



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Strike Media
Originator	Flexicell
Service Type:	Unsolicited Commercial Communication
Source of Complaint:	Public
Complainant:	Sean Crookson
Complaint Number:	9061
Date Received:	18 March 2010
Code Version:	8.0
Advertising Rules Version:	Not applicable

Complaint

The formal complaint is the escalation of the unsubscribe request logged by the complainant on the 17th of March 2010 via the WASPA unsubscribe facility in respect of an unsolicited commercial communication in the form of an sms message. The complainant listed the following grievances against the SP:

- (i) *that the originating number of the commercial communication was not a valid number;*
- (ii) *that no number was provided to send an "opt-out" reply;*
- (iii) *that the originator of the commercial communication refused to provide details of where they had gathered the complainant's personal information; and*
- (iv) *that the SP had ignored the fact that the complainant was listed on the Direct Marketing Association & the Vodacom "no marketing" list and still sent a commercial communication to him.*

Service provider's response

The SP, in response, on or about the 18th of March 2010:

- (i) ***blocked the complainant from the service;***
- (ii) ***contacted the originator and requested that they provide the complainant with further information on the source of his personal information; and***
- (iii) ***contacted the complainant and explained the nature of their business relationship with the originator***

The complainant was not satisfied with merely being removed from the message originator's database and insisted that he be provided with the source of his personal information, in this case his telephone number.

The SP stated that it received the complainant's details from the message originator, in this case Flexicell. When contacted by the SP, Flexicell stated that "we (Flexicell) work on a referral basis hence we are unable to assist with details of who provided us with the number". In the same communication Flexicell confirmed that they had removed the complainant from their database, following the request from the SP.

The SP further communicated with the complainant providing a breakdown of the actions taken by the SP to resolve the complaint and enquiring as to whether the complainant was satisfied with the result. The complainant responded that he was not satisfied and requested a meeting between himself and the SP to discuss the matter.

Complainant's Reply:

The complainant responded on 23 March 2010 to WASPA's query on the satisfactory resolution of the unsubscribe request by providing as follows:

- (i) *more generally that the complainant's request was not resolved;*
- (ii) *that the complainant had still not been provided with the source of his telephone number;*
- (iii) *that the originating number was invalid in so far as that you could not call the number and that no reasonable person would attempt to send an sms to a number which you could not telephone;*
- (iv) *that there was no indication of the cost of sending an opt-out message;*
- (v) *that the originating number was "invalid" according to the website search conducted on <www.smscode.co.za>;*
- (vi) *that the staff of the SP were ill-equipped to handle queries from the public relating to spam ; and;*
- (vii) *that the complainant found it unacceptable that the SP " ignored specific requests to the DMA & Vodacom not to send unsolicited SMS's".*

Sections of the Code considered

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.

2.18. The “originating number” is the number allocated to the WASP by the network operator from which a commercial message is sent.

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

3.9. Information Providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. Where any service provider that is not a WASPA member conducts any activity governed by the provisions of the Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the service provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and vicariously liable for any breach of the Code resulting from the acts or omissions of any such service provider.

4.2 Privacy and confidentiality

4.2.1. WASPA and its members must respect the constitutional rights of consumers to personal privacy and privacy of communications

4.2.2. Members must respect the confidentiality of customers’ personal information and will not sell or distribute such information to any other party without the explicit consent of the customer, except where required to do so by law.

5.1. Sending of commercial communications

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.

5.1.7. 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.

5.2. 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.**

5.3. 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.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her.

With reference to (i) the initial complaint, (ii) the SP's response to the complaint, (iii) the complainant's reply and (iv) the sections of the Code considered:

It appears from the information that the commercial communication sent to the Complainant was indeed "spam" in terms of the definitions provided in Section 5.2 of the Code and as such was a contravention of Section 5.3 of the Code. On the basis of the information presented, it cannot be established that **the complainant had requested the message; had a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator or had provided consent to receive the communication.**

Regarding the validity of the originating number in terms of Section 5.1, I find the number is indeed valid. The mere fact that an individual cannot telephone the number does not render such number invalid, the number in question belongs to a server and although you cannot call it, an sms can be sent to the number. The website mentioned by the Complainant, being <www.smscode.co.za>, is not able to identify numbers belonging to servers.

The SP is, in terms of the Code, is not under an obligation to include the cost of an opt out message in a commercial communication. Rather, in circumstances where 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.

In respect of one of the Complainant's main causes of complaint, being that he has not been provided with the source of his telephone number, I make reference to Section 5.1.7 of the Code: "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". In these circumstances, Flexicell as the message originator, is obliged to provide the Complainant with the source of his personal information. This to date has not been done and the alleged inability to assist by the Originator suggests a violation of the Code. That said, Flexicell is not a WASPA member nor an affiliate member at this time but Sections 3.9.1 and 3.9.2 of the Code provide that **in these circumstances Strike Media is vicariously liable for the conduct of Flexicell and as such I am holding Strike Media liable for the infringing conduct of Flexicell in this matter.**

Regarding the application of the Vodacom "no marketing list" and Direct Marketing "do not contact list", such lists are limited in application. Neither the SP nor the message originator is subject to compliance with such lists. As such, the SP is not guilty of any wrongdoing for failure to take cognisance of the complainant's entry onto such lists.

Sanctions

The SP is:

- (i) **Ordered to confirm in writing to the WASPA Secretariat that the Complainant's information has been removed from the Originator's database within five (5) days of date of notification of this Adjudication;**
- (ii) **Ordered to provide the Complainant with the source of his personal information (if not already done) within five (5) days of date of notification of this Adjudication;**
- (iii) **Fined the sum of R10 000, payable to the WASPA Secretariat within five (5) days of date of notification of this Adjudication.**