



REPORT OF THE ADJUDICATOR

Complaint reference number: 16668

WASPA member(s): Sprint Media (IP) / Opera Interactive (SP)

Membership number(s): 1168 / 0068

Complainant: WASPA Employee

Type of complaint: Subscription Service

Date complaint was lodged: 8/3/2012

Date of the alleged offence: 8/3/2012

Relevant version of the Code: 11.6

Clauses considered: 4.2.1; 5.2.1; 5.3.1; 6.5.1; 11.1.1; 14.3.13

Relevant version of the Ad. Rules: Not Applicable

Clauses considered: None

Related cases considered: See report in complaint 16735

Complaint and Response

1. This complaint revolves around a subscription service operated by the Information Provider.
2. The Information Provider (IP) in this matter is Sprint Media, which provided the service complained of using the systems of Opera Interactive, which accordingly takes the role of the Service Provider (SP) here. As the IP is an affiliate member of WASPA, it is responsible for its infringements of the Code of Conduct.

3. The complaint was lodged on the 8th of March 2012 by the Complainant, who is employed by WASPA as a software developer.
4. The matter was not resolved informally, and was escalated to a formal complaint on the 8th of March by notice to the IP. The SP was informed of the complaint on the 26th of March, but did not make a submission.
5. I will deal with the parties' versions of events below.
6. The Complainant contends the following:
 - 6.1. On the 8th of March 2012 at 10h16 he received an MMS from the IP in the following terms:

'Your account 0836256660 has 500 bonus poi...!' Click to read full message [http://ems.cx/w/?m=\[MSISDN_REMOVED\]](http://ems.cx/w/?m=[MSISDN_REMOVED]) /optout: sms-stop-39325
 - 6.2. He immediately opened the link in his web browser on his Mac computer in an effort to ascertain who the service provider was. He was taken to a WAP page and captured a screen shot, which he submitted with his complaint, and which is appended as Annexure A.
 - 6.3. At 10h34 he received a further MMS message:

Your 500 Bonus points will expire in 24hrs. Click here to make your claim now <http://ems.cx/b/0E22DDF4C4>
 - 6.4. He again followed the link using his Mac's browser, and was taken to another WAP page, which is reproduced as Annexure B.
 - 6.5. At 10h49 he received a third message:

Last chance to claim your Bonus! Click here <http://ems.cx/b/4CE3119BB1>
 - 6.6. He again followed the link, and was presented with a WAP site which was the same as that corresponding to the second message.
7. The Complainant raises two possible infringements of the Code of Conduct:
 - 7.1. The messages sent to him were unsolicited and hence spam (clause 5.2.1 read with clause 5.3.1).
 - 7.2. The IP did not meet the requirements of clause 11.1.2 in that it did not display at least two examples of the content to be provided under the subscription service.
8. He recognised that he had not actually been subscribed to the service in question.
9. The IP responded on the 27th of March in the following terms:
 - 9.1. The Complainant's first interaction with the IP did not take place on the 8th of March, as he said, but rather on the 27th of February. On

that day the Complainant accessed the IP's WAP site of his own accord. Moreover, the IP was able to capture the details of the Complainant's computer's browser, operating system and other relevant details from the Complainant's access at that time, as per its supporting logs. The corresponding log entry reads:

<	2012-02-27 19:41:20	Web Registration	WebSite Mobmatic	Website Registration IP Address: 41.0.56.253 (ZA) URL: <i>http://m.mobmatic.com/lps/picture/smsa1c/</i> Phone: chrome 1.0 User-Agent: Mozilla/5.0 (Macintosh; Intel Mac OS X 10_7_3) AppleWebKit/535.11 (KHTML, like Gecko) Chrome/17.0.963.66 Safari/535.11
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9.2. On the same day the Complainant entered his MSISDN on the IP's WAP page.

9.3. In response, and as the second leg of the IP's double opt-in process, the IP sent the following message to the Complainant's MSISDN:

Click <http://ems.cx/w/8Q7K4DCN> to complete activation.
help@mobmatic.com subscription service R7/day. to unsub sms stop
39325

9.4. The Complainant did not respond to this message, and so the double opt-in process was not completed and the Complainant was not subscribed to the IP's service.

9.5. The IP maintains that the terms and conditions of its WAP site allow it to send marketing messages to consumers who consent to the terms, and that by visiting its WAP site on the 27th of February and clicking "Next" (as is indeed displayed on the version of the WAP site reflected in Annexure A), the Complainant had agreed to such terms.

9.6. Thus the message sent to the Complainant on the 8th of March 2012 was not unsolicited, but resulted from the permission given to the IP on the 27th of February.

9.7. Further, the IP maintains that:

The WAP landing page clearly states:

At the Top of the page:

- "SUBSCRIPTION SERVICE R7/DAY."
- "Mobmatic's premium wallpapers for your Cell. Click next to join."

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10. The IP's response came as something of a surprise to the Complainant who responded as follows on the 29th of March 2012:
 - 10.1. The web browser history on the Complainant's computer only shows visits to the IP's WAP site on the 8th of March 2012.
 - 10.2. He is not aware of ever having accessed the IP's WAP site of his own accord, as he does not access sites that offer mobile content. As an employee of WASPA the Complainant was fully aware of what subscription services are. Moreover, the mobile phone that he used at the time was owned by his employer, which would not take kindly to his subscribing to mobile content on its account. He thus had no reason to visit such a site.
 - 10.3. Only the Complainant had access to his Mac computer at the time, and it is encrypted and password protected every time he leaves it. Thus he doubts whether a third party could have accessed the IP's WAP site using his computer without his knowledge.
 - 10.4. He did not receive any messages to confirm subscription.
 - 10.5. The Complainant conceded that the IP had described his operating system and other details of his computer accurately; moreover the IP address reflected for his internet connection was correctly reflected in the IP's logs. He thus felt that he could not argue with the authenticity of the logs.

I have therefore no choice to accept the WASPs explanation regarding section 5.2.1, as it contains information that points back to the actual machine the request was done on. I can say in all honesty though that I did not do this, or is (at the time the complaint was logged, and still) completely unaware that I did this.

11. The IP responded to the Complainant's contentions on the 26th of April, but added nothing it had not already submitted.
12. I requested the WASPA Secretariat to obtain clarity for me from the parties on several points.
 - 12.1. I noted that the IP had not produced a log showing when the Complainant had actually entered his MSISDN into its WAP site on the 27th of February. The IP answered as follows:

In the correspondence of 27th March 2012, we provided a detailed log of the registration of the MSISDN, which captured IP address and User Agent. This information is only provided when a user clicks nexus (*sic*) and submits their MSISDN through the landing page. At no point have we alleged a visit when we have this detail recorded.
 - 12.2. I am not at all clear what this means – the IP seems to be saying that a log could only have been generated if the Complainant had entered his MSISDN, but then disputes that it said he ever visited the site and did so.
 - 12.3. I asked the Complainant if he had a record of whether his assigned IP address changed between the 27th of February and the 8th of March, but he did not have this information.

Sections of the Code considered

13. The conduct complained of took place on or about the 8th of March 2012, and consequently version 11.6 of the WASPA Code of Conduct is applicable. The following clauses have relevance:

4.1. Provision of information to customers

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

5.2. Identification of spam

5.2.1. Any direct marketing message is considered unsolicited (and hence spam) unless:

(a) the recipient has requested the message;

(b) the message recipient has a prior commercial relationship with the message originator and has been given a reasonable opportunity to object to direct marketing communications

(i) at the time when the information was collected; and

(ii) on the occasion of each communication with the recipient; or

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

5.2.2. Any commercial message is considered unsolicited after a valid opt-out request.

5.2.3. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

5.3. Prevention of spam

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.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

6.5. Use of the word "free"

6.5.1. The keyword "free" or words with the same or similar meaning (in any language) may not be used for any service unless that service has no associated charges whatsoever, excluding network bearer charges.

11.1. Promotion of subscription services

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required

to obtain any portion of a service, facility, or information promoted in that material.

14.3. Formal complaint procedure

14.3.13. Providing incorrect or fraudulent information in response to a complaint, or in response to any other request to provide information is itself a breach of this Code.

Sections of the Advertising Rules considered

14. Not Applicable

Decision

15. This complaint turns, as it so often does, on the logs provided by the IP. The Complainant feels that he cannot dispute the authenticity of the IP's logs.
16. The parties' versions of events are incompatible, and hence either the Complainant is mistaken about the facts, or the IP is being untruthful. I must use the submissions that have been given to me to decide which it is.
17. I have taken the following factors into account in deciding which version is to be believed.
- 17.1. The Complainant is a computer programmer who works in the WASP industry. He is not a "little old lady" who is easily befuddled by new-fangled technology. In short, he is someone who can be expected to know what he is doing.
- 17.2. The Complainant had no reason to enter his work MSISDN into a mobile content site, especially as the MSISDN was for an account belonging to his employer.
- 17.3. The Complainant locks his computer when he is away from it, and I have no reason to doubt this.
- 17.4. I also have no reason to doubt that the Complainant's browser history only shows a visit to the IP's WAP site on the 8th of March, and no visit on the 27th of February.
- 17.5. The Complainant denies having received the IP's confirmation message on the 27th (though I give this little weight given how many consumers instinctively delete messages that are considered "spam").
- 17.6. I was somewhat surprised by the IP's response to my enquiry as set out in paragraph 12.1. To my mind this response could be taken as an attempt to evade the question, but the evidence is too weak to give it any weight.

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- 17.7. The evidentiary value of the Logs. The IP contends that it captured the Complainant's computer specifications on the 27th of February 2012. It states that the Complainant entered his MSISDN into the IP's site on this date. The implication of course is that the IP would not have been able to link the Complainant's computer to his MSISDN if he had not provided his MSISDN on that date. If there was no other explanation for how the IP came to link the Complainant's computer with his MSISDN, then the enquiry would end at this point – the IP's version would have to be accepted. There is however another possible explanation. Note that what follows is not necessarily what actually occurred, but is a viable alternative theory.
- 17.8. Let us assume that the Complainant's initial version of events is the correct one, in other words that the messages of the 8th of March 2012 were indeed unsolicited. The IP's ability to link the Complainant's computer to the Complainant's MSISDN can be explained as follows.
- 17.8.1. The IP had the Complainant's MSISDN to start with. Whether it obtained the MSISDN from a third party or randomised it is of no consequence. It used the MSISDN to send the marketing messages to the Complainant on the 8th of March.
- 17.8.2. I note that the link contained in the first marketing message of the 8th of March contains the Complainant's MSISDN embedded in it. When the Complainant submitted the link using his computer's web browser (which the Complainant admits that he did), the browser would have sent the link to the server hosting the IP's WAP site. Contained within the link was the Complainant's MSISDN. The Complainant hence unwittingly informed the IP's WAP site server of his MSISDN, even though he was using a browser on his Mac and not his phone to access the WAP site.
- 17.8.3. When the Complainant visited the IP's WAP site, the IP's system captured the MSISDN from the server request, as well as the computer's details (which web servers routinely do). Hence the IP established the link between MSISDN and the Complainant's computer (with its specification details) on the 8th of March, not the 27th of February.
- 17.8.4. In this scenario the Complainant is not mistaken: he did not visit the IP's WAP site on the 27th of February, and neither did anyone else using his computer. The IP took information that it gleaned from his visits to its WAP site on the 8th of March to fabricate log entries to show a fictional visit on the 27th of February.
18. If logs had not played a part in this complaint, I would have had no hesitation in believing the Complainant's version based on his submissions. In the circumstances I must balance the Complainant's word

against the evidence of the logs. The logs would have been unassailable if the IP could only have linked the Complainant's MSISDN with his computer specifications if the Complainant had manually entered the MSISDN in the IP's WAP site. I have shown that this was not the only feasible method of doing so. When weighing up the Complainant's contentions against the now weakened evidence of the logs, I have no hesitation in concluding that the Complainant's version is the correct one.

Spam

19. It follows from the above that the Complainant did not visit the IP's WAP site on the 27th of February, and hence there is no prior relationship between the parties. Nor did the Complainant consent to receipt of marketing messages from the IP.
20. The messages sent to the Complainant on the 8th of March did not fall under any of the exceptions set out in clause 5.2.1 of the Code of Conduct, and those messages were spam.
21. The IP has infringed clause 5.3.1 of the Code of Conduct.

Falsification of Logs

22. The IP has stated a version of events which is incompatible with the Complainant's version. As the IP supported its position with logs that are themselves incompatible with the Complainant's version, the inescapable conclusion is that the IP falsified those logs.
23. The IP has infringed clause 14.3.13 of the WASPA Code of Conduct. This necessarily also involves an infringement of clause 4.1.2.

Subscription Services

24. I have no reason to doubt that the screen shots provided by the Complainant are authentic. In neither of the screenshots are the services in question "prominently and explicitly" identified as subscription services, as required in clause 11.1.1 of the Code of Conduct.
25. The IP has infringed clause 11.1.1 of the Code of Conduct.
26. I can find no grounds for an infringement of clause 11.1.2 as alleged by the Complainant.

Misleading Marketing

27. It strikes me that the IP's practice of sending marketing messages to consumers advising them that they have an account with 500 points sitting in an account with the IP ready to be redeemed may be misleading, whether or not the recipient has a prior relationship with the IP. The term "freemium member" is particularly troubling when used by the IP in this context.
28. The "points" can apparently only be redeemed if the consumer subscribes to the IP's service and becomes a "full" member. Hence there is really no

such thing as a "premium member" at all, and the facility is certainly not free.

29. The IP could very well be infringing clauses 4.2.1 and / or 6.5.1 by doing this.
 30. I do not have sufficient information to make a ruling on this head, and will refrain from doing so. Nonetheless, the WASPA Monitor is requested to investigate potential infringements of clauses 4.2.1 and / or 6.5.1.
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Sanctions

31. The WASPA Secretariat is requested to investigate the IP's practice as described in paragraphs 27 to 30.
32. I have adjudicated complaints 16319, 16333, 16668 and 16735 together. For the sake of convenience I have dealt with sanctions for all these complaints in my report for complaint 16735.

Annexure A

Your account
0836256660 has
500 mobmatic
points. Click next
to redeem:

NEXT >

Support:
help@ems.cx

Mobmatic is a subscription service at R7/Day. As a freemium member of mobmatic you have 500 Mobmatic points, by upgrading to a subscription service you will get 1000 more points to exchange for premium services. ([forgot your password?](#)) Mobmatic has requested that your mobile number be made available. Clicking on on the action button you're declaring to be 16+ and are accepting both the [terms and conditions](#) and to receive free promotional messages relating to this and other services operated by Sprint Media S.L. To opt-out from promotions, sms STOP to 39325, contact help.sa@mobmatic.com or call 0213002334. [Privacy Policy](#).

Annexure B

Your bonus has
been confirmed.
Click complete to
claim now:

COMPLETE

Support:
help@ems.cx

Clicking on 'complete'
you are joining
Mobmatic subscription
service for just R7 a
day. To cancel service
send stop to 39325.
For support call
0213002334 or email
support@mobmatic.com