



## REPORT OF THE ADJUDICATOR

|                                              |                 |
|----------------------------------------------|-----------------|
| <b>WASPA Member (SP)</b>                     | iTouch          |
| <b>Information Provider (IP)</b><br>(if any) | s/a             |
| <b>Service Type</b>                          | Unsolicited SMS |
| <b>Source of Complaints</b>                  | M Sanders       |
| <b>Complaint Number</b>                      | 2445            |
| <b>Date received</b>                         | 25 October 2007 |
| <b>Code of Conduct version</b>               | 5.3             |

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### Complaint

The complainant submitted this complaint via the WASPA website on 25 October 2007. The complainant received an unsolicited SMS message on his cellphone number from the SP on 9 October 2007 which reads as follows:

*EXCLUSIVE OFFER! wild uncensored hardcore vids Get them now, UNLIMITED D/LOADS & access 2 the entire STRAIGHT club!sms FILM to 39999(R10/5daysSubscriptionService)*

The complaint was initially dealt with under WASPA's informal complaint procedure.

In response to the complaint, the SP made contact with the complainant and advised him that the communication was part of a campaign which targeted persons who had previously downloaded content from the SP's direct adult brand on the short code 37777. The SP alleged that the complainant last interacted with the brand and downloaded content on 18 November 2004. However the SP did state that its normal policy was to only correspond with consumers that had interacted with its in-house brands within the past 6 months.

The SP also acknowledged that it was possible that the sms was sent to the complainant without an opt-out option and that this was due to human error. The SP advised that both issues were being dealt with internally in order to prevent other consumers from being inconvenienced, especially where content of adult nature was concerned. The SP also confirmed that the complainant had been opted out from all further marketing correspondence and his msisdn had been white listed.

The complainant informed WASPA that his current contract and use of the number only commenced at the beginning of 2005 and therefore he could not have interacted with the brand and/or downloaded content himself as alleged by the SP. The complainant expressed his concern that he is receiving adult sms correspondence based on the previous number owner's interaction with the SP's brands. He felt that the SP should be called upon to verify each cell number owner for adult services to avoid unsolicited adult correspondence being sent to children.

Unfortunately, the complainant subsequently received the following further unsolicited sms correspondence from the SP on 01/12/2007:

*EXCLUSIVE OFFER! wild uncensored hardcore vids Get them now, UNLIMITED D/LOADS & access 2 the entire STRAIGHT club! sms FILM to 39999(R10/5daysSubscriptionService)*

The complaint was then escalated to the formal complaint procedure.

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## **SP Response**

After having responded as above to the complaint initially while it was being dealt with informally, the SP has failed, despite numerous reminders from the Secretariat, to respond to the formal complaint.

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## **Sections of the Code considered**

### **5. Commercial communications**

#### **5.1. Sending of commercial communications**

*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. Where feasible, persons receiving commercial messages should be able to remove themselves from the database of a message originator using no more than two words, one of which must be 'STOP'.*

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

*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.*

*5.1.6. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the up-front description of the service.*

## **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 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.*

*5.2.2. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.*

## **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.*

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## **Decision**

The SP has argued that the commercial message sent to the complainant was not unsolicited as adult content had previously been downloaded to the complainant's number in December 2004. The SP is therefore implying that there was a prior commercial relationship which allowed it to send further commercial communications. The SP does however add that its policy is normally to restrict further correspondence to recipients who have interacted with it within the previous 6 months.

The complainant has stated that his current contract and use of the number in question began in 2005, i.e. after the alleged last interaction with the SP in 2004. It would therefore appear that the previous owner of the number may have interacted with the SP but not the complainant.

Section 5 refers to the "message recipient" and, from my reading of the section, this can only be interpreted to mean a person and not to the number used. I therefore find that there was no prior commercial relationship between the complainant and the SP.

Furthermore, even if it was accepted that there had been previous interaction between the complainant and the SP in December 2004, this certainly cannot be seen as "recent" within the meaning of section 5.2.1(b).

I am therefore of the view that the sms messages received by the complainant is spam within the meaning of section 5 of the code.

Regarding the absence of an opt-out option in the messages received, the SP has admitted same but has put this down to human error. This is no excuse and I also find that the SP has contravened section 5.1.2.

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## **Sanction**

The SP's contraventions of the code are aggravated by the following:

1. The unsolicited communications are of an adult nature.
2. After undertaking to remove the complainant from its database, another unsolicited communication of an adult nature was sent to him.
3. I have noted from the record of previous adjudications that the SP has been found guilty of other contraventions of section 5 but has only received reprimands to date.

I have found no mitigating factors.

I therefore make the following order:

- a) The SP is ordered to immediately remove the complainant's details from its database and to provide written confirmation to the Secretariat within 7 (seven) days of being notified of this decision that it has done so.
- b) The SP is ordered to ensure in future that all its commercial communications of an adult nature comply with section 5.2.1 of the Code. Such communications must only be sent to intended recipients under the following circumstances:
  - a) The intended recipient has requested the communication;
  - b) There is a prior commercial relationship with the intended recipient (not the number used) with the last interaction taking place within the previous 6 months;

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- c) The intended recipient has explicated consented to his/her contact information being given to and/or used by the SP for this purpose.

The SP is ordered to adjust its internal processes and measures accordingly.

- 4. The SP is fined R10 000.00.