



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	iTouch
Information Provider (IP): (if applicable)	n/a
Service Type:	Subscription Services
Complainant:	Consumer
Complaint Number:	5044
Code version:	Code v6.2 and Ad Rules v1.6
Date of Report:	15/12/2008

Complaint

1. On or about the 16th of September 2008 the Complainant made an unsubscribe request via the WASPA automated unsubscribe service, and also requested that the Member should provide proof of subscription. According to records provided by the WASPA Secretariat the Complainant was indeed unsubscribed, but the member allegedly did not furnish the Complainant with proof of subscription. Three requests were made for the member to provide such information, as set out below:

Dorcas 2008-09-19 12:16:26 ITOUCH please provide PROOF OF SUBSCRIPTION.

ITouch 2008-09-22 08:49:23 The number was unsubscribed from the Fun Club on the 17th September 2008, confirmation sms sent.

Dorcas 2008-09-25 16:01:04 ITOUCH you have not provided a PROOF OF SUBSCRIPTION yet, please comply.

ITouch 2008-09-29 14:07:16 The number was subscribed to Fun Club on the 3rd August 2008 via sms the text sent through was "hot" to the shortcode 31194.A welcoming/joining sms was sent to the MSISDN on the same day subscription was joined. Customer has been receiving WASPA reminders each month -last reminder was sent on 3rd September 2008. The subscription has now been cancelled on 17th September 2008.A confirmation sms has been sent.

Dorcas 2008-10-13 13:11:53 ITOUCH please SUPPLY WITH PROOF OF SUBSCRIPTION.

ITouch 2008-10-16 15:08:40 The number was subscribed to Fun Club on the 3rd August 2008 via sms the text sent through was "hot" to the shortcode 31194. A welcoming/joining sms was sent to the MSISDN on the same day subscription was joined. Customer has been receiving WASPA reminders each month -last reminder was sent on 3rd September 2008. The subscription has now been cancelled on 17th September 2008. A confirmation sms has been sent. Lorraine 2008-10-22 09:32:41 Escalation reason: Did not supply proof of subscription as requested.

2. The information given by the member was not accepted as proof of subscription, and the complaint was hence escalated to a formal complaint on the 22nd of October 2008. The member was furnished with notice of the escalation the same day.
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Response

3. Despite a further reminder sent to the member on the 31st of October 2008, no further response was forthcoming.
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Portion of the Code Considered

4. The following portions of the Code of Conduct are of relevance:

3. General provisions

3.1. Professional and lawful conduct

3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

...

5. Commercial communications

5.1. Sending of commercial communications

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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.

Decision

5. The facts in this matter are very similar to those in complaint number 4900 involving the same member. Rather than joining the two complaints, I reproduce my reasoning in that complaint below:

It is important to note at the outset that the member has NOT been accused of wrongfully subscribing the Complainant to a subscription service. Whether the Complainant regarded the service as illegitimate is not stated in the complaint. Even if I could draw the inference that the Complainant held this view from the fact that she requested that the member should furnish her with the subscription request, the member is nonetheless not accused of an infringement of the subscription service provisions Code of Conduct.

The same argument applies to an accusation that the Complainant has been guilty of sending spam to the Complainant. The only charge that the member has to answer is that it failed to provide proof of subscription.

This in turn leads us to a two-stage enquiry: firstly, do the responses furnished by the member constitute sufficient proof of subscription; secondly, is the failure to provide such proof an infringement of the WASPA Code of Conduct?

On the first question, what the member has provided as “proof” of subscription is merely a statement of its version of events. This is entirely subjective and is not sufficient as proof, which would need to take the form of objective evidence. In this case, an extract from the member’s log would probably be sufficient as proof of subscription. The member has thus not provided proof of subscription.

The WASPA Code of Conduct is silent on the matter of providing PROOF of subscription. The provision that comes closest to addressing the issue is section 5.1.7 as set out above. This places a duty upon the member to identify the source of personal information – in this case, where it obtained the Complainant’s MSISDN. The section does however not require that the member furnish PROOF of such source – it seems that the member’s unsupported statement is sufficient. Thus the member’s conduct is not an infringement of this section.

Section 3.1.1 imposes a duty upon the member to act in a professional manner in dealing with the public and with WASA. If WASPA had advised the member what was required as proof of subscription and the member had persisted in ignoring the request or in furnishing inadequate proof, in that case the member would have been in breach of this section. In this case however, the member was not advised as to what constitutes adequate proof of subscription. It would seem from the record reproduced above that the member was under the impression that a mere statement of the facts was sufficient proof. As the member was not advised what was expected of it, and as it cannot be expected have knowledge of the law of evidence, it cannot be said to be in breach of this section.

Interestingly enough, the section dealing with subscription services, section 11, is silent on the question of providing proof of subscription. Section 11.3 places a duty upon members to register all subscription services with WASPA, but disclosure of the method or source of such subscription is not a requirement. Perhaps if it WERE a requirement the request for proof would not have been required.

6. The same reasoning applies, *mutatis mutandis*, to this matter, and the complaint is hence dismissed.

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