



REPORT OF THE ADJUDICATOR

WASPA Member (Service Provider):	Opera Telecom
Information Provider (IP):	Switchfire Ltd
Service Type:	Subscription
Source of Complaints:	Public
Complaint Number:	4655
Code Version (“CoC” and “AR”):	Code of Conduct 6.1 and Advertising Rules 1.6
Date of Report:	16 October 2008

Complaint

1. The Complainant lodged a complaint as a result of receiving unsolicited SMS' between (and including) the dates of 20 July 2008 to 29 July 2008 from the SP. Although not all SMS' were individually referred to by the Complainant, the Mobile Operator / Mobile Terminator Logs for the relevant number indicate that ten SMS' were received by the Complainant from the SP and that he was charged a total of R75. For ease of reference those SMS' are reproduced here:
 - 1.1. Hot videos on yr mobile WOW :: [unique URL provided]
 - 1.2. Hope you enjoyed using Video Garden - For More follow the link when it arrives on yr mob!!
 - 1.3. Video Garden :: [unique URL provided]
 - 1.4. Free Msg. U are subscribed to Video Garden for cost 1 wap menu cost R25 every 3 day until you text STOP. Helpline 0800-981-221.
 - 1.5. Hope you enjoyed using Video Garden - For More follow the link when it arrives on yr mob!!

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1.6. Video Garden :: [unique URL provided]

1.7. Free Msg. U are subscribed to Video Garden for cost 1 wap menu cost R25 every 3 day until you text STOP. Helpline 0800-981-221.

1.8. Hope you enjoyed using Video Garden - For More follow the link when it arrives on yr mob!!

1.9. Video Garden :: [unique URL provided]

1.10. Free Msg. U are subscribed to Video Garden for cost 1 wap menu cost R25 every 3 day until you text STOP. Helpline 0800-981-221.

2. The Complainant indicated in his complaint that he had not provided his permission to be contacted by the SP and/or the IP and further indicated that it was extremely unlikely that any other person may have subscribed to the services offered above due to the cell phone being for his personal use only.
3. On 08 August 2008 (it is presumed that the Complainant erred in referring to the date as 08 July 2008 in the original complaint) the Complainant telephoned Vodacom Customer Care and the call centre assistant confirmed that R50 had been added to his cellular telephone bill (in contrast to the R75 indicated by the records provided above) but indicated that she was unable to remove the fee from his account and after contacting her supervisor at Vodacom Customer Care was put in contact with the SP.
4. The Complainant then telephoned the SP and spoke to Koogan Govender of the SP who indicated that the STOP functionality was not working. The SP then undertook to refund the R50 into the Complainant's account which he refused and he then requested that he be provided with a R50 pay-as-you-go voucher instead.
5. The IP is Switchfire Limited, a WASPA affiliate member.

Response

6. In response to the above Complaint, the SP indicated that Video Garden, the customer of the IP, sent an initial message to the Complainant to "test" the service.

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7. The Complainant's cellular number was obtained as a result of the Complainant accessing the Opera service within the last 12 months (specifically on 11th September 2007) and the Complainant would thus, in terms of clause 5.2.1(b) of the WASPA Code of Conduct v6.1 ("CoC") reasonably expect to receive marketing communications from the SP. However the SP did indicate that it was unaware at the time that the CoC which came into operation on 01 July 2008 indicates that this commercial relationship should be within the last 6 months in contrast with the WASPA Code of Conduct v5.7.
8. Arguably even in terms of the previous version of the CoC a commercial relationship in excess of 6 months would not be seen to be a "recent" commercial relationship.
9. The SP then goes on to indicate that it accepts that it has breached clauses 11.1.2 and 11.1.4 of the CoC in that:
 - 9.1. "It was not clear to the subscriber that he had been subscribed, nor was he aware he had clicked on a link", and
 - 9.2. "Subscription services are only allowed if a user has specifically opted in to receive the service".
10. The SP further indicates that while the confirmatory SMS that is required by clause 11.1.7 was provided to the Complainant, this was only sent three days after the Complainant was subscribed in breach of the said clause of the CoC.
11. The SP goes on to dispute that clause 3.1 of the CoC has been breached in that:
 - 11.1. "At no time was there an attempt to deceive the public. The WAP site did state it was a subscription service and how it worked;
 - 11.2. Once we realized there was an issue we have co-operated fully with the networks and with WASPA;
 - 11.3. We suspended the service voluntarily;
 - 11.4. We have also set up a dedicated customer service number (082 239 5569) to handle customer complaints/queries; and
 - 11.5. We have implemented a formal refund policy and treated all subscribers with care and professionalism".

Mitigation

12. The SP then provides various grounds of mitigation relating to this matter including:

- 12.1. That this was the first subscription service provided by the SP;
- 12.2. Processes have been implemented to ensure that this did not reoccur;
- 12.3. The SP accepts that various breaches of the CoC have occurred;
- 12.4. The SP is not directly responsible for the service but rather that the IP is responsible for the content;
- 12.5. The subscription service provided by Switchfire Ltd is within the bounds of the laws of the United Kingdom;
- 12.6. The SP was not aware that the CoC had been updated to indicate that a “recent” commercial relationship was one that occurred within the last 6 months.

Portions of the CoC Considered

13. As the conduct complained about occurred in July 2008 version 6.1 of the WASPA Code of Conduct is applicable to this dispute.

14. The following clauses of the CoC were considered:

3.1. Professional and lawful conduct

3.1.1. 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.

3.1.2. Members are committed to lawful conduct at all times.

3.9. Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

3.9.3. The member must act in accordance with the WASPA complaints and appeal process and if appropriate, suspend or terminate the services of any information provider.

3.12 Employee awareness

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3.12.1. Members must ensure that any relevant employees are made aware of this Code of Conduct and the requirements and procedures associated therewith.

3.13. Alterations

3.13.1. WASPA reserves the right to make alterations to this Code of Conduct from time to time, following due consultation with members.

3.13.2. WASPA will notify its members and network operators of any alteration to the Code of Conduct.

3.13.3. Any alterations to the Code of Conduct are binding on all members. The current Code of Conduct will always be available on the WASPA web site.

3.13.4. WASPA reserves the right to immediately amend or alter this Code of Conduct if directed to do so by a court of law.

5.1. Sending of commercial communications

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

5.1.4. Notwithstanding 5.1.3, for SMS and MMS communications:

(a) 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 must be included at the start of any messaging service, for example: "reply STOP to opt out".

(b) Recipients of premium rate or non-replyable messages must have the option to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). This opt-out instruction must be included in every commercial premium rate or non-replyable message, for example. "sms STOP to 32xxx to opt out".

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.

5.2.1. 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. 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.

11.1. Manner of subscription

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item.

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11.1.3. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.1.5. Subscription services with different billing frequencies should not have a subscription mechanism likely to cause a customer to accidentally subscribe to a more frequent service.

11.1.6. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

11.1.7. Once a customer has subscribed to a subscription service, a notification message must be sent to the customer containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number.

11.2. Termination of a service

11.2.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

11.2.2. All subscription services must have a readily available unsubscribe facility which costs no more than one rand.

11.2.3. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'.

11.2.4. Members must ensure that the termination mechanism is functional and accessible at all times.

11.2.5. A user must be removed from a subscription service if no successful bills have been processed for that service for more than three months, or if there is an indication from one of the mobile networks that the number is no longer in use.

11.2.6. If a user ports their number from one operator to another, that number must be removed from all subscription services.

Decision

15. As partially conceded by the SP the messages sent to the Complainant were clearly spam as defined by clauses 5.2.1(b) of the CoC and as such breached clause 5.3.1. It is not accepted that there is any "partial" breach of this clause. Any lack of awareness of the new clause 5.2.1(b) as indicated by the SP can only be considered as a factor related to the mitigation or aggravation of the sanction imposed as indicated below.

16. The Complainant in this matter alleged that the "STOP" functionality was inoperative and that a subscriber would be unable to stop the service by sending an SMS to the relevant cellular number (which, if correct, is a breach of clause 11.2.4). In order to afford the SP the opportunity to refute this allegation a request for further information was sent to the SP. The SP's response was to accept that the message explaining the "STOP" functionality was provided to the

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Complainant three days later - which is in itself a breach of clause 11.2.1 in that the "STOP" functionality was not "readily available". This response was, unfortunately, inadequate in responding to the complaint that the "STOP" functionality was not working which is a distinct question from whether the "STOP" functionality was communicated to the Complainant.

17. Thus we are left with uncorroborated evidence from the Complainant indicating that the "STOP" functionality was not working and a bare denial (of sorts) by the SP that the "STOP" functionality was in fact working. For the sake of clarity it should be noted that the SP's response to the request for further information should have been to provide evidence that similar "STOP" messages were being successfully processed at the time of the complaint and as such the weight of evidence would then have supported the contention that the "STOP" functionality was operative. However bearing in mind the lack of conclusive evidence relating to either position it would appear equitable to rule that the SP must provide evidence to the satisfaction of the WASPA secretariat that the "STOP" functionality does in fact work before resuming the service.
18. In addition to the definition of spam as found in the CoC, an unsolicited commercial communication which does not allow the user to cancel his/her subscription to the mailing list is a matter that attracts a criminal sanction in terms of the Electronic Communications and Transactions Act no 25 of 2002 ("ECT Act") which in turn would breach clause 3.1 of the CoC in that the conduct complained of was unlawful. Assuming that the "STOP" functionality was indeed not functioning, the Complainant nonetheless had the option (which he elected not to exercise) to telephone the SP using the call centre number as provided in the subsequent messages to the Complainant. This information was, however, only communicated to the Complainant three days later. While it is not disputed that the call centre number was operational there remains the question as to whether the delay of three days in providing the call centre number which the Complainant would use to unsubscribe is acceptable in terms of South African law. While the delay of three days breaches the CoC as described above, s45 of the ECT Act is unclear about any delay relating to the ability to unsubscribe. In the absence of a clear indication by the legislation the benefit of the doubt should be provided to the SP and in turn we consider the above actions not to be unlawful or in contravention of s45 of the ECT Act and as such clause 3.1 of the CoC has not been found to have been breached.

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19. The SP rightly conceded that clause 11.1.2 was contravened in that the first invitation to the Complainant to join the Video Garden service did not contain any reference to a subscription service. Additionally the SP correctly conceded that clause 11.1.4 was contravened by the fact that the Complainant was automatically subscribed to the subscription service without him being aware of the fact that it was in fact a subscription service nor what the costs of the subscription services were. This is a major breach of the CoC.
20. While the subsequent (3 days later) messages sent to the Complainant do indicate that this was a subscription service and provide the necessary information, it is our opinion that the required message which must be sent in terms of clause 11.1.7 must be sent as soon as reasonably possible to the recipient. Consequently the lack of the provision of a message complying with clause 11.1.7 within a reasonable time is a breach of clause 11.1.7 notwithstanding the fact that a s11.1.7. compliant message was sent three days later. In our opinion this omission by the SP is not able to be remedied *ex post facto* or after the fact since by that time the Complainant had already been subscribed by the IP.

Mitigation/Aggravation

In Aggravation

21. The following points were considered in aggravation of the sanction to be imposed:

21.1. The use of the "STOP" functionality to terminate subscription services is vital to the image of the industry and it is vital that there is no weakening of the public's perception of the efficacy of this tool to prevent spam and/or terminate subscription services.

21.2. Automatic subscription services have in other adjudications been seen to damage the reputation of the industry while at the same time allowing SPs and IPs to benefit from the financial incentives that arise from an automatic subscription service in those cases where the recipients do not complain.

In Mitigation

22. The following points were considered in mitigation of the sanction to be imposed:

- 22.1. It is noted that the said portions of code have not been contravened by the SP in prior WASPA decisions.
- 22.2. It is accepted that this was the first subscription service provided by the SP;
- 22.3. The SP has indicated that processes have been implemented to ensure that this did not reoccur;
- 22.4. The SP has accepted responsibility for some of the breaches of the Code;
- 22.5. Although the SP does not provide the service or the content therein it cannot be found that this could be held to be ground of mitigation in that this would apply to vast majority – if not all - of matters before the WASPA Adjudicators and would thus result in every matter being subject to a ground for mitigation;
- 22.6. That the subscription service provided by Switchfire Ltd is within the bounds of the laws of the United Kingdom is not accepted as a ground for mitigation in that clause 3.9.1 of the CoC indicates that the SP is required to contractually bind the Information Provider to the WASPA code of conduct and as such ignorance of the WASPA code of conduct by the IP which is based in the UK is not excusable. Moreover the IP is itself a WASPA affiliate member. In the circumstances ignorance of position of WASPA is inexcusable.
- 22.7. It is arguable that the SP being unaware that the Code had been updated to indicate that a “recent” commercial relationship was one that occurred within the last 6 months is a point in mitigation rather than in aggravation of this dispute. Furthermore clause 3.12 of the CoC indicates that the SP has a responsibility to ensure that its employees are aware of the CoC. In the circumstances no weight is placed on this point.
- 22.8. The service was voluntarily suspended by the SP before being required to do so by an Emergency Panel.

Sanction Imposed

23. The following sanction is imposed in respect of the SP's breach of the Code of Conduct:

23.1. The SP is reprimanded for allowing the IP to breach the WASPA Code of Conduct;

23.2. The SP is directed to refund the full amount - which according to the records is R75.00 - to the Complainant in the form of an airtime voucher as requested by the Complainant and to provide proof thereof to the WASPA secretariat.

23.3. the SP is directed to continue the suspension of the service provided by the IP - as set out in clause 3.9.2 of the CoC - until such time as the services provided by the IP are not in contravention of breaches identified in this adjudication. In particular the SP must ensure that the IP has systems comply with section 5.2.1 (b) of the new Code of Conduct within 24 hours of notification of this report's findings in that the IP must ensure that there is a direct prior commercial relationship with the message originator within the past 6 months of the message being sent;

23.4. the SP is directed to provide satisfactory proof to the WASPA secretariat that its "STOP" functionality is functional before this service can be permitted to resume;

23.5. the SP is fined an amount of:

23.5.1. R2 000 for the breach of clause 5.3.1,

23.5.2. R5 000 for the breach of clause 11.2.1,

23.5.3. R10 000 for the breach of clauses 11.1.2 and 11.1.4;

23.5.4. R5 000 for the breach of clause 11.1.7,

payable by the SP to the WASPA Secretariat within 5 business days of this the date of this adjudication;

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23.5.5. In addition the SP is fined an amount of R25 000 which is wholly suspended for 12 months from the date of this adjudication provided that the SP is not found guilty of breaching clause 11.1.2 or 11.1.4.

Appeal

Please note that should the SP or IP wish to appeal this decision it must inform the secretariat of this within five working days of this decision in terms of clause 13.3.14 of the CoC.

Annexures

None