

REPORT OF THE APPEALS PANEL

Date	06 September 2010
Information Provider (IP)	Teleplay Communications
Service provider (SP)	Strike Media
Complaint Number	6542
Code Version	7.0

1 INTRODUCTION TO THIS APPEAL

- 1.1 This appeal concerns a complaint lodged by a member of the public against Teleplay Communications, the Information Provider (IP), and appellant in this matter.
 - 1.2 The Service Provider Strike Media was not included in the adjudication and is not a party to the appeal.
 - 1.3 The complaint, lodged in May 2009, cited alleged breaches of sections of the WASPA Code of Conduct (Code) dealing with the provision of adult services.
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2 THE CODE

- 2.1 Relevant sections of the Code considered:
 - 2.2 Section 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; and
 - 2.3 Section 8.1.4: Marketing messages (including commercial communications) may no longer be sent to a customer of an adult service if that customer has not made use of the service during the preceding three months. This is to prevent the accidental marketing of such services to children as a result of a recycled telephone number.
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3 DECISIONS OF THE ADJUDICATOR

- 3.1 *Findings on Complaint*
 - 3.1.1 The adjudicator accepted the IP's proof of the complainant's prior relationship with the IP. He concludes however that because the provision of adult services to the complainant had occurred some 5 years earlier, that the IP was in breach of section 8.1.4 of the Code.

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3.1.2 Additionally, the adjudicator found that the IP had not taken sufficient care to ensure the recipient of the marketing communication offering the adult services was 18 years or older, which action constituted a further breach, of section 8.1.3 of the Code.

3.2 *Sanctions Imposed*

3.2.1 The adjudicator, considering the breach of sections of the Code relating to the protection of children to be of an extremely serious nature, imposed a fine of R150,000.00.

4 GROUNDS OF APPEAL

4.1 The letter addressed to the WASPA Secretariat by the IP containing its grounds of appeal is somewhat emotional and accusatory. The panel will deal only with facts relevant to this appeal.

4.2 In summary, the IP seeks relief on the basis that the fine and its quantum are unwarranted and excessive and asks that it be revoked. In relation to the complainant, the IP contends:

4.2.1 The complainant had a prior relationship relating to adult services.

4.2.2 The complainant had not opted out from receiving marketing communications and would have been removed from the IP's database had he done so.

4.2.3 The adjudicator did not address the situation "where a customer actively agreed or ask[ed] to receive SMS advertisements and was informed about all the methods to be opt[ed]. out".

4.2.4 That it uses an "automatic precaution system" that would result in any names being removed from the database following 2 failed delivery attempts. This system would automatically eradicate recycled SIM cards and there was no chance that the new user of a recycled SIM card would receive further advertisements.

4.3 In relation to WASPA, the IP contends:

4.3.1 That it is "not ethical" for WASPA to impose "this enormous fine without advertising in advance a finalized and clear list of fines for each breach of code" or, to base its sanction on the complainant's assertions regarding the IP's actions or omissions only.

4.3.2 The fine is "not legitimate", will lead the IP to bankruptcy and result in unemployment and hardship for the IP's staff and their families, which cannot be WASPA's intention.

4.3.3 As a full member, the IP expects WASPA to "justify" its "goals", protect WASPs from customers and notify and/or warn members if "they breach or [are] about to breach the code of conduct before causing

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them insolvency”.

5 FINDINGS OF APPEALS PANEL

5.1 *Objectives of WASPA and the Code of Conduct*

5.1.1 The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The Code aims to equip consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members and provide a framework for impartial, fair and consistent evaluation and response to any complaints made.

5.1.2 The Code of Conduct also sets standards for advertising mobile application services, and includes a framework for the provision of adult services, to ensure adequate protection of children from potentially harmful content. The Code is discussed, circulated, and agreed to by members. It is updated frequently as a result of suggestions by members and other interested parties, and in order to reflect changes in technology and services. The primary, overriding objective is protection of the consumer.

5.1.3 WASPA is an independent, non-profit organisation representing the interests of organisations providing mobile application services in South Africa. The association aims to provide a neutral forum for members to address issues of common interest and interact with industry stakeholders, network operators and government bodies. WASPA aims to ensure that end-users receive world-class services and industry participants earn a fair return on their investments.

5.1.4 Membership of WASPA is voluntary. Voting members are required to have an existing business relationship with one or more of the network operators. All members are required to accept the WASPA Code of Conduct and related procedures as binding. Members consist in both IPs and SPs. IPs may be found liable for breaches of the Code in their name, or through the SP with whom they contract.

5.2 *Findings of the appeal panel*

5.2.1 Given the above stated objectives of WASPA and the voluntary and inclusive basis of membership, it is neither illegal nor unethical for WASPA to impose fines or to determine the quantum of fines.

5.2.2 Since its inception in 2004, WASPA, as a self-regulatory organisation, managed and controlled by its members, has elected to appoint independent adjudicators to assist in the enforcement of its Code of Conduct. The role of these adjudicators is to enforce the Code drafted for, and approved of by members. The panel accepts

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that if members required the codification of sanctions linked to a specific scale of fine, this would be recorded in the Code which is regularly updated and to which members are encouraged to contribute. The function of this panel is to ensure the equitable application of the Code. We note for the record, that WASPA has in the past considered codifying sanctions under the Code but that this has not been done, possibly because of the difficulty involved in doing so, as each individual complaint is unique and sanctions are determined by considering the facts and surrounding circumstances of each particular complaint.

- 5.2.3 The WASPA complaints process provides for consumer redress by allowing the complainant to make assertions that are in the first instance considered by the WASPA Secretariat, and if considered serious enough, allocated to an adjudicator for formal adjudication. The findings of adjudicators are always based on assertions made by complainants, or by the WASPA Media Monitor who acts in the interest of consumers. The complaints process does not exclude members from refuting assertions made and/or providing further evidence. The IP was notified of the complaint and given an opportunity to respond prior to the decision to refer the matter to adjudication.
- 5.2.4 The “legitimacy” of WASPA sanctions cannot be linked to bankruptcy, unemployment and hardship for members. Breach of the Code with the resultant sanctions is part of business risk, open for assessment by any entrant to the mobile industry and published on the WASPA website. The panel is confident that the Complaint Reports located at <http://www.waspa.org.za/code/complaints.php>, which include 6 years of adjudicator reports, indicate clearly the possible impact of breach and the need for compliance, much the same as any law of specific application.
- 5.2.5 The panel upholds the findings of the adjudicator and finds that the IP has breached sections 8.1.3 and 8.1.4 of the Code. Any contention by the IP relying on a prior relationship is meaningless given the 5 year gap in communications preceding the complaint.
- 5.2.6 We have considered the processes outlined by the IP, and its initial advertisement. We agree that this is not unduly harmful in the first instance in that it does make clear the fact that the service is an adult service and that subscribers are required to declare their age and to opt in to the service, on the IP’s version.
- 5.2.7 The panel finds the fine imposed by the adjudicator excessive, even given the seriousness of the need to protect children. The panel reduces the fine to R50,000.00.
- 5.2.8 The appeal fee is not refundable.