



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Smartcall Technology Solutions
Information Provider (IP): (if applicable)	Lessa
Service Type:	Unsolicited Commercial Communications
Complainant:	Consumer
Complaint Number:	11183
Code version:	Code v 10.0 and Ad Rules v 2.3
Date of Report:	23 February 2011

Complaint

1. The Complainant in this matter, a journalist who has apparently had several unpleasant experiences with miscellaneous WASPA members, lodged this complaint on the 17th of November 2010. The complaint was forwarded to the SP on the 23rd of November.
2. The initial complaint itself is made up of at least two email communications with the WASPA Secretariat, which were combined by the Secretariat to form the complaint to the Member, and of which the following extracts have relevance:

Then there was 087023404 (19:49 2010/11/06) which sent me an invitation to Flirt... I never subscribed to this service and was getting tired of always spending my airtime and bandwidth to \unsubscribe\... I contacted WASPA to identify this PROVIDER and ensure that they stop... this never happened and this provider has been benefiting from my airtime ever since, while its identity has not been disclosed to me either.

Then today +27820048810449 (14:04 2010/11/17) I once again received an MMS inviting me to Erotic Chat 18+. I never subscribed to any such rubbish and WASPA seems to have allowed your providers to continue abusing consumers including myself and with it went my airtime again. Ironically, these stupid invitations only come to my Cellphone just after contacting WASPA and your members to unsubscribe me. Are there some of your members who troll your database seeking those who have unsubscribed from one provider?

...

I've since established that both numbers I'd failed to identify 087023404 (19:49 2010/11/06) and +27820048810449 (14:04 2010/11/17) both belong to Smartcall Technology Solutions (Pty) Ltd that list as its Director Mr. Gary Lawrence Nunez (Cell No. [removed]).

I've never had any dealings with this Company and do not intend to. However after identifying the company this morning through our own means, the Call Centre agent at Smartcall Technology Solutions who answered our call maintained that I subscribed to their services on November 6th at 18:51. She even claimed that I subscribed to ringtones (despite not having subscribed for ringtone or any other services,) what has ringtones got to do with erotic and flirting online. This cannot be true as even after receiving the claimed MMS that provided an hyperlink, I simply copied the link onto my Home Computer (in order to identify the owners) and never at any point used my phone to access the link. The fact of the matter is that Smartcall Technology Solutions (Pty) Ltd initiated communication with me on my cell and since I never asked them to subscribe me, I wasn't going to waste my airtime unsubscribing as that would have been sustaining their scam. It's money for providers when consumers send text to unsubscribe.

The claim that I subscribed to the services are as defamatory as the contents that they have been sending to my phone. I therefore would like complete refund of all the amounts debited from my cell and an undertaking that I'll never receive any such rubbish. I would also like to know from where they got my contact details.

3. On the 30th of November the SP requested that the complaint be redirected against the IP, which is an affiliate member of WASPA, and this was done on the same day by the WASPA Secretariat.
4. Notwithstanding the fact that SP had requested that the matter be redirected to the IP, it provided a response to the complaint on the 6th of December in which it stated the following:
 - 4.1. The SP does not own the number 087 012404, and according to ICASA, the number was not allocated. The SP could thus not determine who contacted the Complainant via this number.
 - 4.2. On the 6th of November "...the link was accessed via WAP advertising", which presumably means that someone clicked on a link in a WAP site which navigated the user's browser to the WAP site in question. Thereafter a video was downloaded and the amount of R9.99 charged against the relevant number. The SP provided the WASPA Secretariat with a copy of the video file that was purportedly downloaded. It shows a woman gyrating in skimpy clothing. No private parts are shown.
 - 4.3. On 17 November a marketing message was sent in accordance with section 5.2.1(b) which allows commercial messages to be sent to people with whom the originator has a direct and recent prior commercial relationship. This was the only message sent via the SP's gateway.
 - 4.4. The SP provided logs that record the transactions between its gateway and the Complainant's MSISDN on the days in question, and according to the

SP, shows activity from a Nokia mobile phone on the 6th of November, and a PC on the 17th of November.

- 4.5. The Complainant's number has been removed from all databases and no further marketing messages would be sent to the Complainant.
- 4.6. A full refund was given to the Complainant.
5. The Complainant responded to the above on the day it was received - he was not satisfied with this response, and still wanted to know where the IP got his number from in the first place.
6. On the 10th of December the SP forwarded a response from the IP to the WASPA Secretariat stating the following:

The user accessed the WAP portal on 6 November 2010 and entered his cellphone number as the system did not recognise his msisdn. The WAP portal consists of two parts. One subscription and the other single downloads. The user has the option to either subscribe to the chat service or he could proceed to download content and only pay for the content he downloads.

The below user did not subscribe to the chat service but clicked on the link for single purchases. As per the attached logs you can see that the user did browse a lot of pages on the single content pages and then proceeded to download a video. The user was charged R9.99 for this single download.

The service message that he received at 19:49 on 6 November 2010 was a message to invite the user to enter the chat application as the user was busy interacting with the service the message was merely a marketing message to invite the user to the other service available on the site. As per the attached logs the user was on the site from 18:51.

The second message sent to the user on 17 November 2010 was for marketing purposes as the user did interact with the WAP site in the last 3 months.

7. The IP in other words confirmed the SP's version that the Complainant initiated the content download on the 6th of November, and that the marketing message sent out on the 17th was justified by the prior commercial relationship between the parties.
8. On the 7th of January 2011 the Adjudicator requested that the Complainant should clarify his grounds of complaint, and that the Complainant, SP and IP should answer the following questions:

What was the context of the WAP link that was allegedly clicked by the complainant on the 6th of November? Did the Complainant navigate to a WAP site on his own or did he click on a link in an MMS or otherwise how did he land on the WAP site?

If an MMS, on what grounds was it sent to the complainant? Where did the IP get the Complainant's MSISDN? Why would the message not be considered spam?

9. The SP provided a response to the above on behalf of itself and the IP on the 17th of January in the following terms:

1. The user clicked on WAP advertising and that is how the user navigated to this WAP site.

2. On the 6th of November the link was accessed via WAP advertising. The link to download single content was accessed and thereafter the attached video was downloaded. The cost for the content was R9.99. This is NOT a subscription service.

On 17 November 2010 a marketing message was sent to the client according to the Code of Conduct Clause 5.2.1 (b). The message was sent from 27820048810449. The message started with 42361 which is the identifying sms shortcode for the service. This message was the first and only message sent to the complainant from our gateway.

The marketing message was sent to the user based on the initial interaction from the user thus the message sent to the user will not be considered (*sic*) as spam.

10. The Complainant responded on the 24th of January 2011. On the request for clarity on his grounds of complaint, the Complainant stated that the grounds were in fact "well documented", a response that the Adjudicator finds supremely unhelpful. He did however furnish the following further allegations:

10.1. The only unsolicited communication that he received on the 6th of November 2010 was an MMS from the number 087023404.

10.2. The Complainant accessed the link contained in that MMS from his Mac personal computer on the 6th of November 2010. He accessed this link numerous times in order "...to get details of the company and individuals behind the unsolicited invite."

10.3. Vodacom confirmed that the communication of the 6th of November was made from the number 087023404.

10.4. The refund offered to the Complainant amounts to an admission of guilt by the SP.

11. The complaint addressed to the SP and passed to the IP clearly mentions the number 087 023404 in the above regard; the SP however furnished information regarding the number 087 012404, and denied knowing who it pertains to.

12. On the 4th of February 2011, on the Adjudicator's request, the WASPA Secretariat put the following questions to both the SP and the IP:

1. Please can the SP/IP show by logs or otherwise how they know that the site was accessed via WAP advertising, including the content of said advertising and process followed by the complainant.

2. In the original complaint the originating number is listed as "087023404 (19:49 2010/11/06) which sent me an invitation to Flirt". However in the

response of 2010-12-06 the member replies "Please note that Smartcall Technology Solutions does not own the number 087012404". Please advise if 087023404 is in use by either the SP or IP, and if so, explain how the complainant's MSISDN was obtained.

13. The SP responded by furnishing another copy of the log mentioned above, and advising that it had no knowledge of the ISDN 087023404.
14. The IP gave no response.
15. There was not mention of this number on the log mentioned above, so on the 4th of February 2011 the Adjudicator searched for the number "087 023404" on WASPA's "www.smscodes.co.za" website, but no result was returned. He then entered the URL that the Complainant alleges was contained in the MMS of the 6th of November into his mobile phone's browser: "rd1.in/r7e23e3sy3qw2asa23.wml". This loaded up a WAP site of URL:

<http://4funchat.mobi/?cmp=&ID=79527&msisdn=&token=da39a3ee5e6b4b0d3255bfef95601890afd80709>

16. The WAP site was entitled "Sex Contact". A notice appeared on the screen advising that the site did not recognise the Adjudicator's MSISDN and asked for this to be entered. The Adjudicator entered his MSISDN, and was presented with a message saying:

Thank you!! You will receive (sic) in a few minutes a WAP push message with your link to the portal. Enjoy!

17. The Adjudicator entered his MSISDN in the WAP site but by the date of this report had received no communication from the IP.
18. The Adjudicator then looked up the second URL set out in paragraph 15 and established that its nameserver was at the URL:

"<http://www.smartcalltech.co.za/msisdnrouter/default.aspx?ID=79750&url=http://4funchat.mobi/?cmp=25>"

19. The server in question is apparently in the SP's domain. Consequently the Adjudicator asked the WASPA Secretariat to establish from the SP whether the sites at the URLs set out in paragraph 15 were operated by the IP. The SP responded in the affirmative.

Portion of the Code Considered

20. As the conduct complained of occurred in November 2010, version 10.0 of the WASPA Code of Conduct applies to this complaint.
21. The Complainant does not cite any sections of the code himself, and did not see himself clear to clarify with the Adjudicator exactly what the grounds of his complaint were but the following sections may have been infringed:

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.

5.3.1. 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.

Decision

22. The nub of this problem is the matter of who sent the MMS that the Complainant alleges that he received on the 6th of November 2010 and whether the URL contained therein set this complaint in motion.
23. The Adjudicator has established that the MMS sent to the Complainant on the 6th of November at 19h49 was sent by the IP, and this has been confirmed by the IP itself. Both the Complainant and the IP agree on the time at which this MMS was sent. The Complainant's activities on the site in question however commence at 18h51, as per the above log. The Complainant's version is that after receiving a spam MMS on the 6th he visited the IP's site so as to investigate who sent the MMS.
24. Unfortunately, because the Complainant's visit to the site is recorded on the SP's log as commencing before the MMS was sent, the facts do not support his version of events. Either the Complainant was mistaken as to the time at which he received the MMS in question (and remember that only one MMS was sent to him on 6th), or the SP has altered the logs. In the first scenario, the IP could be covering its tracks by agreeing with the Complainant's version. There is however no evidence to support the contention that the MMS was sent to the Complainant before he commenced his access of the IP's WAP site.
25. Consequently, the Adjudicator cannot find evidence on the facts presented to him that a spam MMS was sent to the Complainant on the 6th of November. There is no evidence contradicting the IP's version that the MMS sent on the 6th was as a result of the Complainant's activities on its WAP site.
26. Similarly, the MMS on 17 November was sent pursuant to a prior commercial relationship (the Complainant's activities on the 6th) as contemplated in section 5.2.1 (b). As a result, there's been no infringement of section 5.3.1 of the WASPA Code of Conduct.
27. Further, given that there is no evidence contradicting the IP's version that it obtained the Complainant's MSISDN from his interactions with its website, no infringement of section 5.1.7 of the WASPA code of conduct can be found either.
28. The complaint is accordingly dismissed.
29. As a postscript, it emerged during the Adjudicator's investigations into this complaint that the MSISDN "087023404" used by the IP was problematic. It was apparently one digit shorter than a genuine MSISDN would be required to be,

indicating that the IP's activities in this regard are not altogether above board. This issue was outside the ambit of this enquiry, but the WASPA monitor is requested to investigate the issue.

-----oooOoo-----