



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	iTouch
Information Provider (IP) (if any)	n/a
Service Type	Commercial SMS advertising subscription service
Source of Complaints	Competitor
Complaint Number	#1655
Date received	1 July 2007
Code of Conduct version	5.2

Complaint

The Complainant alleges breaches of multiple provisions of the WASPA Code of Conduct flowing from the following sequence of events:

“On Sunday 1 July 2007 at 15:04:32 I received an unsolicited SMS from an unknown source +2782xxxxxxx - this is an invalid phone number - sent to my phone 076 xxx xxxx. The sms offers free services which are in fact later identified as subscription services. Following is a copy of the sms and this SMS is available for your perusal: ‘get a FREE chat app including hot weekly games, graphics, tones, gags & more! Just sms FREE to 36060 now! All items 25c each! (R5/5dayssubscriptionservice)’. This is totally misleading. A service cannot be free if there is a charge. also R5/5dayssubscriptionservice does not clearly explain the cost of the service.”

The specific provisions raised by the Complainant are 5.1.1, 5.1.2, 5.1.3, 5.1.4, 5.2.1, 6.2.6 and 11.1.7(b). The Complainant also raises an allegation of “false promises” without referencing this to a section of the Code of Conduct.

In later correspondence and after an unsuccessful attempt by the SP to resolve the matter telephonically, the Complainant requested that the matter be escalated to a formal complaint.

The Complainant also amplified his position with regard to the unsolicited nature of the SMS:

“They have also not clarified how I opted in nor have they shown me where I personally gave them permission to send out these messages to my phone. This is contrary to the regulations. The fact that they opted me out after sending me spam means nothing! They opted me in without my permission and I object in the strongest terms.”

The Complainant recommended “that all revenue earned from this service be reversed and that everyone who subscribed be refunded and given the service totally free”. He further stated that he expected “compensation for my wasted time and the inconvenience received at the hands of [the SP] and their staff”.

SP Response

In its responses under the informal procedure the SP denied that it had intended to mislead consumers.

“Please note that the use of the keyword FREE is referring to the ‘FREE chat application’ available as a value add within the subscription service.

It was not our intention to mislead consumers, hence we did stipulate individual content pricing at 25c. The addition of ‘(R5/5daysSubscriptionService)’ clause in the message is as per WASPA regulations, and we have no knowledge of this requirement having changed in the interim.”

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“As part of the subscription service users DO GET A FREE CHAT APPLICATION to download (FYI: Mxit charge R5 for their chat application). Content prices as well as subscription costs are mentioned, and as stipulated to [the Complainant] on numerous occasions during our call, is within WASPA regulations.

Regarding the use of the keyword 'FREE' – it is not stipulated anywhere within the WASPA guidelines that certain keywords may not be used, and the keyword 'FREE' is in any case referring to the free chat app offered."

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"Furthermore, regarding receiving marketing correspondence, [the Complainant] queried how he was opted in. The complainant made use of 35050 services, and was therefore opted-in to receive marketing messages from brands within iTouch as stated in the terms and conditions."

The SP confirmed that [the Complainant] has now been opted out from all of its services as of 18 / 07 / 2007.

Sections of the Code considered

The following sections of the WASPA Code of Conduct were raised and considered:

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. 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".

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- (b) Recipients of premium rate or non-replyable messages must have the option to opt out at a cost of R1 or less. 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".

5.2.1. 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.

6.2.6. Unless otherwise specified in the advertising guidelines, the name of the WASP or the information provider providing the service must appear in all advertisements for premium rated services.

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.

Decision

At the outset the Adjudicator wishes to highlight the following:

- complaints referred to the formal procedure are adjudicated with reference to the provisions of the WASPA Code of Conduct and not with reference to the personal feelings of the complainant, no matter how strongly these may be expressed;
- where a complainant is a competitor there is a strong line of precedent in WASPA Adjudications that Adjudicators in such complaints should adopt a strict interpretation of the Complaint and are not required to give the same degree of latitude as may be provided to a consumer complainant who is

unaware of the workings of the industry and who is not expected to having knowledge of the existence and provisions of the WASPA Code of Conduct and Advertising Rules;

- an Adjudicator is not empowered to make any awards for “compensation for wasted time and inconvenience” and it is noted that it is doubtful whether any South African forum would entertain a claim of this nature.

The Adjudicator in this matter takes particular exception to the “shotgun” approach taken by the competitor complainant. No less than 7 breaches of the Code of Conduct are alleged with a bare minimum of substantiation and, as will be seen below, there is precious little merit in any of these. The Complainant’s further habit of spreading a single complaint over a number of e-mails and interleaving the details of one complaint with another is also objectionable and confusing.

The following findings are made on the versions presented by the Complainant and SP:

1. The statement by the SP that the Complainant had opted in to the receipt of marketing correspondence through the use of related brand services is accepted. It follows that the Complainant had a “direct and recent prior commercial relationship with the SP and would reasonably expect to receive marketing communications from the SP” [see section 5.2.1.(b) of the Code]. In simple terms consent has been given through agreement with a set of terms and conditions and the message received by the Complainant was not unsolicited as alleged. The aspect of the Complaint dealing with section 5.2.1 is dismissed.
2. No substantiation is included in the Complaint for the allegations relating to a breach of sections 5.1.2, 5.1.3 and 5.1.4 of the Code and these aspects of the Complaint are dismissed. The Complainant makes no allegations in this Complaint about trying to unsubscribe or the cost thereof.
3. Likewise no substantiation is provided in respect of the alleged breach of section 11.1.7 of the Code of Conduct. The Complainant does not even state that he subscribed to the service in question let alone aver that no confirmatory message was received as required by section 11.1.7. This aspect of the Complaint is also dismissed.
4. The allegation that the SP has not provided its name in the SMS advertisement is not dealt with by the SP in its reply. Under section 5.1.1 of

the Code the SP is required to provide a valid originating number AND/OR he name or identifier of the message originator. In other words the SP can provide a valid originating number on its own and this will be sufficient for the purposes of the section. An “originating number” is defined in the Code as the “number allocated to the WASP by the network operator from which a commercial message is sent”. This is evidently present and this aspect of the Complaint is dismissed. The Complainant’s observation that it is not a valid telephone number is irrelevant.

5. The allegation that the SMS advertisement, which is for a premium service, does not contain the name of the message originator is not dealt with by the SP in its reply. There is nothing in the Advertising Rules to absolve the SP from this requirement in respect of SMS marketing and, notwithstanding the fact that the 36060 brand is well-known, the failure to display the name of the SP constitutes a breach of the Code of Conduct.

With respect to the central objection of the Complainant that the use of the word FREE is misleading, the following should be noted:

1. The Complainant has not raised the correct sections of the Code which relate to misleading pricing and, as noted above, it is not the role of the Adjudicator to assist a competitor complainant in such circumstances.
2. While the Adjudicator to a degree agrees with the essence of the Complaint in respect of the use of the word FREE the SP is correct where it points out that “it is not stipulated anywhere within the WASPA guidelines that certain keywords may not be used, and the keyword ‘FREE’ is in any case referring to the free chat app offered.”
 - a. The WASPA Advertising Rules do state, in the Introduction thereto, that “For subscription services, providers should take all reasonable steps to ensure that all promotional material, whether in print media, on the Internet, television or transmitted via text message, clearly explains how the subscription service works. Consumers should have ready access to an explanation of their “purchase” and what, if anything, they need to do to access the Content. **Great care should be exercised in using the word ‘free’.** (my emphasis).
 - b. While the Adjudicator does harbour concerns about the manner in which FREE has been used by the SP the above does not constitute a

substantive section of the Advertising Rules which places a direct obligation on the SP not to use the word FREE.

- c. The Adjudicator would nevertheless request the SP to examine its practices in this regard. Notwithstanding the other precautions taken and the existence of genuine value through the download application, the use of the word FREE, particularly as a keyword, almost of itself creates the potential for confusion in the mind of the consumer.
3. As pointed out by the SP it is in compliance with the applicable WASPA rules regarding the pricing display and, even if a finding were to be made regarding the use of the word FREE, the Adjudicator is satisfied that any potential prejudice would be counteracted by the clear statements of per item and subscription charges to be agreed with by the consumer before the service can be accessed.
4. The Adjudicator does not regard the evidence provided by the Complainant to be sufficient to justify a finding of intention to mislead on the part of the SP>

The SP is accordingly found to have breached section 6.2.6 of Version 5.2 of the WASPA Code of Conduct. The SP has not been found to be in breach of this section to date and is hereby issued with a formal reprimand and a fine of R2 500. The SP is also cautioned in respect of the use of the word FREE in advertisements and as a keyword.

The balance of the Complaint is dismissed.