

WASPA appeals panel
Complaint 12034

REPORT OF THE APPEALS PANEL

Date: 22 July 2011

Service Provider: Tanla Mobile

Information Provider (IP): AdBuyer

Appellant and Service Provider (SP): Tanla Mobile

Complaint Number: 12034

Applicable versions: 10.0

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 27 January 2011 for an unsubscribed request against AdBuyer, an Information Provider (IP).

1.2 The IP is an affiliate member and the SP is a full member of WASPA.

1.3 The complaint relates to an alleged unsolicited message of pornographic nature.

1.4 The complaints, the findings of the Adjudicator, the SP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

2. CLAUSES OF THE CODE CONSIDERED

2.1 The following clauses of the Code were considered:

- 2.1.1 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.
- 2.1.2 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.
- 2.1.3 2.23. “Spam” means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1
- 2.1.4 5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.
- 2.1.5 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.
- 2.1.6 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.
- 2.1.7 5.1.5. Once a recipient has opted out from a service, a message confirming the optout 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.

2.1.8 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.

2.1.9 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.

2.1.10 5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

2.1.10.1 (a) the recipient has requested the message;

2.1.10.2 (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

2.1.10.3 (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

2.1.11 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.

2.1.12 8.1.1. Any adult service must be clearly indicated as such in any promotional material and advertisements.

2.1.13 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.

2.1.14 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.

2.1.15 8.1.5. A marketing message sent to initiate or re-initiate adult services may not:

2.1.15.1 (a) include any graphical or photographic content that includes full frontal images or portrayal of intimate parts of the body; or

2.1.15.2 (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

2.1.15.3 (c) include any links to any content described in (a) or (b).

2.1.16 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.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR (Please note that this extract is a verbatim copy of part of the Adjudicator's Report)

3.1 ... 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.

3.2 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.

3.3 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.

- 3.4 I therefore regard the marketing message sent to the complainant as unsolicited and hence spam.
- 3.5 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.
- 3.6 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.
- 3.7 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.
- 3.8 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.
- 3.9 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.
- 3.10 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.

3.11 The complaint is accordingly upheld.

3.12 Sanctions Imposed

3.12.1 Should the SP not provide satisfactory proof of the sending of a monthly reminder message in compliance with the Code within 7 (seven) days of this ruling the SP is to refund the complainant within 5 (five) days of receiving this report. 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.

3.12.2 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:

3.12.2.1 1. The SP is fined R 75 000.00.

3.12.2.2 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.

4. GROUNDS OF APPEAL

4.1 Grounds of appeal for complaint 12034

4.1.1 The Appellant submitted detailed grounds of the complaint which will not be recanvassed in full here.

4.1.2 In its appeal it questioned the balance of proof, referred to factual errors and indicated its dissatisfaction with being held responsible

for an action of alleged misconduct by an information provider that is an affiliate member of WASPA.

4.1.3 It inter alia stated that “The Adjudicator, nonetheless, in this matter finds “on a balance of probabilities” recognizing that “this is unusual and perhaps extreme”. The Adjudicator justifies such an unusual and extreme action based on the assertion that Tanla Mobile did not submit a “detailed and acceptable explanation”.

4.1.4 It continued stating that Tanla has in its initial response to WASPA confirmed that the MSISDN referred to in the complaint is not in its database and referred the complaint to IP to resolve the issue.

4.1.5 In summary it contended that there are no complaints upheld against Tanla Mobile till date for violating the Code of Conduct prescribed by WASPA, that WASPA has issued a final warning against Tanla just in the second instance of a Complaint being lodged and that such action by WASPA is harsh and not encouraging business houses that are legally compliant.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 Version 10.0 of the Code, in use from 13 October 2010 to 08 June 2011, therefore applies.

5.2 Decision

5.2.1 After having read the initial complaint, the IP’s response and the subsequent adjudication, the Appeals Panel is perturbed by some of the reasons offered and subsequent conclusions reached by the Adjudicator.

5.2.2 As referenced in paragraph 3.3 above, the Adjudicator reached its conclusion based on an absence of evidence from the IP in this matter.

5.2.3 In fact, the Adjudicator requested evidence from the Complainant, which could subsequently not be provided, apart from an email message from the Complainant (**his version of events**) that indicated the proximity of the words allegedly used by the IP in its alleged breach of the Code. This type or format of evidence coincided with the type or format of evidence that was provided by the IP (**its version of events**).

5.2.4 Based on the Complainant's words and his allegation in par 3.2 above and the IP's subsequent failure to provide evidence (negating the IP's version of events), the Adjudicator concluded that there was a breach of the Code.

5.2.5 The Adjudicator as referenced in paragraph 3.6 above then applied the same reasoning in finding the SP (the Appellant in this matter) in breach of the Code.

5.2.6 At a first glance it might come across as completely unfounded.

5.2.7 However, in its communication to the SP, which was subsequently handed down to the IP, the WASPA Secretariat did recommend that certain evidence should be provided.

5.2.8 It is however unclear if this "**recommendation**" (par 5.2.7) should be treated as a "**request**" as detailed in section 14.3.12 of the Code which states that: "Where a complaint involves any interaction with a customer, when **requested** to do so, a member must, within five working days, provide **clear copies of all relevant logs** of that interaction."

5.2.9 If the Adjudicator utilised section 14.3.10 of the Code which states that: "The adjudicator may ask the secretariat to request that the complainant, the member, or both, furnish additional information relating to

the complaint” then in such an instance it could have been adduced that a definitive **request** was levied at the member.

5.2.10 In this matter, the Adjudicator did in fact make a request to both the IP and Complainant, **but** this request only related to the copy/wording of the SMS message.

5.2.11 It was therefore a definitive request in terms of the Code, but not a definitive **request to provide clear logs** etc.

5.2.12 It could therefore be argued that the IP failed to provide the necessary information.

5.2.13 It could further be argued that the Code in section 14.3.12 clearly states that: “Where a complaint involves any interaction with a customer, when **requested** to do so, a member must, within five working days, **provide clear copies of all relevant logs of that interaction.**”

5.2.14 The fact of the matter is that the Adjudicator in this matter **did not request any relevant logs**, but only the copy/wording of the SMS.

5.2.15 It is the opinion of this Panel that the IP’s inaction to provide logs (which was **not requested**), does not proof the non – existence thereof.

5.2.16 Members that are not frequented with complaints are not necessarily going to provide logs **without being requested** to do so – inaction in the opinion of the Panel that is not contrary to the Code.

5.2.17 Section 14.3.14 of the Code states that: “On the basis of the evidence presented, the adjudicator will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits.”

5.2.18 This Panel is of the opinion that the ruling and subsequent findings as referenced to herein as paragraphs 3.7, 3.8, 3.9 and 3.10 does not satisfy the requirements of section 14.3.14 (par 5.2.17 as referenced

herein) and as such finds that the Adjudicator erred in its application of the facts or lack thereof.

5.2.19 However, the IP's failure to act on the Secretariat's request is viewed in a serious light.

6. The finding of the Appeals Panel is:

- 6.1 The Panel finds that there is insufficient proof against the IP, therefore making the ruling against the SP unsubstantiated.
- 6.2 The Adjudicator's decision is overturned on a procedural technicality.
- 6.3 However, the Panel finds the IP in breach of section 3.1.1 which states that members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.
- 6.4 The IP is formally reprimanded for its breach.
- 6.5 Both the SP and IP are cautioned that WASPA will take serious action against any of its members (not discounting suspension from its membership) should it become evidenced that its Code is not strictly adhered to, especially when dealing with content of adult nature.

The cost of appeal is refundable.