



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Tanla Mobile Limited
Information Provider (IP) (if any)	Adbuyer
Service Type	Unsolicited commercial messages (adult nature)
Source of Complaints	Mr D Trope
Complaint Number	12034
Date received	21 February 2011
Code of Conduct version	10.0

Complaint

The complainant logged an unsubscribe request on the WASPA unsubscribe system on 27 January 2011. The SP responded by stating that the complainant's number could not be found on its database. The complainant was not satisfied with the response and the matter has been escalated as a formal complaint for adjudication.

The complainant alleges that he received an unsolicited SMS prompting him to subscribe to a pornographic service using short code 41656.

SP's response

The SP referred the complaint to the IP.

IP's response

The IP alleges that on 9 December 2010 the complainant's handset was used to access one of its WAP sites by clicking on an advert. The terms and conditions of use for the site were accepted, which included an opt-in provision to receive future marketing messages from the IP.

The IP provided details of the handset and IP number used to access the site in question.

The service advertised was a pay-per-download service and not a subscription services. No content was downloaded by the user and no charges were levied.

3 (three) additional free marketing messages were sent to the complainant's number by the IP.

Complainant's reply

The complainant alleges that his SIM card was stored in a drawer in his house on 9 December 2010 while he was on holiday with his family.

Sections of the Code considered

2.1. An “**adult service**” is any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature.

2.2. An “**adult content service**” is any service for the provision of content which has been classified as suitable only for persons 18 years or older by an appropriate body (such as the Film and Publications Board), or content reasonably likely to be so classified.

2.23. "Spam" means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.

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. 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.

5.1.5. 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.

5.1.6. Where the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the service provider must honour the opt-out request as if the word 'STOP' had been used.

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.

5.2.1. 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.

Adult services

8.1.1. Any adult service must be clearly indicated as such in any promotional material and advertisements.

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.

8.1.4. Marketing messages (including commercial communications) may no longer be sent to a customer of an adult service if that customer has not made use of the service during the preceding three months. This is to prevent the accidental marketing of such services to children as a result of a recycled telephone number.

8.1.5. A marketing message sent to initiate or re-initiate adult services may not:

- (a) include any graphical or photographic content that includes full frontal images or portrayal of intimate parts of the body; or
- (b) include any words or phrases that may be considered profane, including common popular or slang terms for excretory functions, sexual activity and genitalia; or
- (c) include any links to any content described in (a) or (b).

8.2.3. Adult services may not be marketed via direct communications with a customer of non-adult services, unless that customer has explicitly given permission for such

marketing to take place and the customer has confirmed that they are, in fact, an adult.

Decision

I have noted the IP's response that the complainant's handset was used previously to access one of the IP's WAP sites and, in doing so, also consented to receive further marketing messages from the IP.

However, the complainant has placed this allegation in dispute and has advised that he was on holiday on the relevant date and that the handset was packed away in a drawer at home.

I am not satisfied that the IP has shown that it had a direct and recent (within the last six months) prior commercial relationship with the complainant and that the complainant would reasonably expect to receive marketing communications from the IP.

I therefore regard the marketing message sent to the complainant as unsolicited and hence spam.

In terms of section 5.3.1 of the WASPA Code of Conduct, members must 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.

The SP, as the WASPA member, has not responded to the complaint and has merely referred same onto the IP. Therefore, no evidence has been placed before me that reasonable measures were taken by the SP to ensure that its facilities were not used for the purposes of sending the message which is the subject matter of this complaint.

It also does not appear that the wording of the message in question contained a valid originating number and/or the name or identifier for the IP. Section 5.1.1 of the WASPA Code of Conduct has also been contravened.

There also does not appear to be a facility to allow message recipients like the complainant to remove themselves from the IP's database, so as not to receive any further messages from the IP. Section 5.1.2 of the Code has therefore also been breached.

The IP has also not provided any further detail on the nature of the WAP site that was allegedly accessed on 9 December 2010, and in particular, whether this site promoted adult or non-adult services. In terms of clause 8.2.3 of the Code, the IP cannot market its adult services via direct communications with a customer of non-adult services, unless that customer has explicitly given permission for such marketing to take place and the customer has confirmed that they are, in fact, an adult.

There is no evidence before me that the IP has such explicit consent and/or that they sought confirmation that the complainant is an adult. Section 8.2.3 of the Code has also been breached.

The complaint is accordingly upheld.

Sanction

I have noted the decision in complaint 7246 that was upheld, which deals with adult services marketed by various IP's using short codes offered by the SP. I have also noted that an appeal is pending in this regard.

In the current complaint, the SP has acknowledged that the IP is a client of theirs, but has taken no further steps to respond to the complaint.

In light of the seriousness of contraventions of provisions of the Code which relate to adult services and the marketing of such services, the following sanctions are given:

1. The SP is fined R 75 000.00.
2. The SP is issued with a final warning to take reasonable measures to ensure that its facilities are not used for the purposes of sending unsolicited

commercial messages (spam) and in particular, marketing messages for adult services that do not comply with section 8 of the Code.