



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Celerity Systems (BulkSMS)
Information Provider (IP): (if applicable)	Dewberry Trading 26 (Pty) Ltd (Polo)
Service Type:	Unsolicited Messages (spam)
Complainant:	Consumer
Complaint Number:	4555
Code version:	Code v 4.7 and Ad Rules v1.6
Date of Report:	16 September 2008

Complaint

1. This complaint involves the alleged sending of unsolicited commercial messages by the IP to the Complainant using the SP as a conduit. The submissions are lengthy, with no single statement of complaint by the Complainant, but it will suffice for our purposes to set out the undisputed facts.
 - 1.1. On the 26th of January 2007 the Complainant lodged a complaint with WASPA (which was allocated WASPA complaint number 973) alleging that he received unsolicited commercial SMSes sent to him via the SP with the sender ID of 278332600629001. This ID was found to be that of the IP. The Complainant said that he had purchased goods from the IP's store in Sandton on one occasion, and that he was now being sent promotional SMSes.
 - 1.2. On the fifth of February 2007 the SP sent an e-mail to the Complainant advising him that his mobile number had been removed from the SP's mailing list for the IP, and that it had also been blocked from the IP's account with the SP, meaning that the IP would not be able to send any SMSes to the Complainant's mobile number in future. The WASPA complaint did not proceed to adjudication.
 - 1.3. On the ninth of July 2008 the Complainant sent an e-mail to the SP advising that he had received one or more promotional SMSes on the same mobile number as before from the IP, this time using a sender ID of 27833260062900. It is noteworthy that this sender ID is identical to that set

out above, except that it is missing the final "1". The text of the SMS, according to the SP, read as follows:

Created 2008-07-09 10:18:21.0
 Relayed 2008-07-09 10:20:04.0
 Message Polo stores VIP customers Sale preview, Wednesday 09 July 2008
 @
 5:00PM till 7:00PM. 50% off selected items.

- 1.4. On the same date the Complainant contacted WASPA with an unsubscribe request. This request was logged on the WASPA unsubscribe system as ticket number 11168 in respect of the Complainant's mobile number.
- 1.5. On the 10th of July 2008 the SP blocked the Complainant's mobile number from receiving SMSes from the IP.
- 1.6. On the 14th of July 2008 the SP e-mailed the Complainant:

We are investigating how this happened. Our system was supposed to block this message, and our client was also supposed to remove the number. We clearly slipped up here, as the message in question (on 7 July) came from the same account (POLO). We either blocked the number on the wrong account, or did not block it when we thought we did, or there is a fault in our software. We would like to apologise for this error.

As soon as we identified the problem, I will let you know. In the mean time we will block the number again (and this time double check), and also ensure that POLO does also remove the number. We will again deal with POLO, and ensure they comply to the WASPA code.

- 1.7. The SP also created a ticket on its support system to track the issue. It e-mailed the IP notifying it of the complaint, and advising it that the Complainant's mobile number had been blocked from the receipt of SMSes from the IP's account with the SP. The IP was moreover requested to remove the Complainant's mobile number from its database permanently.
- 1.8. On the 17th of July 2008 the SP closed its support ticket.
- 1.9. On the 28th of July 2008 the Complainant received another SMS from the IP, this time originating from the number 0767520475.
2. The adjudicator is satisfied from a thorough perusal of the documentation that this last message was not sent to the Complainant by the SP or by the IP using the SP as a conduit. As no allegation is made that any other member of WASPA was involved in the transmission of this last message, I agree with the SP's contention that this last message is irrelevant to this adjudication, and will not address this issue further.
3. One or more other IPs, using the SP's system, also sent the Complainant SMSes, and the Complainant used the "stop" unsubscribe facility to prevent receipt of further messages from them. The SP was concerned that it would be taken to task for this, but as it is clear that the unsubscribe system worked in this other case or

cases, and that the Complainant has not raised any other allegations against specific IP's, the SP need have no concerns on this score.

Response

4. The SP in its response gave a prompt and full disclosure of all steps taken in dealing with the complaint, most of which are set out above. Its submission in respect of the apparent failure to block the Complainant's mobile number properly reads as follows:

On 2008/07/10, in response to WASPA unsubscribe system ticket #11168, Celerity Systems blocked (i.e. unsubscribed) the Complainant's cellphone number 27834483448 from receiving messages from the account of Dewberry Trading 26 (Pty) Ltd (POLO).

Celerity Systems does recognise that this number should have been blocked at a prior date from the system, as indicated to the Complainant via email on 2007/02/05. On further investigation, there does seem to have been a problem with the manual or system processing of the blocked cellphone number at that time.

5. The IP was rather less forthcoming in its response, furnishing a set of answers to questions posed to it by the SP, some four weeks after the SP's response was sent to the WASPA Secretariat:

[Celerity System request for information:]

1) When and how was the cellphone number: 27834483448 subscribed to your database to receive promotional SMS messages?

[POLO response:]

The number 27834483448 was left in one of our stores by the customer and they forwarded it to our head office by mistake.

[Celerity System request for information:]

2) Confirm that the cellphone number: 0767520475 was used by a POLO representative to send a promotional SMS message to the cellphone number: 27834483448 on 28 July 2008.

[POLO response:]

This number was used by us to advertise our sale.

[Celerity System request for information:]

3) What the content of the SMS message sent on 28 July 2008 sent to the cellphone number: 27834483448.

[POLO response:]

Sale now at Polo.

[Celerity System request for information:]

4) Confirm that the cellphone number: 27834483448 has been removed from your Database.

I can confirm that the number is now removed from our data base.

Portion of the Code Considered

6. Due to the fact that the Complainant's unsubscribe request should have been acted upon in February 2007, the Code of Conduct as it existed at that time is relevant, being version 4.7. The following sections of the Code of Conduct are relevant here:

5. Commercial communications

5.1. Sending of commercial communications

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. Where feasible, persons receiving commercial messages should be able to remove themselves from the database of a message originator using no more than two words, one of which must be 'STOP'.

5.1.4. Any mechanism for allowing a recipient to remove him or herself from a database must not cost more than one rand.

5.1.5. 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.

5.1.6. 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. Identification of spam

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 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.

5.2.2. 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.

Decision

7. As this complaint centres on the alleged transmission of spam to the Complainant, the first question to answer is whether the messages in fact constituted spam, that is to say unsolicited commercial messages. The Code of Conduct uses the test set out in section 5.2 to determine whether or not a message or messages constitute spam. It is unclear why the Complainant left his cellphone number at the IP's store, and on the IP's version, it was itself not certain whether or not be Complainant wished to receive marketing messages. The IP cannot argue that the Complainant requested the messages after receipt of the unsubscribe request.
8. The same fate would meet an argument that the IP had a "direct and recent prior commercial relationship" with the Complainant; not only would the unsubscribe request nullify this ground, but the period between the initial unsubscribe request and the second complaint is longer than would be required to constitute "recent".
9. We can thus safely conclude that the messages in question were indeed spam.
10. On the facts, several sections of the Code of Conduct may have been infringed, being:
 - 10.1. **Section 5.1.2**, in that the message originator (the IP here) did not have a facility to allow the recipient to remove him or herself from its database.
 - 10.2. It appears that the SP provides a "campaign management system" of sorts which allows the IP to manage its SMS marketing campaign on the SP's system. It further appears that "stop" requests in respect of the IP's messages terminate on and are processed by the SP's system. It is clear from the documentation that the "stop" facility on the SP's system does work, but for some reason in the present instance there was a technical or other

error in respect of the original unsubscribe instruction of 2007. Thus the removal facility, while extant, failed in this case. Accordingly section 5.1.2 of the Code of Conduct has been breached.

- 10.3. **Section 5.1.3** in that persons receiving commercial messages should be able to remove themselves from the message originator's (IP's) database by using no more than two words one of which must be "stop".
- 10.4. The adjudicator is satisfied that the SP's system allows for removal of consumer details from message originator databases as contemplated in section 5.1.3. This section expands upon section 5.1.2 in specifying how a removal facility should work, and it would thus not make sense to find a breach of both sections in this case.
- 10.5. **Section 5.3.1** in that the SP did not take reasonable measures to prevent the sending of spam.
- 10.6. While the IP can be said to have sent the spam, the IP is not a member of WASPA, and accordingly the proper inquiry is whether the SP has put in place reasonable measures to ensure that its facilities are not used by others for the purpose of sending spam. This is a rather holistic inquiry, and given that the SP clearly has a working system, albeit one which has failed in this one isolated incident, the adjudicator is prepared to accept that the SP has taken reasonable measures to ensure that its facilities are not used for the sending of spam. This impression is strengthened by the thorough and expeditious response of the SP, not only to this complaint, but to the original complaint of January 2007.

Sanction

11. In imposing a sanction the following factors were taken into account:
 - 11.1. the SP's praiseworthy conduct in dealing with this complaint is set out above;
 - 11.2. the SP's good record with WASPA as regards spam, notwithstanding the fact that it is a major provider of bulk SMS services; and
 - 11.3. the isolated nature of this incident.
12. The SP is issued with a formal reprimand for its breach of section 5.1.2 of the Code of Conduct.

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