



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	ViaMedia
Information Provider	Rasco Productions (Pty) Ltd
Service Type:	Subscription Service
Source of Complaint:	Public
Complainant:	Chris Wolmarans
Complaint Number:	9691
Date Received:	16 July 2010
Code Version:	9.0
Advertising Rules Version:	Not applicable

Complaint

The formal complaint is in respect of an unsolicited commercial communication in the form of an sms message, sent to the complainant. In the initial complaint, the complainant listed the following grievances:

- (i) *that the originator did not have his consent (opt-in) to send him commercial communications;*
and

- (ii) *that the SP had sent an identical commercial communication to him 2 months earlier from a different originator, regarding which he had also laid a complaint with WASPA.*

The complainant requested:

- (i) *immediate disclosure of the source of the complainant's contact details, as per section 45(1) of the ECT (Electronic Communications and Transactions Act); and*
- (ii) *to be unsubscribed from the subscription service in order to ensure that the complainant does not receive further unwanted marketing or promotional material from the SP.*

Service provider's response

The SP, in response, on or about the 24th of June 2010:

- (i) ***black listed the complainant's number;***
- (ii) ***provided the complainant with the assurance that the complainant will not receive further communications from ViaMedia;***
- (iii) ***provided the complainant with the explanation that the message in question was received from the SP's Information Provider, Rasco Productions whilst the prior message referred to by the complainant was received from the SP's Information Provider, Blue Label and that the SP has terminated its services to Blue Label;***
- (iv) ***provided the complainant with the explanation that the messages were similar notwithstanding the different Information Providers due to the SP's services to the Information Providers which indicate the successful campaigns of previous Information Providers;***
- (v) ***revealed to the complainant that the Information Providers utilised the default Powerball results campaign provided by the SP to the Information Provider;***

The SP further recorded that:

- (i) ***the Information Provider, Rasco Productions assured the SP that the Information Provider had the necessary consent to send the communication in question to the complainant;***
- (ii) ***that such consent was recorded in a database held by Rasco Production's, the relevant extract of which the SP had requested from the Information Provider and offered to provide to WASPA on receipt;***
- (iii) ***that the SP intended to develop a "global opt-out list" which would prevent recurring unsolicited communications to the same person albeit from different Information Providers to the SP; and***
- (iv) ***that it is impossible for Viamedia to have "100%" control as each of its Information Providers constitute separate relations.***

Complainant's Reply:

The complainant responded on 29 June 2010 to WASPA's query on the satisfactory resolution of his complaint by the SP as per the SP's response by providing as follows:

- (i) *more generally that the matter was not resolved;*
- (ii) *that the complainant was not satisfied with being removed from the SP's database as they had given him the same assurance in dealing with his previous complaint and such assurance was not honoured;*
- (iii) *that the complainant had still not been provided with the source of his personal information from the Information Provider despite the claim that Information Providers have access to legitimate databases ;*
- (iv) *that the SP had not verified a recent previous commercial relationship between the complainant and the Information Provider; and*
- (v) *that the complainant would (still) like to be provided with the source of his personal information, in this case his telephone number, as well as proof of the alleged opt –in recorded in the Information Provider's database.*

Further, the SP communicated with the complainant providing a breakdown of the actions taken by the SP in respect of its compliance with the Code of Conduct.

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.

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

3.9. Information Providers

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.

5.1.7. 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 and the absence of the extract of the Information Provider's database to confirm consent to receive the communication:

it cannot be established that **the complainant had requested the message; had a direct and recent prior commercial relationship with the Information Provider and would reasonably expect to receive marketing communications from the Information Provider; and**

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.

The receipt of such message was aggravated by the fact that the Complainant had, only 2 months prior to lodging this complaint, lodged a complaint against the SP with WASPA on a similar set of facts as are present in this case.

In respect of one of the complainant's main causes of complaint, being that he has not been provided with the source of his personal information, 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, Rasco Productions as the Information Provider and message originator, is obliged to provide the complainant with the source of his personal information. This to date has not been done.

That said, Rasco Productions 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 ViaMedia is vicariously liable for the conduct of Rasco Productions and as such I am holding ViaMedia liable for the infringing conduct of Rasco Productions in this matter. ViaMedia even note the fact that they bind Rasco to the Code of Conduct in their response to the Complainant.**

Further in respect of the assurances provided by ViaMedia to prevent future receipts by the complainant of such communications, I find that as an SP I would expect that they would indeed keep a “global opt-out list” to ensure that members of the public do not continually receive unwanted communications from the SP's various customers. The constitution of such list in itself does not provide a firm assurance as requested by the complainant that the complainant will not receive future communications of a similar nature.

I find that the SP has indeed breached sections 1.7 and 5.3 of the Code of Conduct and in aggravation, note that similar complaints on a similar set of facts has been laid against the SP in the past.

I note that the SP has not terminated the services of the Information Provider notwithstanding that no assurance of the complainant's consent to receive the communication has been received from the Information Provider.

I do not feel mitigation of sanctions is justified in these circumstances in terms of Section 3.9.3 as the SP has stated numerous times that it closely monitors the conduct of its Information Providers and that the specific campaign is one offered by the SP to the SP's Information Providers.

Out of Scope of this Adjudication

Compliance with the Electronic Communications & Transactions Act 25 of 2002

Sanctions

The SP is:

- (i) **Ordered to confirm in writing to the WASPA Secretariat that the complainant's information has been placed on the SP's global opt-out list within five (5) days of date of notification of this Adjudication;**
- (ii) *Ordered to provide the complainant with the source of the complainant's personal information and consent received by the Information Provider to send the communication in question to the complainant within five (5) days of date of notification of this Adjudication;*
- (iii) **Fined the sum of R15 000.00 payable to the WASPA Secretariat within five (5) days of date of notification of this Adjudication in the event of compliance with (i) and (ii) above;**
- (iv) **Fined the sum of R 35 000.00 payable to the WASPA Secretariat within ten (10) days of date of notification of this Adjudication in the event of non-compliance with either or both (i) and (ii) above; and**
- (v) *The termination of the services to the Information Provider, Rasco Productions in the event of the SP's failing to receive from the Information Provider: the source of the complainant's personal information and the consent received by the Information Provider to send the communication in question to the complainant.*