



REPORT OF THE ADJUDICATOR

WASPA Member (SP): Cointel

Information Provider

(IP): 121_SMS
(if applicable)

Service Type: Spam alternatively inappropriately advertising adult content

Complainant: Member of the public

Complaint Number: 0330

Adjudicator: Kerron Edmunson

Code version: Code v4.3 and Ad Rules v1.6

Complaint

The complainant appears to be the mother and possibly the account holder of the account held by her daughter with Vodacom. The complainant has submitted a complaint in relation to a text received from 082 007 0036. The complaint is relatively short and I have repeated it in full as it will be necessary to review this against the Code and Ad Rules to decide how best to adjudicate it: "This offer was to subscribe to an adult content publication. This was sent to my teenage (14 years) daughter. This is not the first time that a Vodacom number has sent messages to my and my daughter's phone with an offer to subscriber/download adult content. This is not acceptable! They don't know the ages of the recipient and I don't approve of my daughter being offered adult content! It should not be allowed! Thank you."

SP Response

The SP responded at length on the assumption that the complaint concerned a breach of the section of the Advertising Guidelines (Ad Rules) that deals with distribution lists, although making the point that it is not clear from the complaint which section of the Code or Ad Rules is alleged to have been breached. The assumption regarding the Ad Rules is made as a result of the subject matter of the complaint and its heading. The SP has reserved its right to respond if it is found that the complaint is based on another section of the Code or Ad Rules.

The initial response from the SP states that "the advertising guidelines require that "a sender to a distribution list may not send Adult Content, nor send advertisements that link to Adult Content...to consumers that have not previously expressly requested such content or would reasonably expect to receive such content."

"In this case during or about June 2005, the recipient of the SMS sent a request for content to the number 42408. Thus there was a direct and recent association with the recipient of the SMS. Moreover and service in question is advertised only during

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the adult time slot on ETV and contains express warnings that the service is only available to over 18s. An active confirmation that the user is over 16 years is also required before the content can be downloaded.

The SMS in question is an advert to receive a copy of a publication and reads as follows: FREE 4 U >> We're giving you a FREE copy of the ADULT CLASSIFIEDS; a brand new adult services guide for SA. Just SMS your postal details to 31474.

The publication would have been delivered to the recipient (had she responded with her postal address; which she did not) is not "adult content" as defined in the Guidelines since the level of explicitness of the pictures of women that appear therein does not exceed level 1.7 of the Vodacom matrix, nor would the pictures be classified as xx, x18 or F18 in terms of the Films and Publications Act. Notwithstanding the above, we have removed the recipient's name from the database of customers who have previously ordered content that is appropriate for over 16s only."

Consideration of the WASPA Code

I have decided to proceed with an assessment on the basis of the alleged breach of the Ad Rules to which the SP has responded as in my view the complaint could also have been based on an allegation of spamming (section 5 of the Code) and/or an allegation that the service has not complied with section 8 of the Code in relation to adult services, and I believe the response by the SP does in fact address these matters as well. The Ad Rules forming part of the Code, I assume the SP does not intend to avoid liability under any similar provisions under the Code. It would obviously be unduly onerous to expect that the complainant, a member of the public, would know their way around the specifics of the Ad Rules or Code as well as the SP does.

The SP has alleged that the content complained of was not "Adult Content" as defined, for various reasons. An analysis of the definition and related definitions makes a useful starting point:

- The definition of "**Adult Content**" in the Ad Rules is "*content classified as suitable only for persons 18 years or older in terms of the mobile network operators' Content guidelines, and/or Content classified (or which would be classified) as XX, X18 and/or F18 in terms of the Films and Publications Act 65 of 1996 as amended*".
- The Code defines "**adult services**" as "*any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is clearly of a sexual nature, or indicates directly or implies that the service is of a sexual nature*".
- An "**adult content service**" is defined in the Code as "*any service for the provision of content which has been classified as suitable only for persons 18 years or older by an appropriate body (such as the Film and Publications Board) or content reasonably likely to be so classified*".

Looking specifically at the Ad Rules, there are a number of relevant provisions:

1.2: display rules for cost and t&c information: 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.... If on TV, any advertising of adult content on broadcast channels may only be done during

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the watershed hours defined by a licensed broadcaster and may not contain any sexual content or nudity in excess of that displayed within the programme the advertisement is placed in.”

1.3: this rule is explicit in relation to Adult Content and how it may be advertised in different media. Section 1.3.8 of the Ad Rules is specific in relation to Distribution Lists. The summary of this section states “indicate if consumer automatically placed on list. // No sexual or sexually suggestive Content in list if the list recipient does not request or expect it. // Provide reasonable opt-out procedure. // Sender must have direct and recent association with recipient.”

In addition, bullet 1 states “a sender to a distribution list may not send any Adult Content, nor send advertisements that link to Adult Content, nor send any advertisements that contain Adult themes, Age Restricted Content sexually suggestive Content and language to consumers that have not previously expressly requested such Content or would not reasonably expect to receive such Content.” The bullets continue to explain that communication older than 10 days must “at the first communication to that user after the 10th day, indicate who the service is provided by and how the user may unsubscribe from the service, and the cost thereof.”

These latter points are of course, similar in content and form, to section 5.2.1 of the Code which states that a commercial message is considered unsolicited (and hence spam) unless the “message recipient has (a) requested the message, (b) 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.”

Section 8.1.3 of the Code which I can refer to since the SP has specifically referred to the age of the persons whom it targets with its messages, provides that “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.”

Decision

If we look at the complaint side by side with the SP’s response, it appears to me that two things have happened – (i) the complainant has received a message the content of which she found offensive in view of the age of the recipient, her daughter, and (ii) that message does not appear to have been specifically requested by the recipient.

The SP has stated that in relation to (i) it has taken reasonable steps to ensure that recipients of its messages are older than 16 years and in any event, the message was not adult content because it doesn’t fall into Vodacom’s description of what this is or the Films and Publications Act definition. If we dissect this response a little further, it would appear to me that:

- If the SP wishes to rely on the Ad Rules, the section quoted clearly states “a sender to a distribution list may not send any Adult Content, nor send advertisements that link to Adult Content, nor send any advertisements that contain Adult themes, Age Restricted Content[,] sexually suggestive Content and language to consumers that have not previously expressly requested such Content or would not reasonably expect to receive such Content”. It is clear to me that a directory explaining in detail how to access Adult services

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would constitute an advertisement containing Adult themes at the very least, but is in actual fact a gateway or 'ticket' to accessing Adult services, and therefore is governed by the same rules.

- Vodacom's description of what constitutes Adult Content is irrelevant to this complaint
- Any material which might constitute Adult Content is required to contain an age restriction of 18 years and older – by implication, advertisements for Adult Content or Adult Content Services should not be aimed at persons younger than 18 years. The SP states on its own version that the tv ads require persons who wish to access the services to be older than 18 years but an active confirmation that the user is over 16 years is required before content can be downloaded. This is not adequate to meet the requirements of the Ad Rules or the Code.

In relation to point (ii), the SP states that about a year ago a message was sent to a particular short code (not the current message originator number) which creates a "direct and recent association with the recipient of the SMS." Again if we dissect the SP's response:

- The Ad Rules require at bullet 1 that "a sender to a distribution list may not send any Adult Content, nor send advertisements that link to Adult Content, nor send any advertisements that contain Adult themes, Age Restricted Content sexually suggestive Content and language to consumers that have not previously expressly requested such Content or would not reasonably expect to receive such Content." The bullets continue to explain that communication older than 10 days must "at the first communication to that user after the 10th day, indicate who the service is provided by and how the user may unsubscribe from the service, and the cost thereof." It is not clear from the version of the complainant or the SP that the advertisement allowed the message recipient to unsubscribe, but leaving that aside, I note that the SP has now unsubscribed the message recipient who did not respond to the message in any event.
- The time lapse between the original SMS apparently sent by the message recipient to the SP and the resulting advertisement is a year (unless the SP has made a typographical error in its response by referring to June 2006?). This is not a recent prior commercial relationship. Furthermore, no matter what the date, the SP does not contend that the short code 42408 was an adult service. It is therefore not clear to me why the recipient would therefore be assumed to be seeking commercial messages regarding adult content, on the SP's version. The message recipient who is 14, did not respond to the original message regarding the advertisement in any event, so no commercial relationship can be construed at this point either.

In the circumstances and on the SP's response to the complaint, I find that the SP has breached the requirements of the Ad Rules at sections 1.2 and 1.3 and the Code at sections 5.2.1 and 8.1.3 by making advertisements of adult content available to message recipients not 18 years or older, without their express consent.

Sanction

The SP is required to pay a fine of R5,000 to WASPA in relation to its breach of the Ad Rules and by extension, the Code by (i) providing adult content to persons younger than 18 years, and (ii) providing messages to a person who has not specifically requested them. Payment of this fine must be made within 5 days of the date of publication of this finding.