

WASPA Member (SP)	iTouch
Information Provider (IP)	N/A
Service Type	Unsolicited SMS
Source of Complaint	Christopher Brunsdon
Complaint Number	#2040
Code of Conduct Version	5.3
Date of Adjudication	19/02/2008

Complaint

The Complainant raised a breach of the prohibition on the sending of unsolicited commercial SMSs as set out in the WASPA Code. The detailed description of the Complaint read as follows:

“I have recently been receiving unsolicited MT's from RCS (MSISDN: 0840004868, iTouch South Africa (Pty)).

There is no \"STOP\" keyword on the text. 2 of the previous MT's did contain a call-center number (086...) but the most recent contained no such contact.

I have made repeated attempts to mail RCS direct with no success. I have made no contact with iTouch.

Being involved with commercial messages, I am aware of WASPA guidelines.

The most recent MTs were

2007/09/06 16:29 (New Service...)

2007/08/30 11:41 (Need Cash?...)”

SP Response

An initial response was received from the SP wherein it indicated that it will contact the Complainant and seek to resolve the case. The complaint was

however, according to the Complainant not dealt with appropriately since it kept on receiving unsolicited messages. Subsequently the Complainant asked for the case to be reopened. On acquiring these details the SP further responded by stating the following:

“Dear Mr Brunsdon

My name is Rose van Rooyen, I am the Senior Brand Manager at iTouch. I have received your complaint from WASPA in regards to you receiving RCS messages without any opt-out or unsubscribe option being available.

My technical department is gathering all the data for me in this regard and I will be able to contact you ASAP in relation to this. I would first like to get everything together before I give you a call as I see this is a complaint that has been reopened.

Thank you so much for your understanding in this regard.”

Sections of the Code considered

The following sections of version 5.3 of the Code of Conduct were 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”.

(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”.

5.1.5. 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.

5.2.1. 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.

5.3.1. 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.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. In this particular instance, the WASPA Secretariat has made no less than four attempts in its efforts to elicit a further response from the SP at the contact details last provided by it. Although an initial response was received, this did not fulfill the requirements and the earlier promises of eradicating the complaint by the SP lead to become unfulfilled.

The Adjudicator is therefore satisfied that the SP had more than enough time to file a response as is required by section 13.3.4 of the WASPA Code of Conduct. In the absence of the SP raising such a response, the Adjudicator has to assume that the SP, as is indicated in section 13.3.5 of the WASPA Code of Conduct, does not wish to respond to the claim. In light of these circumstances the Adjudicator has no alternative but to accept the uncontested version of the Complainant.

The Complainant stated that he has received various unsolicited messages. This would imply that none of the exclusions provided for by section 5.2.1 were fulfilled.

It is therefore held that the SP **has breached** section 5.3.1 read with section 5.2.1 of the WASPA Code of Conduct.

The Complainant further iterated the fact that he was not afforded the opportunity in stopping these messages although he has made several attempts in contacting the Information Provider. The SP did not react to this and neither did it

stop these messages within a reasonable time. The Complainant was also not informed as to how his information was obtained. This would therefore indicate that sections 5.1.2 to 5.1.5 of the Code were not followed.

It is therefore further held that the SP **has breached** sections 5.1.2, 5.1.3, 5.1.4 and 5.1.5 of the WASPA Code of Conduct.

In determining an appropriate sanction, the following factors were considered:

- The industry imperative to root out the sending of spam;
- The prior record of the SP with regard to breaches of section 5.3.1 read with section 5.2.1 as well as sections 5.1.2 to 5.1.5 of the WASPA Code of Conduct; and
- The failure of the SP to respond to the follow-up Complaint.

The SP is fined R5 000, 00 for its breach of clause 5.3.1 and a further R6 000, 00 for its combined breach of sections 5.1.2, 5.1.3, 5.1.4 and 5.1.5. These fines are payable to the WASPA Secretariat within five (5) days of notification hereof.

The SP is further ordered to ensure that the Complainant is not made subject to any similar breaches of the WASPA Code of Conduct for which it (SP) is liable and is strongly advised to remove the Complainant from any mailing lists which might be construed as giving future rise to a similar Complaint.
