



REPORT OF THE ADJUDICATOR

Complaint reference number:	12203
WASPA member(s):	Quadra Mobile Media Ltd. (IP) / Tanla Mobile Limited (SP)
Membership number(s):	IP - (1177) / SP - (0118)
Complainant:	Public
Type of complaint:	Unsolicited / Adult
Date complaint was lodged:	2011-03-02
Date of the alleged offence:	2011-04-13
Relevant version of the Code:	10.0
Clauses considered:	5.1, 5.3.1 and 8.1
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	N/A
Related cases considered:	10802

Complaint

The Complainant alleged that the IP in this matter has sent him unsolicited messages containing inappropriate material at inappropriate times.

Information provider's response

In its initial response the IP alleged that the Complainant consented to its services and hence commercial messages. It also referred to an attachment which indicated proof of subscription. No such proof of subscription was however attached.

In a subsequent response, after a request by the Adjudicator for further information was made, the IP stated the following:

"We found out that the customer or somebody else with access to his phone has clicked on a WAP banner which we use for advertising. Please find attached the screenshot of the banner (1. A copy of the WAP banner (advertisement))."

Our system was not able to recognize the MSISDN, so the user was redirected to a page where he had to enter the MSISDN manually. After that the customer has received an SMS from us containing a link to our Wap portal landing page he had to confirm the T&C which he did. Please find attached screenshot of the WAP Landing page and subsequent terms and conditions (2. A copy of the WAP Landing page and subsequent terms and conditions). After all the customer did not subscribe to our service and we did not bill him for any of our services.

Please find attached requested logs regarding:

- 1. A copy of the WAP banner (advertisement);*
- 2. A copy of the WAP Landing page and subsequent terms and conditions;*
- 3. Clear copies of *all* relevant logs of its interaction with the complainant."*

In a later response, after a further request from the Adjudicator for clear logs which was not provided us indicated above and initially requested, the IP responded by providing two single logs.

Sections of the Code considered

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.

5.1.4. For SMS and MMS communications, a message recipient must be able to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). If replying 'STOP' as set out in 5.1.3 will result in a charge greater than the lowest tariffed rate available, then instructions for the lowest tariffed rate opt-out must be included in every message sent to the customer.

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.

5.1.8. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the upfront description of the service.

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.

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.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the IP's subsequent reply.

The alleged facts of this case as provided by the IP and Complainant seem to be at odds with one another and the IP in its responses seem to contradict itself on the validity of accounts that have taken place.

The Adjudicator will start its elaboration on the merits of this case by first providing the reader with a brief summary of the various allegations raised and subsequent facts revealed.

The Complainant alleged receiving an unsolicited message from the IP.

At first the IP alleged that the Complainant, or somebody having access to his phone, accessed a WAP Portal and subsequently clicked on a WAP Banner. The IP assumed that the Complainant did this via a Wi-Fi enabled phone.

The Complainant stated that he lives alone, that no one has access to his phone, and that he cannot access internet or WAP from it. He further stated that he did not:

- access the IP's site;
- enter the MSIDN manually; nor
- did he accept any T&C as the IP claimed.

The IP further alleged that the Complainant received a link where after he was provided an opportunity to subscribe to the services.

The IP claimed that the Complainant was afforded an opportunity to access the terms and conditions, which according to the IP, the Complainant allegedly accepted.

The Complainant in this matter, as indicated above, vehemently denied such acceptance.

The IP further stated that it had proof that the Complainant was indeed subscribed.

No such proof was however provided.

In a later response, after the Adjudicator requested further information, the IP contradicts itself by stating that there was obviously no subscription service.

In its response it stated:

"After all, the customer did not subscribe to our service and we did not bill him for any of our services."

The IP then concluded in a later response, after the Adjudicator requested logs between the IP and Complainant, that:

"I would like to remind you that the client only had access to our service, but it has not been used and therefore we have not charged the customer."

In its response the IP also provided logs of ALL communication between it and the Complainant.

The logs provided by the IP indicated the 6th and 16th of August 2010. The latter of the two dates was an unsubscribe request.

The alleged date of offence however, was the 2nd of March 2011.

The IP did not provide the Adjudicator with the SMS that contained the link. It was however provided by the Complainant.

The Adjudicator will now further elaborate on its findings.

The Adjudicator requested the IP to provide him or her with ALL messages sent to the Complainant in this matter. Only two messages were received.

The IP also did not provide the Adjudicator with the link it claimed it sent to the Complainant. The Complainant did however provide the Adjudicator with the link.

On lack of any other evidence provided, the Adjudicator has to rely on the link provided to it by the Complainant. The link did not conform to ANY of the sections sub paragraphed under section 5.1 which relates to commercial messages and the Adjudicator finds the IP in breach of section 5.1 and all its sub paragraphs.

Section 5.1.1 inter alia states that all commercial messages must contain a valid originating number and/or the name or identifier of the message originator. This was not provided.

Another section, 5.1.8, for instance states that commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the upfront description of the service. The link was sent at 23:45.

Section 5.2.1 states that 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.

According to the logs that were provided, the IP alleged that the Complainant in this matter accessed its site or portal on the 6th of August 2010 and then allegedly unsubscribed on the 16th of August 2010.

It is difficult to see how this relates to the merits of this case and the Adjudicator can only assume that the intention of the IP was to illustrate that the Complainant had requested the message, or that there was a direct and recent commercial relationship between the IP and the Complainant, or that the IP had the Complainant's explicit consent to do so.

The dates of the logs do however not validate any of these intentions, and the IP in this matter, in the opinion of the Adjudicator, does not qualify for any of these preconditions. Hence, the message is considered SPAM and the IP is found in breach of section 5.3.1.

Section 8.1.4 also states that 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.

This section, according to the dates on the logs provided, has also not been conformed to by the IP.

Due to the nature of the Complaint and other inconsistencies, the Adjudicator will not make a decision on the alleged presence or absence of subscription services.

The Complaint is upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the IP with regard to breaches of the relevant sections of the Code of Conduct; and
- The IP's subsequent response.

The IP is fined R 50 000-00 for its breach of section 8.1.4, of which R 30 000-00 is suspended for 6 months.

The IP is fined R 75 000-00 for its breaches of sections 5.1 and 5.3.1 of which R 65 000-00 is suspended for 6 months. The unsuspended amounts of the fines must be paid to the WASPA Secretariat within 7 (seven) days after notification hereof.