



REPORT OF THE ADJUDICATOR

WASPA Member	Mobimex
Service Provider (SP) (if any)	Opera Interactive
Service Type	Unsolicited Adult SMS
Source of Complaints	WASPA Media Monitor / Film & Publications Board
Complaint Number	8180
Date lodged	25 November 2009
Code of Conduct version	8.0

This complaint was lodged by the Media Monitor subsequent to receipt of a complaint received from the Film and Publications Board of South Africa (“the FPB”) relating to an allegedly unsolicited SMS message which was sent to a minor.

It is important to note that the complaint is closely linked to two other complaints received on 23 and 24 November 2009 respectively - [Complaint 8148](#) and [Complaint 8167](#) – which appear to relate to the same adult service and which were lodged by the WASPA Media Monitor and a competitor respectively.

The original complaint, set out in the letter received from the FPB, read as follows:

“Please see the attached, which was sent to my cell phone. The organisation that is sending these messages cannot know whether the person receiving the message is adult or child, and these days many children have cell phones. It therefore seems clear that children are being exposed to pornography in this way. All a child would have to do to receive the undesirable content is to SMS ‘freevids’ 31975”

The monitor specified in her complaint that she believed the member to be in breach of sections 3.1.1 (requiring professional conduct) and 5.2.1 (relating to unsolicited SMS messages).

The Monitor, noting that this was a serious matter and that a number of other complaints had been received against the WASPA member, called for the immediate suspension of all

service provided by the member in South Africa, The Monitor further requested that the matter be referred to a WASPA Emergency Panel.

On the date that the complaint was lodged, the WASPA Secretariat sent out a SP Notice to Opera Interactive, which was acting as the aggregator for Mobimex in respect of the service complained about. This notice read as follows:

“The appended formal complaint has already been sent directly to the Affiliate member indicated below for their response. However, the WASPA Secretariat believes that the Affiliate member involved is making use of your infrastructure to provide this service and we are thus making you aware of this complaint.

You may:

1. Choose to allow the relevant Affiliate member to respond to this complaint, and not provide any response of your own; or
2. Provide a written response to the complaint, which will be considered by the adjudicator in addition to any response provided by the relevant Affiliate member.

Depending on the severity of the alleged breach, you may also wish to take additional steps regarding the service that is the subject of the complaint. If you do choose to take such steps in response to this notification, please notify the WASPA Secretariat of the steps taken.

Please note that this message constitutes formal notification of this complaint in terms of clause 13.3.3 of the WASPA Code of Conduct. This means that whether or not you choose to respond, it is possible that the independent adjudicator will treat you as a respondent for this complaint, and sanctions could be imposed on your company. The adjudicator may also hold you liable for the actions of the Affiliate member in the event that that member does not comply with any sanctions imposed on that member by the adjudicator.”

On 26 November 2009, the day after the complaint was lodged, Mobimex filed the following response:

“We received the document regarding complaint #8180 and are extremely surprised to read that marketing communication of ours is treated as SPAM. I would like to assure you that Mobimex is sending marketing messages only to phone numbers which have requested and/or agreed to receive such. Furthermore marketing communications for adult services are sent only to such numbers which have explicitly confirmed the age of 18+.

We are willing to immediately clarify and resolve all suspicions regarding our services and to fully cooperate with WASPA and all parties concerned.

Particularly from the document in complaint #8180 we cannot understand, which is the number being marketed, neither the date, nor any details at all. Kindly send us a report including phone number, date, history of the complaint. We are committed to immediately resolve all pending complaint.”

A notice notifying Mobimex of the convening of a WASPA Emergency Panel was sent to Mobimex on 27 November 2009. Mobimex responded the same day, essentially reiterating their response as set out above and requesting further detail in respect of the complaint.

The WASPA Emergency Panel considered the matter – together with Complaint 8148 - on 3 December 2009, and made the following ruling, which was sent to Mobimex on the same date:

“Complaints 8148/8180: Mobimex

Both complaint 8148 and 8180 relate to services offered by Mobimex (the SP) and were lodged by the WASPA Media Monitor. Complaint 8148 deals with subscription and content services, while the thrust of complaint 8180 is the unsolicited marketing of adult content services to minors.

After reviewing the information provided in complaint 8148, the emergency panel concluded that there were clear breaches of clauses 6.2.3, 6.5.1, 8.1.3, 11.1.1, 11.1.2, 11.1.5, 11.1.8 and 11.5.1 of the WASPA Code of Conduct and prima facie evidence of breaches of clauses 3.3.1, 4.1.1 and 4.1.2. In addition there is a clear breach of clause 11.2.1 of the Advertising Rules.

After reviewing the letter provided by the Film and Publications Board as part of complaint 8180, and the SP's response thereto, the panel agreed with the SP that there is a lack of sufficiently detailed evidence to support a claim of unsolicited communications in this specific instance.

The panel found, however, that the contents of complaint 8180, when read together with 8148, provided an indication that the SP is in breach of section 8.1.3 of the Code. The two complaints give a clear indication of a problem with the SP's adult and/or adult content services.

The panel found that there were a number of fatal breaches of the WASPA Code of Conduct in respect of complaint 8148. These breaches fall into two main categories:

- (i) Irregularities with the SP's subscription service methodology
- (ii) Irregularities with the SP's adult and/or adult content services (which is amplified by the unsubstantiated allegations in complaint 8180, in respect of which no finding is made)

The emergency panel therefore orders that:

1. Mobimex must immediately suspend all subscription services offered in South Africa.
2. Mobimex must immediately suspend all adult and adult content services offered in South Africa.
3. WASPA members whose facilities are being used by Mobimex to provide any of the above services must ensure that those services are suspended.
4. A copy of this emergency panel notice must be circulated to all WASPA members.
5. Recognizing the number of consumer complaints lodged against Mobimex for these and other services, the emergency panel requests that any new complaints lodged with WASPA regarding services offered by Mobimex should be immediately referred to an emergency panel for review.
6. The above orders apply pending the outcome of the formal complaint adjudication process for complaints 8148 and 8180."

In response to notification of this ruling Mobimex once again requested further particularity in respect of the allegations made:

"The document in complaint 8180 sent by the Film and Publication Board does not provide sufficient information regarding the number which has received the marketing message. Without the mobile we cannot see what messages were sent and when. This lack of minimum information prevents us from defending our position that Mobimex is sending marketing messages only to mobile numbers which have previously requested it or explicitly agreed to receive such. We are not sending unsolicited messages (SPAM) to mobile number which have never used our service before. All our adult services have an explicit age verification page and the relevant marketing messages are being sent only to these members which have confirmed their 18+ age and agreed to receive them.

Kindly provide us with mobile number in order to investigate the case and provide all the relevant information.”

The WASPA Secretariat obtained the relevant MSISDN from the FPB and forwarded this to Mobimex, Mobimex indicated, however, that after a check of their systems and logs, they had no record of the specified MSISDN or any messages sent to it by their system. They accordingly requested that they be provided with the date and time the message was received and the text thereof.

The MSISDN was checked with the FPB, who confirmed that it was the only number they had. Testing of the number, however, indicated that it was a switchboard number for Opera Telecom.

The matter was then assigned for formal adjudication.

Sections of the Code considered

The following sections of version 8.0 of the Code of Conduct were considered:

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.

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 (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.

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.

Decision

1. The complaint in respect of section 5.3.1 read with 5.2.1 is dismissed. In the absence of the provision of the relevant MSISDN it is not possible for the WASPA member to respond to the complaint. The member is therefore placed in a position of not being able to meet the charges through no fault of its own and the principles of natural justice demand that the complaint be dismissed.
2. The complaint in respect of sections 8.1.3 and 3.1.1 is likewise dismissed given the lack of sufficient particularity in the complaint.
3. The WASPA emergency panel made no finding in respect of this complaint on the basis that the panel regarded it as unsubstantiated. In finalising the matter the Adjudicator agrees with this finding and now dismisses the complaint.

Adjudicator's note:

While this complaint may lack sufficient evidence to sustain it, a great deal more evidence was provided under [Complaint 8148](#) and [Complaint 8167](#), which relate to adult services provided by the same WASPA member. A reading of this Adjudication Report should not be regarded as complete until the above two matters have also been considered.