



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP)</b>	Mira Networks
<b>Information Provider (IP)</b> (if any)	Dialogue / K2-Media
<b>Service Type</b>	Adult content services
<b>Source of Complaints</b>	Ms R Waters
<b>Complaint Number</b>	0975
<b>Date received</b>	29 January 2007
<b>Code of Conduct version</b>	4.8

---

### Complaint

The complainant lodged a complaint via the WASPA website on 29 January 2007 regarding unsolicited commercial messages being sent to her ten year old daughter's cellphone number inviting her to reply to the number 40440 to download pornographic videos. The complainant alleges that the messages are being received 5 and 6 times a day and at all hours of the night and morning.

The complainant states that she has tried to contact the IP telephonically but gets an automatic voice response.

---

### SP Response

The SP has responded to the complaint by forwarding a direct response from the IP. The IP states that the promotional SMS's were sent to the complainant's daughter after she purchased a ring tone pursuant to an advertisement in Heat magazine.

The IP states further that it only advertises in publications which are aimed at the 18 to 35 year old market.

The IP reports that it has taken steps to stop the messages being sent to this number in the future and has deleted same from its system. The number may only be re-entered by way of telephonic pre-approval.

The IP has a helpline number, as advertised, which is a live helpline between the hours of 8.30am to 5.30pm GMT. Outside these hours, the line is manned by an automatic answer phone service to take a queries and questions and also to enable customer's to leave their phone number with an instruction to unsubscribe.

The IP also tenders a refund to the complainant for the content downloaded as well as a R50 goodwill payment.

---

### **Sections of the Code considered**

I have considered section 5 and 8 of the Code and in particular:

#### 5. Commercial communications

##### *5.1. Sending of commercial communications*

*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.*

*5.1.3. Where feasible, persons receiving commercial messages should be able to remove themselves from the database of a message originator using no more than two words, one of which must be 'STOP'.*

*5.1.5. 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.*

*5.1.6. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the up-front description of the service.*

##### *5.2. Identification of spam*

*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.*

### *5.3. Prevention of spam*

*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.*

*5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.*

and

## *8. Adult services*

### *8.1. Required practices....*

*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. Prohibited practices*

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

---

## **Decision**

Although there is no evidence before me that the complainant's daughter did in fact previously download a ring tone from an advert that appeared in this publication, I will accept the IP's version in this regard and assume that it has the necessary records should it be necessary to view same in future.

I also accept that Heat Magazine is a publication that is aimed at persons over the age of 18 years old.

I therefore find that there has been no contravention of section 8 of the Code in this regard.

In terms of section 5.2.1 (b) of the Code, any commercial message is considered unsolicited (and hence spam) unless 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. The messages being sent to the complainant's daughter would fall within the ambit of this subsection and would therefore not constitute spam.

Although the complainant tried to contact the IP via its helpline, she was not clear on whether she actually left a message on the IP's answer service with an instruction to unsubscribe her daughter's number from their database. It is also not apparent from the complaint whether any further steps were taken to unsubscribe. Had she done so and the messages continued, then there would be a problem. However, there is nothing before me that suggests that the IP has contravened section 5.

I am happy with the steps that have been taken by the IP to ensure that no further messages of this nature are sent to the number in question.

The complaint is accordingly not upheld.

---