



REPORT OF THE ADJUDICATOR

WASPA Member (Member):	iTouch
Information Provider (IP): (if applicable)	Unknown
Service Type:	Unsolicited SMS
Complainant:	Consumer
Complaint Number:	3797
Code version:	Code v5.7 and Ad Rules v1.6
Date of Adjudication:	2 July 2008

Complaint

1. On the 27th of March 2008 the Complainant submitted a complaint against the Member by means of the WASPA website at URL www.waspa.org.za. The relevant portion of the complaint reads as follows:

Code_Breached: 5.1.4. Notwithstanding 5.1.3, for SMS and MMS communications:

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".

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.

Detailed_Description_Complaint: 1. The SMS was sent from on behalf of a third party to whom I did NOT give permission to send me SMSs

2. No details on how to stop receiving SMSs were included in the SMS

3. iTouch evidently made no effort to ensure that the third party had my permission to contact me via SMS.

2. Unfortunately the complaint does not include the text of the SMSs in question, or even the identity of the third party on whose behalf these messages were sent. It is

thus probable that the Member was merely fulfilling the role of SP, and that the message originator was an unknown IP. Given the lack of information in this manner this is impossible to determine, but I will nonetheless proceed on the assumption that the Member acted as a SP.

3. The complaint has two parts:
 - 3.1. that the Member sent unsolicited SMSs to the Complainant, and
 - 3.2. the SMSes in question did not comply with the prescribed "unsubscribe" requirements as set out in the code of conduct.
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Response

4. On the 4th of April the WASPA Secretariat e-mailed the complaint to the Member. On the 11th of April a reminder was sent to the Member. On the 16th of April a notice of escalation was sent to the Member, with a reminder 23rd of April for the Member to respond. On the sixth of May the final request for a response was e-mailed to the Member.
 5. Despite the above, the Member made no response to the complaint.
 6. Subsequent to the final reminder a suspicion arose that the Secretariat had been sending correspondence for the Member to the incorrect email address. The correct email address was established but despite two further requests for a response from the Member, none whatever was forthcoming.
 7. Notwithstanding, I am satisfied that the Member has been given adequate opportunity to respond to the complaint. This adjudication will thus be decided without the benefit of the Member's input.
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Portion of the Code Considered

8. The following portions of the code are relevant to this complaint:

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. 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. Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.

5.1.6. Where the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the service provider must honour the opt-out request as if the word 'STOP' had been used.

5.1.7. 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.

5.1.8. 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 upfront 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.

Decision

9. The facts given in the complaint are sparse, but in the absence of any response to the complaint by the Member these facts are the only ones available to me. I have been given no reason to doubt the credibility of the Complainant's version and so I will proceed on the basis that the facts are as given by the Complainant.
10. Breach of clause 5.3.1 - sending of spam: The Complainant has made an uncontradicted allegation of his receipt of Spam from or through the Member, and from the Complainant's version it does not appear that any of the exceptions set out in clause 5.2.1 of the Code of Conduct have been met.
11. Consequently I find that the Member has contravened clause 5.3.1 read with clause 5.2.1 of the Code of Conduct in that on the facts available it either sent or did not take reasonable measures to prevent the sending of Spam.
12. Breach of clause 5.1.4 (b) – inadequate unsubscribe instruction: The Complainant does not make clear whether he tried to unsubscribe from the SMS distribution list, so the question is not whether an unsubscribe facility existed, merely if it was advertised when the transmission of SMSes to the Complainant was initiated.
13. The facts presented by the Complainant indicate a *prima facie* breach of this clause, and as no response was received from the Member, I have no choice but to find that the Member has indeed breached this clause of the Code of Conduct.

Sanction

14. The Member's record with regards to breaches of the clauses of the Code in question is not an admirable one. This is a summary of complaints and fines levied against the Member in this regard:

Clause 5.1.4:

Complaint # 1767 - R3500

Complaint # 2409 - R7000

Complaint # 2040 - R6000

Clause 5.3.1:

Complaint # 1744 - R8500

Complaint # 2409 - R3000

Complaint # 2040 - R5000
Complaint # 3132 - R7500
Complaint # 3349 - R5000
Complaint # 3350 - R5000
Complaint # 3581 - R7500

15. In deciding on a sanction I have taken the following factors into account:
 - 15.1. The need to combat spam in the industry, and
 - 15.2. The Member's obvious disregard for previous decisions of adjudicators relating to the sending of spam and the requirements for commercial messages.
16. The following sanction is imposed:
 - 16.1. The Member is fined an amount R 40 000 for its infringement of clause 5.3.1 read with clause 5.2.1 of the Code of Conduct.
 - 16.2. The Member is fined an amount of R 10 000 for its infringement of clause 5.1.4 of the Code of Conduct.
17. The fines are to be paid to the WASPA Secretariat within 5 days of receipt of notice of this report.

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