubscribe the complainant from its mailing lists and thereafter to send a confirmatory message to the effect that this had been done.

Below is a timeline of events as they unfolded:

2009-02-23 09:05:31

Complainant: I have been for months receiving SMSs to my cellphone number 083 549 xxxx with regards to adult content available at different WAP URLs. The sender information comes up as Unidentified sender and there is no opt out number to SMS to unsubscribe from the service. I have contacted the service provider and have asked to be unsubscribed to no avail. I am still receiving these SMS's on a weekly basis. - Please remove number from your mailing list.

2009-02-24 18:53:47

WASPA Member: The number has been removed and the user has been sent a confirmation.

2009-03-03 09:32:29

WASPA Secretariat: Complainant received another SMS from <http://wap365.net/> yesterday 2009/03/03. Please confirm that number has been removed from your mailing list permanently

2009-03-04 18:11:24

WASPA Member: This number was fully removed on 24th February. Can you confirm that 27835499582 is the correct cellphone number as we have not sent any further messages to this handset.

2009-03-06 17:00:17

WASPA Secretariat: Email received from complainant on 2009/03/03:

“I requested to be unsubscribed from a service a week ago, according to your email below I have been unsubscribed from the service but I am still receiving messages. As of last night I still received about sexual content on a WAP URL ... wap365.net and there is no unsubscribe number to sms to opt out. Please can this be resolved as soon as possible as it is becoming a nuisance.”

2009-03-09 11:57:00

WASPA Secretariat: The matter has been escalated to the formal resolution process.

Complainant sent another complaint (5973) on 2009/03/09:

“I have previously requested via WASPA to have my number removed/unsubscribed from the service provided by this unknown service provider. I did receive a message that I was unsubscribed but I still receive SMSs with regards to the pornographic material provided by this service provider.”

SP Response

The WASPA member filed a formal response on 9 March 2009 in the following terms:

“This number has not received any promotions from AMV Holdings.

On the 9th February 2009 we received the following MO from the user:

2009-02-09 13:22:56 Mobile365 31931 **STOP**

On the 24th February the user was sent a free stop confirmation message, following WASPA Unsubscribe Request 14919, which requested that:

- SP requested to unsubscribe customer
- SP requested to send an SMS confirming this unsubscribe

On 4th March 9, 2009 we uploaded the following feedback:

This number was fully removed on 24th February. can you confirm that 27835499582 is the correct cellphone number as we have not sent any further messages to this handset.

We maintain that no promotional messages have been sent to the user on cellphone number 27835499582 - please confirm that this is the correct number?"

Further correspondence

The response filed by the member was duly passed on to the complainant who responded thereto as follows:

"I have read the response from AMV with regards to my unsubscribe request. I can confirm that my mobile number is 27835499582. I can also confirm that I have received promotional message on Sunday 8th March at 12:21PM. The message stated:

"NoLimit 18+ Vids"

["http://wap.mob365.net/ncsb6h1l-z1ya3d-s1aar-egy8.wml"](http://wap.mob365.net/ncsb6h1l-z1ya3d-s1aar-egy8.wml)

I still have the message stored on my phone."

The WASPA Secretariat brought the above to the attention of the member and enquired whether it wished to make any further submissions in response thereto but the member did not reply thereto.

Sections of the Code considered

The following provisions of version 6.2 of the WASPA Code of Conduct were considered:

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.

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.

5.3.1. 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.

8.1.2. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

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.

Decision

1. The Adjudicator accepts the bona fides of the Complainant and the evidence tendered which indicates that the Complainant has indeed received marketing messages from the WASPA member. The denial by the WASPA member that it had sent any promotional messages to the Complainant can therefore not be accepted.
2. Given the nature of the response the member has not attempted to refute the allegations that the mail was unsolicited. Nevertheless the member did attempt to unsubscribe the Complainant from its mailing list when it first received the unsubscribe request, indicating that the number had been "removed", indicating its willingness to co-operate with the resolution of the Complaint.
3. The example of a message sent to the Complainant by the member, as provided by the Complainant, is in breach of section 5.1.1 in that it does not "contain a valid originating number and/or the name or identifier of the message originator."
4. The Complainant alleges that he contacted the member and asked to be unsubscribed but that nothing came of this. In the absence of any response to this allegation from the WASPA member the Adjudicator accepts the allegation and accordingly finds that the member has breached section 5.1.2 of the Code in that it does not appear to have had a functioning facility to allow the Complainant to remove himself from their database.
5. There is insufficient information relating to how the Complainant came to receive the messages on which to base any finding in respect of sections 8.1.2 & 8.1.3. The Adjudicator is aware that this aspect is being dealt with in a number of other complaints

against the WASPA member. The Complainant may be interested in reviewing the Adjudications in respect of Complaints 5235¹ and 5927².

6. In determining an appropriate sanction in respect of the breaches highlighted above, the Adjudicator has taken into consideration:
 - 6.1. The record of the member;
 - 6.2. Precedent as regards sanctions imposed for breaches relating to section 5.1 of the Code of Conduct;
 - 6.3. Recent tightening-up of the Code of Conduct in respect of conduct of this nature;
 - 6.4. The extent to which the member has already been sanctioned in respect of non-compliant messages of this type sent in early 2009 (not including messages found to be unsolicited commercial messages); and
 - 6.5. The co-operation of the member in the unsubscribe process.

 7. The following sanction is imposed in respect of the breaches of sections 5.1.1 and 5.1.2:
 - 7.1. The member is fined the sum of R25 000, payable in full to the WASPA Secretariat within five (5) days of date of receipt of the relevant invoice from the WASPA Secretariat.
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¹ <http://www.waspa.org.za/code/download/5235.pdf>

² <http://www.waspa.org.za/code/download/5927.pdf>