Wireless Application Service Provider Association

REPORT OF THE ADJUDICATOR

WASPA Member (SP):	HP Computek
Information Provider (IP):	ContiMobile (UK)
Service Type:	Unsolicited SMS
Source of Complaints:	Public complainant employed by competitor (SA WASP)
Complaint Number:	10743
Code of Conduct version:	9.0
Advertising Rules version:	Not applicable

Complaint

Complaint #10743 was lodged by a member of the public employed by a competitor via the WASPA website on 5 October 2010, regarding receipt of an unsolicited SMS. The WASPA Secretariat sent the formal complaint to the SP on 7 October 2010. No response was received from the SP within the 5 working day period. A reminder communication was sent to the SP on 14 October and no response was sent by the SP. The complaint was thereafter assigned for adjudication on 15 October 2010.

The complaint reads as follows:

"*I have received the following sms on* [**redacted number**]*:*

Songs of Solom 4:1 - How beautiful you are, my darling! Oh, how beautiful! Your eyes behind your veil are doves. Your hair is like a flock of goats descending from Mount Gilead. SMS STOP to 42098 (free). T & C Apply.

I have never opted in to any subscription. I have never received a double opt in message, nor a reminder message. I have not given permission to be sent commercial messages. I don't even know who owns the shortcode 42098. www.smscode.co.za is down. T&C apply means zip to me or to any other person if you don't know what T&C it is.

Sending an sms with the word STOP to 42098 is not free as indicated by the spam message. Stating that it's free is false pricing information.

I have never opted into this and want to know where they got my number."

The Complainant alleges a breach of the following sections of the Code of Conduct ("the Code"):

"*4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers*."

"*5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the 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*."

On 19 October 2010 (after the complaint had been referred for adjudication), the Complainant furnished to WASPA certain email correspondence that had subsequently been exchanged between himself and the SP directly, dated 18 and 19 October 2010. WASPA was thereafter also furnished with additional email correspondence that had taken place directly between the Complainant and the IP, dated 19 and 20 October 2010. Some discussion of these emails follows below.

On 18 October, the SP emailed the Complainant and apologised for billing his number, and offered to reimburse the Complainant. The email noted that the SP had recently moved its hosting service which had caused some challenges with technical implementation and that this was the reason behind its client (the IP) billing the Complainant's number for the Christian content sent to him.

The Complainant wrote back to ask how the IP had obtained his number and the SP replied that its client (the IP) probably had the Complainant's number in a database. The SP also advised the Complainant that it had asked the IP to block the relevant number. It again apologised and offered to reimburse the Complainant. The Complainant was concerned following this response and again emailed the SP to ask that the IP be identified and to explain how the IP had obtained his number, as well as how the IP could subscribe and/or bill him without his permission. He also asked: "*Were any other MSISDNs subscribed and billed without permission. I have other MSISDNs I use for testing from time to time and have received similar smses on these also*."

The SP responded to this communication, identifying the IP. In response to how the IP had accessed the Complainant's number, the SP stated as follows:

"*It seems there was an error from [the client] on manually entering your number on their system. A data base was collected from their Church group to receive Christian content for them to send out content to their congregation members. Instead of* [**redacted number**] *the mistake was on* [**redacted similar number, with the same digits in a different order**]."

The SP also offered to look into the other numbers that the Complainant had raised and whether they had indeed been billed by the SP. Later, the SP representative apologised again and asked if the matter could be resolved rather than escalated to a formal WASPA complaint. The Complainant responded by saying that the complaint would not be closed, pointing out that the Code had been seriously breached and that MSISDN numbers were being subscribed and billed without any "opt in". He also stated as follows:

"*I do not care about reimbursement, I care about the fact I was joined into a billed subscription service without my permission. Without any opt in or double opt in proof.*

I also care about how many other people this has happened to and can happen to in future."

The Complainant then received an email directly from the IP, apologising and admitting that the problem was theirs and stating that the SP was not responsible. It states that it is a UK based client and explains as follows: "*[we have] acquired a live test account through [the SP] to aggregate our service so that we may conduct the necessary testings before going live in SA. We are unfortunately still trying to educate ourselves with regards to the double-opt-in rules for all the operators in South Africa and are still in the learning phase with technical implementation. Through this technical issue on our side, [the SP] have now informed us that our test account has been de-activated and we can no longer continue to testing our services through them. The development around this has really cost us a fortune and plead with you to please close this issue with WASPA as our real intention is to build service that is fully compliant and fair to the consumer*."

The Complainant responded that the complaint could not be closed because of the seriousness of the breaches of the Code. The final correspondence on record is an email from the IP to the Complainant again apologising to the Complainant and stating that it had been made aware of the rules by the SP, but that it has had problems with technical implementation. The IP states as follows: "*The tests that were conducted through a test account was to determine if we could link a premium bill or obs with the content that would be delivered but only after the double-opt-in was confirmed. I apologize once again to yourself and [the SP] as this was truly an honest mistake from our part*."

Given that the Complainant furnished the abovementioned correspondence between itself, the SP and the IP to WASPA after the SP had been given an opportunity to reply (and after the matter had been referred for adjudication), the SP and IP were given a further chance to respond to the production of these emails. Specifically, they were asked if they had any further comments and to confirm that they were satisfied that the correspondence furnished was an accurate recording of the communications that took place between the parties. They were also asked whether the SP had ever arranged for the IP to sign a copy of the WASPA template agreement referred to in section 3.9.3 of the Code and, if so, to furnish a signed copy thereof to WASPA and to advise the date of signature thereof. Although the SP asked for some additional time to make contact with the IP, no further response was received from either the SP or the IP after several weeks and the adjudication proceeded on the basis of the information that had been placed before WASPA by 14 December 2010.

SP (and IP) Responses

Apart from the communications referred to above, no further responses to the complaint were delivered to WASPA.

Decision

The Complainant has alleged breaches by the SP of 3 specific sections of the Code. There are also other sections of the Code relevant to the facts at hand, which enable me to assess the matter more clearly and thoroughly. Accordingly, I will deal with all sections relevant in my view.

Section 3.9: Information providers

This section states as follows:

"*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 information service provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information 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 actions or omissions of any such information service provider.
3.9.3. A WASPA member shall, by obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider.
3.9.4. The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.
3.9.5. The member must act in accordance with the WASPA complaints and appeal process and if appropriate, suspend or terminate the services of any information provider."

Due to the fact that an IP was involved in this matter, it bears mentioning that, as made apparent by section 3.9 of the Code quoted above, it is the SP's responsibility to ensure that the IP is aware of the terms of the Code, and acts in accordance therewith. The Complainant points this out to the IP in the email correspondence as follows:

"*Being a UK based company is not an excuse, because any aggregator must make you aware of the rules and regulations required before giving you billing access*." The IP replies as follows: "*We have been made aware of [this] rules around the double-opt-in by [the SP] but the technical implementation for us was the actual problem and we accept blame for what has transpired. The tests that were conducted through a test account was to determine if we could link a premium bill or obs with the content that would be delivered but after only after the double-opt-in was confirmed".*

Section 3.9 makes it clear that the SP shall remain not only responsible but also vicariously liable for any breach of the Code resulting from the actions or omissions of an IP. The fact that no signed template agreement has been furnished, means that this factor is not available to be considered in mitigation of the SP's possible liability for a breach of the Code by the IP, however, the SP did take steps to de-activate the test account after the complaint was made, and the IP states in its correspondence to the Complainant that due to the de-activation, it can no longer continue its testing services through the SP. The SP's conduct in this regard is in accordance with conduct recommended by section 3.9.4 of the Code.

Section 4.1: Provision of information to customers

The Complainant has alleged a breach of section 4.1.1 of the Code which reads as follows:

"*4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers*."

The breach of this section relates to the following part of the Complainant's complaint: "*Sending an sms with the word STOP to 42098 is not free as indicated by the spam message. Stating that its free is false pricing information*".

The SP has not dealt with this allegation in its correspondence, and only offers a refund. As such the allegation is undisputed and I must assume that the SMS did state that the STOP sms would be free, and that the Complainant was in fact charged for this. (STOP messages may be charged for, but not if advertised as free). In the circumstances, section 4.1.1 of the Code has been breached.

Section 5.1: Sending of Commercial Communications

The Complainant has alleged breaches of sections 5.1.1 and 5.1.7 which state as follows:

"*5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the 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*."

In relation to section 5.1.1, the section provides that the message must contain a valid originating number and/or the name or identifier of the message originator. It appears from the message as quoted by the Complainant (which is not disputed by the SP or the IP), that the message did not contain either an originating number, nor did it contain the name or identifier of the message originator. It only contained a short code. The Complainant accordingly did not know who the message had come from, and specifically complains of a breach of section 5.1.1. The Complainant stated that he didn't know whose short code this was either, and that the website www.smscodes.co.za was "down". In correspondence between WASPA and the Complainant furnished to me, it appears that WASPA originally thought that the short code belonged to another member SP, as listed on the website www.smscodes.co.za, but that it subsequently transpired that there was an error on the site and that the code in fact belonged to the SP, which was how the SP was identified as the originator of the message. The failure to include a valid originating number and/or identifier of the message originator amounts to a breach of section 5.1.1 of the Code.

In relation to section 5.1.7, the message originator is obliged to identify the source from which the recipient's personal information was obtained, within a reasonable time. The correspondence between the Complainant and the SP shows that the SP did offer an explanation in this regard, although that explanation is slightly confusing. In correspondence dated 18 October, the SP stated: "*You'll find our client could've had a database with [this] numbers in their system for notification or any service one may have run with them*." On 19 October, however, once asked again by the Complainant how the IP accessed his number, the SP stated as follows:

"*It seems there was an error from them on manually entering your number on their system. A data base was collected from their Church group to receive Christian content for them to send out content to their congregation members. Instead of* [**redacted number**] *the mistake was on* [**redacted similar number, with the same digits in a different order**]."

The Complainant has not stated specifically that this explanation is unsatisfactory to him, although he has alleged a breach of section 5.1.7, which implies that the message originator has not identified the source from which it obtained the number. The SP's explanation seems to imply that a manual error was made in relation to a legitimately collected number from a church group, and that the Complainant's number was accordingly not actually *"obtained"* within the meaning of section 5.1.7 but was captured as a result of a typographical error, which allegedly resulted in the content being (erroneously) sent to the Complainant's number.

I have no reason not to accept this explanation, and whilst this resulted in the Complainant being sent SPAM, which is unacceptable, I cannot find the SP in breach of section 5.1.7 of the Code, as the SP has identified how the Complainant's number was erroneously sourced.

Section 5.2: Identification of spam and Section 5.3: Prevention of spam

Section 5.2.1 states as follows:

"*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."

Clearly the Complainant did not request the message. He also alleges that he has never heard of the SP, or seen the short code before (and there was no originating number to identify the SP), which implies that he had not had a direct or recent prior commercial relationship with the SP. He had also not given his consent to the SP or the IP to use his number. The SMS that the Complainant received falls within the definition of SPAM in 5.2.1 of the Code.

Section 5.3.1 states 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*."

If we are to accept the explanation of the SP, then the IP made an honest mistake in inputting the Complainant's number, which resulted in the sending of SPAM to the Complainant. In other words, while it was not intended that SPAM be sent, SPAM was nonetheless sent as a result of negligence and has resulted in a breach of section 5.3.1 of the Code. Furthermore, even if the Complainant's number was used as a result of a "typo", if the service was still in testing (as the SP and IP allege), it also seems negligent of the SP to have enabled its billing system to debit money from the Complainant's account (not to mention also charging it for receiving a STOP message, contrary to its advertisement, as dealt with above).

The complaint also exposes a deficiency in the quality assurance (QA) processes used by the IP to record subscribers' cell phone numbers as a basic data capture error was not detected (as it should be if the data was subject to both a capture process and proper QA check). Unsolicited subscriptions to commercial services are the scourge of the WASP industry and undermine consumer confidence in the industry itself. Complaints of this nature emphasise the need for quality assurance of the very highest standard when capturing numbers intended for commercial subscription services, especially when regard is had for the particular nature of the billing methods used by those services which do not require a consumer to actively confirm a payment instruction but rather automatically debit funds from a consumers' mobile accounts.

Section 3: Professional conduct

The SP also states in correspondence that the "moving of its hosting provider" gave rise to technical problems which was the reason why a testing service and stop message were billed for. It is not the moving of a hosting provider that causes inadvertent billing but rather the failure to properly configure and test new equipment and software. The SP's conduct seems, in my view, to have been somewhat sloppy and accordingly unprofessional. This amounts to a breach of section 3.1.1. of the Code which obliges members to *"at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA."*

Section 11: Subscription procedures

Section 11.2.1 of the Code also provides that *"Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service."* On the facts of this matter, section 11.2.1 of the Code has been breached.

Finding

The complaint is accordingly upheld on the grounds of a breach of sections 3.1.1, 4.1.1, 5.1.1, 5.3.1 and 11.2.1 of the Code.

Sanction

In determining the sanctions to be imposed on the SP, I have had regard to the correspondence of the SP (and IP). Whilst it appears that the SP and IP are apologetic for a mistake that appears to have been made in the initial phase of its business, the result was that the Complainant received an unsolicited commercial message, was subscribed involuntarily to a service he had not requested to be subscribed to, was charged for sending a STOP sms (contrary to the content of the message which said this would be free) – and, on the SP / IP's own version, was charged for what was actually a "test message". In addition, there appears to be no WASPA template agreement between the SP and IP, and the SP remains vicariously liable for the IP's conduct, by virtue of section 3.9.2 of the Code.

However, it appears that there have been no complaints (or adjudications) against the SP to date, and this seems to be a first offence in terms of any alleged breaches of the Code.

Accordingly:

- the SP is ordered to refund the Complainant for all charges billed; and

- a fine of R10 000.00 is imposed on the SP for the breaches of sections 3.1.1, 4.1.1, 5.1.1, 5.3.1 and 11.2.1 of the Code as described above.

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