

## **WASPA APPEALS PANEL FINDINGS FOR COMPLAINT NO. 0330**

**COINTEL**

**Appellant**

**27 August 2007**

---

### **DECISION**

---

#### **Background:**

This is an appeal against a decision of the adjudicator in complaint 0330. The complaint itself stemmed from the receipt by the complainant's daughter of an SMS which, according to the Appellant's submission to the complaint, read as follows:

“...FREE 4U >> We're giving you a FREE copy of the ADULT CLASSIFIEDS; a brand new adult services guide for SA. Just SMS your postal details to 31474”

The complainant alleged that this message was one of several that were sent from a Vodacom number to her under-aged daughter to download or to subscribe to adult content. The complainant alleged that the service provider has no knowledge of her daughter's age, yet offered her adult content in breach of the WASPA Code of Conduct (“the Code”).

#### **The adjudicator's ruling:**

The adjudicator upheld the complaint and found that the Appellant had breached sections 1.2 and 1.3 of the WASPA Advertising Rules ((Revision: 1.6 final) of 30 November 2005 hereafter “the Rules”) and clauses 5.2.1 and 8.1.3 of version 4.3 of the Code by making advertisements of adult content available to message recipients not older than 18 years of age and for providing messages to a recipient who have not specifically requested them. The adjudicator imposed a fine of R5 000.00 for the breach of the Rules and by extension, the Code.

## **Grounds of Appeal:**

The Appellant denies any breach of the Rules or of the Code.

The Appellant's grounds of appeal are as follows:

- **Ad point 1 of the appeal:** *sections 1.2 and 1.3 of the Rules are irrelevant* - it is alleged that the adjudicator erred in applying sections 1.2 and 1.3 of the Rules to this complaint as it only pertains to advertising done of television.
- **Ad point 2 of the appeal:** *neither the text messages nor the services which it was advertising fall within the definition of "Adult Content"* - it is alleged that the adjudicator erred in finding that the Appellant had contravened the provisions of the Rules and/or the Code as neither the text message, not the publication it advertised would be classified as suitable for persons over 18 years of age and therefore the adjudicator erred in holding that the member contravened the Rules relating to distribution lists or clause 8.1.3 of the Code.
- **Ad point 3 of the appeal:** *the recipient had a prior and recent relationship with the message originator* – it is alleged that clause 5.2.1 of the Code was not breached as the recipient had a prior and recent commercial relationship with the message originator.

## **The final adjudication in this case follows:**

Findings of the appeals panel and reasons

### **1. First ground of appeal: error in applying sections 1.2 and 1.3 of the Rules -**

The Appellant alleged that the adjudicator erred in applying sections 1.2 and 1.3 in adjudicating the complaint. Sections 1.2 and 1.3 are applicable to interactive television programmes, promotional competitions and television infomercials. Adult services are discussed under section 1.3, but as noted in section I of the Rules, each section has been devised to be specific to the various advertising mediums which Content Providers may utilize. Each medium has its own formatting and display variations which the Rules attempt to cover. The adjudicator therefore erred in applying section 1 of the Rules to this complaint.

This complaint relates to an advertisement for a content booklet contained in an SMS message. Section 6 of the Rules applies to Content booklets and section 11 of the Rules applies to SMS/MMS advertisements. The Content Booklet was

never ordered through the access channel, so only the SMS advertisement forms the subject matter of this complaint, though its nature is relevant to other aspects of this appeal.

The Appellant has, however, indicated that it also lodges an appeal "...to the extent that similar provisions are to be found in the sections of the Code dealing with distribution lists...". Distribution lists are in particular applicable to this appeal and will be dealt with more fully below under the second ground of the appeal below.

This ground of appeal is upheld.

**2. Second ground of appeal: error in finding the content of the message to be adult content and subsequent breach of the Rules and the Code**

Section 11.1 of the Rules "SMS & MMS Offers" provides that it is applicable to all SMSs and MMSs directed to the public where access channels are displayed. The term "access channels" is defined in section ii of the Rules as "The common PSMS, SMS, IVR, USSD, MMS, 3G or WAP methods of obtaining Content or Content Services as may be introduced by the Mobile Network Operators from time to time". The free copy of the Adults Classified could be obtained by customers through the short code "31474".

Content is defined in section ii of the Rules as: "All forms of Content, material, information, applications and/or Value Added Services or Premium Rated Services or activity and includes, inter alia; text, data, pictures, voice, graphics, animation, games, video clips, music, sound recording and experiences such as gambling, competitions and voting lines, accessed by and provided by WASPs to Customers via the mobile networks using any Access Channel, but excludes human-to-human communication as provided by the mobile network operators. This exclusion does not apply to human to human communication provided by WASP's. The phrase Content Services shall be construed accordingly".

The Code is more explicit in its inclusion of "associated promotional material" in the definition of an adult service. Furthermore, the Rules clearly apply to printed media, billboards, television advertisements etc., including SMS advertisements that display access channels (see section 11.1) Moreover, the service was ultimately to be offered electronically - the booklet was promotional material for the service to be ordered by SMS and thus falls under the ambit of the Code of Conduct, hence the Rules.

The Appellant argued that the SMS advertisement for *Adult Classifieds* may not be deemed to be content of an adult nature. Adult Content is classified in section ii of the Rules as content suitable only for persons 18 years or older in terms of the mobile network operators' Content guidelines, and/or Content classified (or which would be classified) as XX, X18 and/or F18 in terms of the Films and Publications Act 65 of 1996 as amended. The mobile operators' content guidelines provide in clause 2.2 that "Adult content" means mobile content classified as suitable only for persons over the age of 18 in terms of a mobile operator's content guidelines or policy, and or content and publications classified or which would be classified as XX, X18 and or F18 in terms of the Films and Publications Act No. 65 of 1996 (as amended). Clause 2.1 of the Code defines an "adult service" as any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature. Clause 2.2 of the Code provides that an "adult content service" is any service for the provision of content which has been classified as suitable only for persons 18 years or older by an appropriate body (such as the Film and Publications Board), or content reasonably likely to be so classified

The complainant clearly states that she deems the publication to be inappropriate for her fourteen year old daughter (although she has not seen the publication itself). The Appellant has made it clear in paragraph 6 of its submission to the Appeals Panel that although the publication is not deemed to be "Adult Content" (as defined) the publication is of an "adult nature". In its concluding paragraph the Appellant stated:

"Simply put the user ordered content of an adult nature...and subsequent to that received a message advertising content of a similar nature..."

The publication that was advertised in the SMS in question, "*Adult Classifieds*" has been made available to the Appeals Panel. The *Adult Classifieds* is a document spanning 14 pages containing advertisements for Access Channels for products and services of a sexual nature. "*Adult Classifieds*" also contain short stories and annotations that are of an explicit sexual nature. The rating of "R 18+" is noted on pages 1 and 14 of this publication. The Appellant has denied that the publication is of an adult nature, yet the publication itself indicates the contrary. This publication clearly falls within the definition of Adult Content. The Appeals Panel therefore concludes that the SMS advertisement in question advertised "Adult Content".

The Rules contain the following general guidelines where services are advertised via SMS. Section 11.2.1 of the Rules provides that the SMS text must clearly show the Access Cost and T&C for each service or Content type offered. Section 11.4 provides that any advertisement that has reference to Content or services that are legally restricted to use only by Adults must indicate that it is for Adults only and/or that verification of the user's age may be required.

Abbreviations to indicate the Adult restriction are allowed (e.g. '18' or '18+' may be used). The access cost was indicated in the SMS advertisement (none), but the Appellant neither included any T&C nor any indication of age restrictions in the SMS message.

Section 11.11 of the Rules provides that sexual or sexually suggestive content may not be sent out via a distribution list if the list recipient does not request or expect such content. If by requesting any Content or accessing a service, the consumer so doing is automatically placed on a distribution list that will continuously or periodically send that consumer further related or unrelated communications from that Content provider or any other Content provider or advertiser, then the Terms and Conditions text must explicitly specify that updates will be sent until cancelled. The Appellant has argued that because the complainant's daughter ordered content of an adult nature a year before this SMS advertisement was sent to her, she cannot claim that she would not reasonably expect to receive such content. However, by the appellant's own admission the complainant's daughter was placed on its distribution list. The requirement of section 11.11, namely that the Terms and Conditions text must explicitly specify that updates will be sent until cancelled has not been complied with. that the compliant is on a distribution list. The SMS advertisement sent by Appellant is thus in breach of sections 11.2.1, 11.4 and 11.11 of the Rules.

As far as the obligations of the Appellant in terms of the Code are concerned, clause 8.1.3 is applicable. This clause provides that members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult services. Clause 8.1.3 provides that explicit confirmation of a user's age must be obtained prior to the delivery of an adult service. The Appellant argued that no confirmation of age was necessary as the advertisement was not for adult services. The Code defines an "adult service" as any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of an adult nature". In light of the finding above that the publication may be deemed to be adult content, it is found that the Appellant failed to take the necessary steps to ensure that only persons of 18 years and older have access to its adult services.

This ground of appeal is rejected. The SMS advertisement sent by Appellant contravenes sections 11.2.1, 11.4, and 11.11 of the Rules and clause 8.3.1 of the Code.

**3. Third ground of appeal: the prior and recent commercial relationship excludes the possibility of spam -**

The first task in addressing the validity of this ground of appeal is to decide whether the message in question was indeed spam. According to clause 5.2.1 of the Code 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.

The message originator did not have the recipient's explicit consent to send the message and the recipient has also not requested the message. The Appellant avers that the recipient had a prior recent commercial relationship with the message originator as she ordered content from the message originator "during or about" June 2005, more than a year before the SMS advertisement was sent to her. The only issue of contention is whether the transaction that took place a year earlier may be deemed to be a "direct and recent" commercial relationship and whether it may be said that the recipient would reasonably expect to receive marketing communications from the originator. The Appellant has averred that at least one network operator has indicated that up to a twelve (12) month period will qualify as "recent".

The Appeals Panel notes that the Code does not expressly define what constitutes a "recent" commercial relationship and the Code affords the Adjudicator some discretion in this regard which must be exercised reasonably and applied to the facts of each specific case. What is "recent" in the context of one type of service or commercial relationship may not be regarded as "recent" in the context of another type of service. In light of the purpose of both the Code and the Advertising Rules, services of an adult nature are generally subject to more restrictive conditions insofar as advertising is concerned than are other types of services. The Appeals Panel has also noted the Advertising Rule's best practices requirements for the use of distribution lists for SMS advertisements contained in section 11.11. These best practises propose that where there has been no communication to a user of that service from either the general participants in that service or the controllers of the service for a minimum of ten (10) calendar days, then any further communication to that user must, at the first communication to that user after the tenth (10th) day, indicate who the service is provided by and how the user may unsubscribe from the service. In the view of the Appeals Panel, a request for adult content by a consumer approximately one year previously does not qualify as a "direct and recent commercial relationship" for the purposes of further advertisements of adult content approximately a year later. In such circumstances, the further advertisement for adult content ought to be regarded as unsolicited. Furthermore, the recipient has complained about the receipt of this SMS message, so it may be inferred that she did not, reasonably,

expect to receive such further adult marketing communications from the originator.

We must thus conclude that the message constituted spam. However, as far as the breach of clause 5.2.1 of the Code is concerned, no definite ruling may be made. This clause defines when a message will be deemed to be spam and imposes no obligations. Clause 5.2.1 can therefore not be breached but can only be used to determine whether other provisions have been breached.

Clause 5.3.1 of the Code provides that members must not send spam. The Appellant has thus breached clause 5.3.1 of the Code.

The adjudicator's ruling that clause 5.2.1 has been breached is thus overturned. Her ruling is replaced by a finding that the SMS message in question constituted spam and that it was sent in contravention of clause 5.3.1 of the Code.

This ground of appeal is rejected.

## **Decision**

The Appeals Panel sets aside the adjudicator's decision as far as the breaches of sections 1.2 and 1.3 of the Rules and 5.2.1 of the Code are concerned and confirm the adjudicator's decision as far as the breach of clause 8.1.3 of the Code is concerned. In addition, the Appeals Panel finds that the Appellant had breached sections 11.2.1, 11.4, and 11.11 of the Rules and clause 5.3.1 of the Code.

## **Sanction**

The sanction of R5 000.00 is set aside and replaced with a sanction of R5 000.00 in respect of each instance of breach of the Code and the Rules, namely a fine totalling R25 000.00.

The Appellant made factual misrepresentations regarding the nature of the publication the *Adults Classifieds* in its submissions to the Adjudicator and to the Appeals Panel.

The appellant argued as follows in its initial the response to the complaint:

“The publication that would have been delivered to the recipient (had she

responded with her postal address; which she did not) is not 'adult content' as defined in the Guidelines since the level of explicitness of the pictures of women that appear therein does not exceed level 1.7 of the Vodacom matrix, nor would the pictures be classified as XX, X18 or F18 in terms of the Films and Publications Act."

The appellant submitted the following in lodging an appeal:

"Moreover the service that was being advertised (as indicated in the original response) would not have been classified as suitable for persons 18 years or older by the Films and Publications Board, nor is it reasonable likely that it would be so classified."

The Appeals Fee is forfeited in light of this misrepresentation and in light of the fact that the grounds of appeal have failed substantially.

## **THE APPEALS PANEL**

27<sup>th</sup> of August 2007