



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	iTouch
Information Provider (IP) (if any)	n/a
Service Type	Commercial SMS
Source of Complaints	Competitor
Complaint Number	1767
Date received	11 August 2007
Code of Conduct version	5.3

Adjudicator's note: Please refer to the Adjudicator's Reports in respect of Complaints #1655 & #1680 as between the same Complainant and SP and regarding alleged breaches of the same sections of the Code of Conduct as found in this Complaint.

Complaint

The Complainant alleged breaches of sections 5.1.1., 5.1.2, 5.1.4, 5.2.1 and 6.2.6 of the WASPA Code of Conduct.

The detailed description of the complaint provided by the Complainant is reproduced in full below:

"On the 10th August 2007 at 15:08 I received the following unsolicited sms: Have u found ur soulmate? Check ur rating with our love test. sms MATCH to 36060. Plus get unlimited poems, tones & hot graphics! (R5/5daysSubscriptionService).

Obviously I-Touch have absolutely no scruples in this aspect and I respectfully request that they be instructed to stop sending out any SMS's immediately and that a suitable fine be imposed. Further more I will be claiming R20,000 compensation for their (I-Touches) illegal actions and wasting of my time. On the 7/08/2007 I received the following from iTouch via your department: "I contacted you this morning to

confirm that you have been unsubscribed from our opt-in lists". It is quite obvious that this is not the case as I continue to receive Spam."

SP Response

The SP's Response is reproduced in full below:

"Please note that complaint #1767 was logged without a corresponding cellular number, however due to previous complaints logged by [the Complainant] our records reflect that the previous msisdn queried on was +2776892xxxx.

I have checked our records for the msisdn +2776892xxxx, which shows that this msisdn was indeed opted out from all marketing correspondence as of the 18th of July. Further checks to our message schedules for sms campaigns actioned on the 10th of August do however reflect that +2776892xxxx was indeed targeted the sms below:

Found ur soulmate? Take our love match test. sms MATCH to 36060. Plus get unlimited poems, tones & hot graphics! Sms OUT to optout (R5/5daysSubscriptionService)

This matter has been logged with our technical department as a matter of urgency, as all blacklisted and opted out msisdn's should automatically be excluded from all sms campaigns actioned.

We apologize sincerely for the nuisance factor and inconvenience caused to [the Complainant] and as he unfortunately was troubled again inspite of our genuine efforts to exclude him from our database we are prepared to pay any proven hard costs he has incurred to bring to your notice this problem - e.g. cost of telephone calls, SMS's sent, etc."

Sections of the Code considered

The following sections of version 5.3 of the WASPA Code of Conduct were raised and 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.

5.1.4. 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".

5.2.1. 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.

6.2.6. Unless otherwise specified in the advertising guidelines, the name of the WASP or the information provider providing the service must appear in all advertisements for premium rated services.

Decision

The Decision in respect of each alleged breach is set out below.

5.1.1

The allegation that the SP has not provided its name in the SMS advertisement is not dealt with by the SP in its reply. Under section 5.1.1 of the Code the SP is required to provide a valid originating number AND/OR the name or identifier of the message originator. In other words the SP can provide a valid originating number on its own and this will be sufficient for the purposes of the section. An "originating number" is defined in the Code as the "number allocated to the WASP by the network operator from which a commercial message is sent". This is evidently present and this aspect of the Complaint is dismissed.

5.1.2

It is evident that the required opt-out facility exists. This aspect of the Complaint is dismissed.

5.1.4

This aspect of the Code was recently amended and SP's were given until 1 August 2007 with which to ensure compliance with the amended section. The Complainant indicates that the SMS complained about was received on 10 August 2007 and accordingly the SP was bound by the amended section 5.1.4 as introduced in Version 4.92 of the Code of Conduct.

The following text appears in the SMS received by the Complainant: "Sms OUT to optout". While there is evidence of an intention to comply the SP is not following the letter of the Code in this regard and the SP is no doubt aware of WASPA's efforts to create a single opt-out mechanism using the word "STOP". The substitution of "STOP" for "OUT" may seem innocuous given that the mechanism exists notwithstanding, but it remains a breach of a section of the Code which has a very clear rationale.

The SP is found to have breached section 5.1.4.

5.2.1

The SP has admitted the breach of section 5.2.1 and this is accepted as such. The version of the SP that this was done in an error is also accepted.

6.2.6

The allegation that the SMS advertisement, which is for a premium service, does not contain the name of the message originator is not dealt with by the SP in its reply. There is nothing in the Advertising Rules to absolve the SP from this requirement in respect of SMS marketing and, notwithstanding the fact that the 35050 brand is well-known, the failure to display the name of the SP constitutes a breach of the Code of Conduct.

The SP is accordingly found to have breached section 6.2.6.

Sanction

The Sanction in respect of each breach of the Code of Conduct found to have occurred is set out below.

5.1.4

The Adjudicator took into account the recent compliance deadline for this section but noted that sufficient notice had been given to the SP to ensure compliance at this time.

The SP is issued with a formal reprimand and a fine of R3 500. The SP is further instructed to review its procedures against the revised section 5.1.4.

5.2.1

The Adjudicator had reference to the Report in respect of #0103 in which the same SP experienced a technical error which resulted in the sending of a commercial SMS after assurances that the Complainant had been “personally” opted out. In this matter the SP was fined R2 000 in respect of the breach of section 5.2.1.

The SP is fined R5 000.

6.2.6

This Complaint was received prior to the SP receiving notice of the Adjudication Reports delivered under #1655 & #1680 and as such the same sanction is imposed as was imposed in respect of those two matters.

The SP is issued with a formal reprimand and a fine of R2 500.

In addition to the above the SP's offer to reimburse the proven hard costs of the Complainant is noted.