

WASPA Member (SP)	Sybase 365 / AMV
Information Provider (IP)	Bling Mobile
Service Type	Various irregularities
Source of Complaint	Sania Thomas
Complaint Number	#4673
Code of Conduct Version	6.1
Date of Adjudication	02/10/2008

Complaint

The Complainant in this matter lodged the following complaint:

“My son who is 8 years old has been receiving WAP PUSH messages from a user that does not have a sender ID present on the sms. The message body has a link in it which leads to a porn site.

I accessed the link from my handset as the sms does not give any options to stop or unsubscribe to the service. Neither is any number available to contact. Once I connected to the link the porn videos was available for downloading and at the bottom of the link it gave options to stop by sending a message to a 5 digit code or you could call the following number listed: 0114610317, it did mention that users should be 18 years and older.

I called the number advertised and spoke to Chris would informed me that my son entered a gaming site for over 18 year olds and he is receiving these links as a marketing ploy.(Date of call, 11/08/08 @ 19h30pm after the sms was received) Never was it established whether my son is 18 or older, neither could they verify that my son opted in for this information. My call to them was not handled appropriately and I was told that his number would be excluded from any further marketing stints. Please address this matter urgently and with the utmost importance as it includes a minor and pornography. The cellphone number which received the WAP PUSH messages is 0782922644.”

SP Response

The SP's response is reproduced here in full:

“On the 4th July 2008 at 13:47 the user accessed our mobile content site through an advertisement on an affiliates website.

While browsing the internet on their **SAMSUNG-SGH-P910** cellphone the user responded to an advert for our Gamezone WAP site.

The user did not purchase any content and was not charged however they did click on a "claim your free item" link which offered a choice of one free item.

If the user decides to dispute browsing Gamezone at the time above he should ask his network operator to provide full internet browsing data for 4th July so we can prove that access to blingmob.com took place at the above time.

The site states that content purchasers or users who access free content may receive future promotions from us, and that they should sms STOP ALL to 31434 to opt-out, or to call our helpline number.

We have not had an opt-out request from this user.

We have since contacted the user with (free) promotions in relation to other services we offer.

These are **not** adult promotions.

AMV do not operate any adult services in South Africa.

The site features bikini content only, there is certainly no adult content.

The user has not purchased any content and has not been charged.

We have now ensured the user is Blacklisted from our promotional database.”

Sections of the Code considered

2.7. “Children’s services” are those which, either wholly or in part, are aimed at, or would reasonably be expected to be particularly attractive to children.

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

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".

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 (within the last six months) 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.

7.2.1. Children's services must not contain anything that is likely to result in harm to children or which exploits their credulity, lack of experience or sense of loyalty.

8.1.2. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Explicit confirmation of a user's age must be obtained prior to the delivery of an adult content service.

8.2.2. Promotions for adult services must not appear in publications or other media specifically targeted at children.

CLAUSES OF THE ADVERTISING RULES CONSIDERED

9.2.1. Broad Overview

ADULT CONTENT AND AGE-RESTRICTED SERVICES

No Content Services that may directly or indirectly allow persons under 18 years of age to obtain Adult Content and/or any Age-restricted Content may be advertised in media of general distribution, unless an adult verification process (implemented or approved by the mobile network operators) is in place to prevent – as may be reasonably possible - access to that content service by children.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her.

In the opinion of the Adjudicator it is imperative that the rights of children are protected and duly enforced. It would be negligent and unjust if we allow providers to exploit the credulity and innocence of children. Having said that, it must also be noted that parents who allow their children access to the use of mobile handsets, have an equal and even more important task to fulfill. Although it remains almost impossible to control children's access to every medium that may contain harmful or unwanted material, certain measures can be taken. Seen from this light and having the WASPA Code of Conduct as a guideline, Service and Information Providers must take full cognizance of its responsibilities in achieving the necessary results in protecting children.

The Adjudicator's first role in this matter is to establish whether the content is in fact children or adult services.

In accessing whether one is dealing with children services a closer look at the definition as defined in section 2.7 of the Code is needed. It states that "Children's services" are those which, either wholly **or in part**, are aimed at, or would **reasonably be expected to be particularly attractive to children**.

Having read the Complaint it could be argued that an eight year old who browsed a mobile content site and that responded to a game zone WAP site, must have found the content particularly attractive. The Adjudicator is also of the opinion that the SP in this matter must have realized that such content will be particularly attractive to children and that it could have been also reasonably expected.

If one goes of the assumption that this is indeed children services, the following section should be applied, namely section 7.2.1 of the Code that reads that children's services must not contain anything that is **likely to result in harm to children** or which **exploits their credulity, lack of experience** or sense of loyalty.

The SP's response indicated the following:

"The user did not purchase any content and was not charged however they did click on a "**claim your free item**" link which offered a choice of one free item.

The site states that content purchasers or users **who access free content may receive future promotions from us**, and that they should sms STOP ALL to 31434 to opt-out, or to call our helpline number.

We have not had an opt-out request from this user.”

These practices are core examples of how a child’s credulity (claim your free item) or lack of experience (...may receive future promotions from us...) can be exploited. No wonder that there has been no opt-out request.

The SP might argue that the content contained an age restriction and hence the fact that further restricted content was marketed to the user.

In the opinion of the Adjudicator the SP failed to verify the user’s age and acted in breach of section 8.1.3 of the Code. This section *inter alia* states that **explicit confirmation of a user’s age must be obtained prior to the delivery of an adult content service.**

If the SP argues that it does not promote any adult content, then why necessitate an age restriction? The Adjudicator is also not convinced that AMV does not facilitate any adult promotions. Previous adjudications prove to the contrary. Here one can refer to Adjudication 4486 where the current SP in its response clearly indicated the facilitation of adult content. In light of this the Adjudicator tends to lean in favor of the Complainant’s interpretation of the content made available.

Section 8.1.2 of the Code also seems to have been contravened by the SP, read in conjunction with clause 9.2.1 of the Advertising Rules.

Although the adjudicator is not 100% convinced that the message was unsolicited, seen from a child’s perspective, in light of his / her lack of experience, the Adjudicator does not feel that an eight year old could have fulfilled the role of a recipient as is indicated in section 5.2.1 of the Code.

The SP is further found in breach of section 5.1.1 by failing to provide the name or identifier of the message originator.

However, parents have a due responsibility to control their children’s access to mobile content and have to realize that SPs’ and IPs’ responsibilities can only extend to what is reasonably expected of them in terms of current technologies.

Games remains a grey area and it would be unfair to assume that adults do not find such entertainment also particularly attractive and that certain games do indeed contain factors that necessitate age restrictions. The Adjudicator’s main concern however pertains to the failure on behalf of the SP to obtain explicit confirmation of the user’s age prior to the delivery of adult content, causing a flow of unnecessary consequences.

The Complaint is upheld.

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

- Any previous breaches of sections found to have been breached;
- Rectifying actions taken by the SP in resolving the matter informally.

The SP is fined R 100 000-00. This amount has to be paid within 5 (five) working days to the WASPA Secretariat from the date of adjudication.

The SP is further instructed to ensure its compliance with the relevant sections considered in all current and future advertisements.

The WASPA Secretariat is requested to forward a copy of this report to the WASPA Media Monitor, together with a request to review the SP's future compliance with the relevant sections of the Code of Conduct.
