



Wireless Application Service Providers' Association

Report of the Appeals Panel

Complaint number	#27729
Cited WASPA members	Interband Enterprises LLC (1315) ("Second Appellant") Smartcall Technology Solutions (0090) ("First Appellant")
Notifiable WASPA members	<i>Not applicable</i>
Appeal lodged by	Interband Enterprises LLC and Smartcall Technology Solutions
Type of appeal	Written appeal
Scope of appeal	<ul style="list-style-type: none"> • Review of the adjudicator's decision • Review of the sanctions imposed by the adjudicator
Applicable version of the Code	14.3
Clauses considered by the panel	4.2, 4.3, 12.1, 22.3, 22.5 and 22.11
Related complaints considered	Appeal panel's report for complaints 15477, 15722, 16851, 16977, 17184 and 17236 dated 2013-10-04 ("the 15477 Appeal Report"); 24103; 24023 and 25122
Amended sanctions	With the exception of the 8 month suspension, all sanctions upheld. The 8 month suspension is overturned.
Appeal fee	Appeal fee forfeited as the Appellants were substantially unsuccessful
Is this report notable?	Notable
Summary of	Further guidance regarding infringements of Code provisions

notability	pertaining to Adult Services.
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Introduction

This Appeal concerns a complaint about an Adult Service operated by the Second Appellant and facilitated by the First Appellant, as aggregator. The complaint was lodged by the WASPA Monitor (the “Monitor”), citing infringements of the following clauses of version 14.3 of the Code:

Professional conduct

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

Lawful conduct

4.3. Members must conduct themselves lawfully at all times and must co-operate with law enforcement authorities where there is a legal obligation to do so.

Web advertising

Display of pricing information

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

Adult services

Required practices

22.3. Any adult service must be clearly indicated as such in any promotional material and advertisement, and must contain the words “18+ only”.

22.4. ...

22.5. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Reasonable steps may include the customer confirming his or her age prior to or as part of initiating the service.

Prohibited practices

22.8. ...

22.9. ...

22.10. ...

22.11. Marketing material for any adult services may not make use of material which is classified as XX or X18 by the Film and Publication Board, or which has not yet been classified but which would likely be classified as XX or X18.

The details of the complaint are set out in the Monitor's complaint and the attachment to the complaint. The attachment contains screenshots and the results of the Monitor's test. It is also attached to the adjudicator's report which is annexed to this report, marked "A".

The adjudicator's findings and sections were as follows:

- 1 Interband Enterprise LLC (1315) fined R 25 000.00 triggered by the continuous breach of clauses 4.2 and 12.1
- 2 SmartCall Technology Solutions (0090) fined R 10 000.00 for breach of clause 4.2.
- 3 R 100 000.00 Fine imposed on Interband Enterprise LLC (1315) and SmartCall Technology Solutions (0090) for breach of clauses 22.3, 22.5 and 22.11 jointly and severally payable on demand by WASPA Secretariat.
- 4 Interband Enterprise LLC (1315) 8 (eight) Month Suspension from WASPA triggered by monumental breach of clause 22.5.

The Appellants lodged appeals against the adjudicator's findings as well as the sanctions the adjudicator imposed in varying degrees. Specifically, the Appellants appealed against the following:

- 1 The finding that the Appellants infringed clause 4.2 of the Code and the consequential sanctions;
- 2 The finding that the First Appellant breached clause 12.1;
- 3 The sanction imposed on the Second Appellant as a consequence of the finding that the Second Appellant infringed section 12.1 of the Code (the Second Appellant argued that this fine should be reduced);

- 4 The finding that the Appellants infringed clause 22.3 of the Code and the consequential sanctions;
- 5 The sanctions flowing from the finding that the Appellants infringed clause 22.5 of the Code (the Appellants argued that the fine should be reduced and the suspension be converted into a monetary fine); and
- 6 The finding that the Appellants infringed clause 22.11 of the Code and the consequential sanctions.

The Appeal's merits

We do not propose to repeat the adjudicator's reports or the appeal submissions in their entirety in this report. Instead, we have attached both documents and will, instead, refer to them where appropriate.

Clause 4.2

Clause 4.2 deals with "Professional conduct". The adjudicator invoked the clause in connection with additional apparent breaches of the Code. The adjudicator made a finding that the member infringed clause 4.2 on the basis of findings that it infringed other provisions of the Code. The clause says:

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

We believe this finding was not correct because it stems from a misunderstanding of clause 4.2's focus.

Clause 4.2 speaks to the manner in which members are expected to deal with various stakeholders; namely public, customers, WASPA and other service providers. Where other provisions of the Code focus on aspects of members' services, clause 4.2 focuses on members' conduct specifically.

A finding that a member's service infringed a provision of the Code does not necessarily mean that the member infringed clause 4.2. To conflate the two would be to create situations where members are sanctioned twice for the same infractions: under the specific clauses of the Code pertaining to the specific aspects of the service in question and under clause 4.2.

It is entirely conceivable that a member could conduct itself professionally and, yet, still operate a service that infringes the Code.

This begs the question what “professional” means? According to the Merriam-Webster dictionary, the word “professional” includes these definitions:

(1) characterized by or conforming to the technical or ethical standards of a profession

(2) exhibiting a courteous, conscientious, and generally businesslike manner in the workplace

We interpret clause 4.2 as saying that when members deal with members of the public, customers, WASPA and other service providers; they must conduct themselves ethically, courteously, conscientiously and in a “generally businesslike manner”.

Put another way, clause 4.2 focuses on the members’ behaviour, specifically, not on the members’ services.

Where members’ services breach the Code, they will have violated other, specific provisions of the Code and these infringements will be determined accordingly. In this particular matter, we find that the Appellants conducted themselves professionally even though their services infringed other aspects of the Code.

A finding of an infringement of clause 4.2 requires an adjudicator to establish the requisite degree of professionalism expected of WASPA members and to then demonstrate that the particular member fell short of that standard.

The adjudicator in this matter did not establish a standard of professionalism that s/he measured the Appellants’ conduct against. Instead, the adjudicator appeared to conflate infringements of other clauses of the Code with the test applied by clause 4.2. The adjudicator then appears to have used apparent findings that the Appellants breached other provisions of the Code as a basis for a finding that the Appellants infringed clause 4.2. As the Appellants pointed out -

The adjudicator failed to set out a clear standard of professionalism that the appellants should have observed. Having failed to do so, the adjudicator could not and did not set out how, on the evidence placed before the adjudicator, the appellants failed to meet such standard.

We therefore disagree with the adjudicator's finding of an infringement of clause 4.2 and set this finding and the consequential sanctions, aside.

Clause 12.1

This clause has been the focus of a number of adjudications and appeal panels. This issue was dealt with in the adjudications of complaints 24103 and 24023, both of which concerned the Second Appellant, which, in turn, cited the 15477 Appeal Report's discussion about the question of prominence.

The 15477 Appeal Report dealt with a predecessor to clause 12.1, specifically clause 11.1.1 of version 11.0 of the Code. The appeal panel, in that matter, gave guidance on the question of what prominence means in the context of subscription pricing information:

We considered these arguments and wish to provide the following guidelines:

- 1. The purpose of the prominence of the subscription services is to alert the consumer to the potential cost in a manner that would not be easily overlooked. As a result the caveat subscriber rule is not an appropriate test. Rather, adjudicators should prefer the more recent approach of the Consumer Protection Act in ensuring that important or unusual terms are highlighted and drawn to a consumer's attention.*
- 2. We consider the cost of the subscription to be a very important aspect of the service and this aspect must always be highlighted. The requirement to highlight the fact that this is a subscription service and what the cost of the subscription service is, is emphasised by chapter 9 of the Advertising Rules (version 2.3).*
- 3. ...*
- 4. ...*
- 5. As a result it would appear that WASPA members have assumed that the subscription services text may be placed anywhere on the email or Web page if no unique access number or Content access code exists. We can not support this approach. Clearly a member is still required to place the subscription service text in a position of prominence ...*

Significantly, the Second Appellant was sanctioned for its failure to comply with the prominence requirement of the relevant version of the Code.

We are satisfied that the Second Appellant ought to have been sufficiently aware of the prominence requirements of the Code. The Second Appellant appropriately conceded that ‘the pricing information was not prominently displayed even though “the pricing information and the fact that this is a subscription service was directly underneath the call to action.”’.

As a clarification, we disagree that the manner in which the Second Appellant stated the pricing information under the call to action meets clause 12.1’s requirements.

The adjudicator imposed a fine of R25 000 for the Second Appellant’s infringements of clauses 4.2 and 12.1. Although we have set aside the adjudicator’s findings regarding clause 4.2, we believe that a sanction of R25 000 remains an appropriate sanction in respect of the Second Appellant’s infringement of clause 12.1 in light of what we outlined above.

The First Appellant has argued that it should not have been found to have infringed clause 12.1 of the Code. Aside from the adjudicator’s general statement that s/he took “the decision to treat both Interbank and STS as joint wrong doers”, we don’t see an indication that the adjudicator found STS to have infringed clause 12.1. Accordingly, it isn’t necessary for us to find on this issue.

Adult Services

Before dealing with the remaining aspects of this appeal, we wish to add context to them. To begin with, the Code includes two important definitions pertaining to adult services:

Definitions

22.1. An “adult service” is any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature.

22.2. An “adult content service” is 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.

The Appellants took issue with the adjudicator’s reference to various submissions and guidelines that deal with the important social issue of children being exposed to adult content or pornography. The Appellants submitted that –

However, the exercise to be undertaken by the Adjudicator was the adjudication of the Code, as it then stood. It is therefore not clear on what conceivable basis either of these documents was deemed legally relevant to the exercise. Indeed, it appears that the submission by WASPA to ICASA was made in 2016 – that is months after the conduct at issue.

We agree that an adjudicator can hardly make use of rules imposed by third parties or draw on materials not yet published at the time a complaint is adjudicated for authoritative support of the adjudicator's stance on an issue. At the same time, there are various public resources that highlight the risks of exposing children to explicit and harmful materials which an adjudicator may have regard to in appropriate circumstances.

As the Appellants pointed out, "the exercise to be undertaken by the Adjudicator was the adjudication of the Code, as it then stood". The Code contains a number of clauses that emphasise the importance of a particular approach to adult services and adult content services (as defined in the Code).

Lawful conduct

4.3 Members must conduct themselves lawfully at all times and must co-operate with law enforcement authorities where there is a legal obligation to do so.

Content control

4.6. Members must not knowingly transmit or publish illegal content.

4.7. If a member becomes aware of illegal content under that member's control, the member must, immediately suspend access to that content. Where required to do so by law, the member must report the illegal content to the relevant enforcement authority.

The Film and Publication Board places special emphasis on the need to protect children from sexually explicit materials. One of its stated mission statements is "balancing the right to freedom of expression with an obligation to protect children from exposure to potentially disturbing, harmful and inappropriate materials".

Two points about these references:

- 1 We have emphasised particularly relevant sections of the clauses; and

- 2 Our references to some of these clauses in this section of our report are not findings against the Appellants on these grounds. Rather, we cite them to substantiate our arguments below.

It would be disingenuous for the Appellants to argue the fact that failing to take adequate safeguards to protect children from sexually explicit materials would be problematic, likely unlawful.

Clause 22 of the Code was designed to implement adequate protections to safeguard children from sexually explicit materials. Clauses 22.3, 22.5 and 22.11 focus on three specific protections:

- 1 Warning visitors to an adult site that the content on the site is intended only for adults (in other words, 18 years and older).
- 2 Implementing measures to verify that visitors who indicate they are 18 years and older *are, in fact*, 18 years and older.
- 3 Prohibiting the use of sexually explicit materials in marketing materials with specific reference to the XX and X18 Film and Publication Board ratings.

The screenshots in the Monitor's test report may be characterised as follows:

- The most prominent image, styled as an embedded video, is of partially undressed and exposed women in sexually suggestive poses.
- The headline is "HOT MILF VIDEOS" (above the image) and the sub-headline below the image suggests "ENJOY WITH THE BEST MATURE WOMAN".
- The call to action begins with large text stating: "Enter your cell to watch", followed by a field to type in a mobile number before tapping a large button with the text "Play Now!".
- Below the large button is light purple text against a dark purple background beginning with "Subscription Service R7/day". This text is followed by what appears to be the text the Appellants quoted in paragraph 28.2 of their appeal submissions: "By accepting these terms and conditions and by subscribing to this service, you also accept to receive promotion text messages from us or our partners in the future. Service is available to users from South Africa only. To unsubscribe the service, send STOP to

44363. To take advantage of this service you need to be Adult 18+ only or older and have the bill payers permission.”

- The reference to “18+” is not visible on the screenshot in the Monitor’s test and it is worth bearing in mind that the Monitor used a Samsung Galaxy Note 2 phone which has a large screen.

Clause 22.3

The purpose of this clause is to inform visitors to the site that the content is intended for adults only. Referring back to our discussion about clause 12.1, we remind you that the appeal panel that wrote the 15477 Appeal Report stated the following:

The purpose of the prominence of the subscription services is to alert the consumer to the potential cost in a manner that would not be easily overlooked. As a result the caveat subscriber rule is not an appropriate test. Rather, adjudicators should prefer the more recent approach of the Consumer Protection Act in ensuring that important or unusual terms are highlighted and drawn to a consumer’s attention.

Given the importance of protecting children from sexually explicit materials, a statement that an adult content service is intended only for “18+” is an important statement that should similarly be prominent. This is not an application of clause 12.1 but, rather, is implicit in clause 22.3’s requirements for the words to be stated and for them to be “clearly indicated”:

Any adult service must be **clearly indicated** as such in any promotional material and advertisement, **and must contain the words “18+ only”**.

The Appellants contention that including the words “18+ only or older” at the bottom of the page in text that is barely distinguishable from the background it is placed on is not convincing. Accordingly, we uphold the adjudicator’s finding that the Appellants have infringed clause 22.3 of the Code.

Clause 22.5

This clause, in a sense, follows on from clause 22.3. It requires that members implement age verification mechanisms to ensure that a person wishing to access an adult service or adult content service is, in fact, aged “18+ only”. It states the following:

Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Reasonable steps may include the customer confirming his or her age prior to or as part of initiating the service.

The Appellants argued that the following sentence at the end of the terms and conditions:

To take advantage of this service you need to be Adult 18+ only or older and have the bill payers permission.

The premise of the Appellants' argument is that a prospective subscriber would read this condition and, by submitting his/her phone number and proceeding with the subscription process, would signal his/her confirmation that s/he meets the "18+ only" access condition.

There are a few flaws in this argument:

- 1 To begin with, the condition is stated in text which is barely visible given how it is formatted and placed in a location on the page which may not even be visible without scrolling down the page.
- 2 The Appellants' argument is premised on a person with contractual capacity reading the terms and conditions and assenting to them. Children lack adequate contractual capacity to conclude various types of contracts and apparent assent to these terms and conditions by a child may be invalid.
- 3 The only reference to this particular condition is at the bottom of the page as we described. The Appellants failed to ensure there was any other reference to this access condition elsewhere on the page and in the marketing materials soliciting subscribers.

The Appellants conceded that "they ought to have gone one stage further and also required the user to specifically confirm that they are over 18." They proposed including additional text on a subsequent login page (also included in the Monitor's report):

"You are about to enter a website that contains content of an adult nature. This service and website requires you to be 18 years or older to enter. By proceeding you are confirming that you are 18 years or older"

While we have concerns whether this addition is more effective than the wording on the landing page, it isn't clear that this proposed addition satisfies clause 22.5's requirement for

“reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services”.

We recommend that WASPA consider raising the question of what constitutes “reasonable steps” with its members as part of a broader industry initiative to develop more effective age verification measures.

In this particular matter, the Appellants conceded that they failed to meet the standard required and only seek to have the sanctions reduced.

The Second Appellant made a number of submissions in support of its arguments for the reduction of the sanctions imposed on it:

- 1 The infringement of clause 22.5 “was not especially egregious”;
- 2 Both appellants conceded that they infringed the Code, committed to remedying their infringements and did so;
- 3 There was no evidence before the adjudicator that the Appellants had repeatedly infringed the Code;
- 4 The “penalty of an eight month suspension seems entirely unprecedented”; and
- 5 Having regard to a previous decision about a breach of clause 22.3, the sanctions imposed by the adjudicator were “severe and unprecedented”.

We disagree with the Appellants’ underlying submission that their failure to comply with clause 22.5 “was not especially egregious”. This complaint does not concern a content subscription service offering ringtones. It concerns the risk of children being exposed to explicit pornography and the Appellants’ failure to comply with the take adequate steps to prevent it.

The 8 month suspension is a specific sanction for the Second Appellant’s infringement of clause 22.5. This infringement is certainly a serious one but we disagree with the adjudicator that such a suspension is warranted in these circumstances. We therefore overturn the finding for suspension.

The Appellants made a further argument that such the Second Appellant’s suspension is analogous to the restraint or censorship of a news publication. The Second Appellant suggested that the suspension would be an infringement of the Second Appellant’s right to freedom of expression under the Bill of Rights. Whether the Second Appellant’s suspension

would be unconstitutional exceeds our scope so we will refrain from making a finding on this argument.

Clause 22.11

Clause 22.11 raises an issue that is, perhaps, most problematic. It states the following:

Marketing material for any adult services may not make use of material which is classified as XX or X18 by the Film and Publication Board, or which has not yet been classified but which would likely be classified as XX or X18.

Whether the Appellants have breached this clause depends largely on whether the images used to market the Second Appellant's service would be classified as either XX or X18 by the Film and Publication Board. The Appellants argued as follows:

At no stage did the Adjudicator reason or find that the material used in the allegedly offending advert made use of material which is classified as XX or X18 by the Film and Publication Board, or that such material would likely be classified as XX or X18.

The adjudicator stated the following in his/her report on this point:

Any age restrictions on the content the WASP is providing must be clearly marked and the service provided must have an Adult Verification System in place for access to that content or service. (http://waspa.org.za/press_release/waspa-lays-down-the-law-on-advertising-subscription-services-to-kids/). This is a serious breach of the WASPA Code, and warrants a serious sanction that the WASP cannot ignore.

Contrary to the Appellants' contention, we find that the adjudicator did find the Appellants' infringed clause 22.11 of the Code, albeit it somewhat simplistically.

As the Appellants pointed out, sections 16(4)(b) and 18(3)(b) of the Films and Publications Act 56 of 1996, material will only be classified as XX if it depicts:

(i) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;

(ii) bestiality, incest, rape, conduct or an act which is degrading of human beings;

(iii) conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour;

(iv) explicit infliction of sexual or domestic violence; or (v) explicit visual presentations of extreme violence ...

Going further –

In terms of sections 16(4)(c) and 18(3)(c) of the Films and Publications Act 56 of 1996, material will only be classified as X18 if it contains “explicit sexual conduct”. That is defined by section 1 of the Act to mean “graphic and detailed visual presentations” of sexual conduct as defined.

While there is certainly some doubt whether the material would fall under the XX category but there is no doubt that the material used to promote the Second Appellants’ contains “explicit sexual conduct” and falls under the X18 classification. The Appellants’ submission that this is not the case is, quite frankly, implausible and disingenuous.

We have no difficulty confirming the adjudicator’s finding that the Appellants’ infringed clause 22.11.

In light of our findings regarding clauses 22.3, 22.5 and 22.11, we now turn to the sanction imposed in respect of these clauses. The adjudicator fined both Appellants R100 000, jointly and severally, for infringements of these clauses. Given the serious nature of these clauses and the Appellants’ failure to comply with them, we believe that the fine of R100 000 is an appropriate sanction.

The Appellants have been substantially unsuccessful and forfeit the appeal fees.



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	#27729
Cited WASPA members	Smartcall Technology Solutions (0090) Interband Enterprises LLC (1315)
Notifiable WASPA members	<i>All</i>
Source of the complaint	<i>WASPA Media Monitor</i>
Complaint short description	<i>Adult Subscription Services</i>
Date complaint lodged	<i>22 September 2015</i>
Date of alleged breach	<i>21 September 2015</i>
Applicable version of the Code	<i>14.3</i>
Clauses of the Code cited	<i>4.2; 4.3; 12.1; 22.3; 22.5; 22.11.</i>
Related complaints considered	<i>#26416 #28130 #21612</i>
Fines imposed	Interband Enterprise LLC (1315) fined R 25 000.00 triggered by continuous breach of clauses 4.2 and 12.1 SmartCall Technology Solutions (0090) fined R 10 000.00 for breach of clause 4.2

	R 100 000.00 Fine imposed on Interband Enterprise LLC (1315) and SmartCall Technology Solutions (0090) for breach of clauses 22.3, 22.5 and 22.11 jointly and severally payable on demand by WASPA Secretariat.
Other sanctions	Interband Enterprise LLC (1315) 8 (eight) Month Suspension from WASPA triggered by monumental breach of clause 22.5
Is this report notable?	<i>Notable</i>
Summary of notability	<i>Apparent and ongoing consumer harm by Interband Enterprise LLC , who have shown to have a high level of deceptive business practices</i>

Initial complaint

- Whilst browsing the internet, the media monitoring team tested an adult content service promoted by Interband ;
- The landing page of the service was of great concern to the monitoring team; and
- The adult images used were potentially unlawful;
- The monitoring team viewed the harm as non-compliance with the Code [of conduct] ;and
- There was NO 18+ displayed; and the
- Pricing display was not prominent.

Member's response

(Interband) - First Respondent response/ acknowledgement is dated 2015/09/22 03:33 PM

We appreciate the seriousness of this matter and as such we have discontinued the service with immediate effect and removed the offending landing page until such time as the service has been made fully compliant with the WASPA code. We will also undertake an internal investigation to determine how this non-compliant marketing was published.

First Respondent Formal Response is dated 2015/10/07 11:12 AM

We want you to take into consideration once more that we work in accordance to WASPA's regulations. In that matter, we have removed and changed everything that was not in compliance with your regulations with immediate effect.

For any information, please be free to contact us.

Dear WASPA Adjudicator,

With regards to our landing page being in contravention of the 22.3, 22.5 and 22.11, we agree that this was in violation of the WASPA code. In mitigation, upon receiving notification of this, we suspended the service immediately and removed the offending landing page. Mrs. Lorraine Hartzner from the WASPA secretariat can confirm the immediacy of this action and that the service remains offline until such time as the landing page is compliant with the WASPA code.

With regard to section 4.2 of the code, Interband provides high quality services around the globe and always strives to have professional dealings both with the public and its customers.

With regard to section 4.3 of the WASPA code, Interband will always strive to conduct ourselves professionally and to co-operate with law enforcement authorities, however, as this matter does not involve law enforcement authorities, this section of the code does not apply to this matter.

With regard to section 4.9 of the WASPA code, section F and G, our banners were placed on adult sites and as such, people clicking on them were unlikely to be offended or degraded as a result of them clicking on an adult related banner. With regard to section 12.1 of the WASPA code, pricing information and the fact that this is a subscription service was directly underneath the call to action. However, we will in future have this information more prominently displayed to avoid further conflict with WASPA.

Kind regards,

(STS)- Second Respondent response/ acknowledgement is dated 2015/10/09 11:04 AM

Hi

Please advise if you could provide us an extension as our legal department is currently reviewing the formal response. Please advise if we could respond by Friday 16 October 2015.

Thank you

Second Respondent response/ acknowledgement is dated 2015/10/19 08:44 AM

Hi

Please advise if you could provide us an extension as our legal department is still reviewing the formal response. Please advise if we could respond by Friday 23 October 2015.

Thank you

Second Respondent response/ acknowledgement is dated 2015/10/26 09:53 PM

Hi

Please note that STS acknowledge receipt of below complaint with Interband. We have sent this to our IP and can confirm that they have removed the campaign with immediate effect.

Please find below response from the client.

We want you to take into consideration once more that we work in accordance to WASPA's regulations. In that matter, we have removed and changed everything that was not in compliance with your regulations with immediate effect.

Please contact me should you need any additional information.

Complainant's response

No further response to the member's initial response was provided by complainant

Member's further response

No further response than those above

Sections of the Code considered

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

4.3. Members must conduct themselves lawfully at all times and must co-operate with law enforcement authorities where there is a legal obligation to do so.

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action,

pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action

22.3. Any adult service must be clearly indicated as such in any promotional material and advertisement, and must contain the words “18+ only”.

22.5. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Reasonable steps may include the customer confirming his or her age prior to or as part of initiating the service.

22.11. Marketing material for any adult services may not make use of material which is classified as XX or X18 by the Film and Publication Board, or which has not yet been classified but which would likely be classified as XX or X18.

Decision

I start by noting that both Interband and STS were given generous opportunities to answer and / or respond to this matter and it is always advisable for all members implicated in a complaint to give input on the complaint and by the First Respondents own admission “*We appreciate the seriousness of this matter*”, it is unknown however how long the harm was in fact in operation, as the complaint was only brought on the 22 October 2015, this in itself is a concern.

Mobile is a significant portion of the market and it is here to stay. Giving people access to products and services on the device of their choice is what many want for their brand, however as a self-regulatory body WASPA must be seen to take steps to prevent non-compliant campaigns from being used to promote services which are in fact harmful to the industry as a whole.

I have taken the decision to treat both Interband and STS as joint wrong doers as this particular breach goes to the heart of what WASPA is attempting to guard against. It is common cause that this campaign was particularly misleading and that there may have been large commercial benefits to both members. STS must be seen to take steps to prevent non complaint campaigns, particularly those relating to adult content as the Code has been continuous on this aspect throughout the years that it has been in operation. There is a significant level of deceptiveness from both members even though in the response from STS dated 14/12/2015, they pointed out that Interband is a registered affiliate member. The WASPA Code is a dynamic document capable of quick amendment to counter new and unethical practices, the section relating to Adult content however, has had no significant evolution from the inception of the code.

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

Consumers are persons to whom goods or services are marketed, who have entered into transactions with suppliers, users of particular goods or recipients/beneficiaries of services. “*Conducting themselves in a professional manner*” when dealing with consumers, include giving consumers an opportunity to observe and be made aware of terms and conditions and to reach the call to action page that triggers the subscription process. Noting both the pricing and age restriction is imperative in any adult service. The members failed to ensure that the consumer is sufficiently advised of the content and the subscribed nature of the service.

The member (s) cannot be seen to have conducted themselves in a professional manner, whether by advertising or channelling the service via a particular platform.

4.3. Members must conduct themselves lawfully at all times and must co-operate with law enforcement authorities where there is a legal obligation to do so.

I concur with the submission by Interband in that there is no breach of 4.3, the matter does not involve law enforcement authorities. Accordingly this service does not warrant the co-operation with law enforcement agencies and sub clause 4.3 does not apply to this matter, there cannot be seen to be a breach of sub clause 4.3.

Complaint regarding sub clause 4.3 is dismissed.

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action

“Prominent” - adjective

1.

standing out so as to be seen easily; conspicuous; particularly noticeable:

2.

standing out beyond the adjacent surface or line; projecting.

<http://www.dictionary.com/browse/prominently>

Taking into account the actual place of the call to action and the pricing, the situation is that there is very little to no “standing” out of the pricing information neither can it be easily seen. The members have breached this clause in that the pricing information is not particularly noticeable and there is no indication that the product offering is adult in nature.

22.3. Any adult service must be clearly indicated as such in any promotional material and advertisement, and must contain the words “18+ only”.

WASPA submitted a paper to the Independent Communications Authority of South Africa and stated the following, “WASPA requests that the Authority consider broadening its definition of an “adult service” to include material which would have been classified as X18 under the Film and Publications Act. This is in line with the approach taken in the Film and Publications Amendment Bill 2015 and with the discussion set out in the South African Law Reform Commission’s Issue Paper on Children and Pornography” (<http://www.ellipsis.co.za/wp-content/uploads/2016/01/WASPA-Submission-Draft-PRS-Code-20160212.pdf>). Therefore as industry members, both are guarded against utilising adult services in a manner which could bring into play a larger breach of national legislation.

Adult Services may not offend against good taste or decency or be offensive to public or sectoral values and sensitivities, the promotional material must indicate the age restriction as 18+ particularly with the images used by the member on the landing page to represent the service offerings. VODACOM ACM (Adult Content Management) Policy Guidelines of 2011, which aim to ensure and provide a responsible and legal framework for the provision of adult content which will not only protect children from accessing inappropriate content but also provide business rules that will ensure compliance with the law under *Clause 5 states - Illegal content will include but not be limited to content which is defamatory, offensive, derogatory, hateful, obscene and as such are prohibited the Vodacom Network. Examples of content that will fall into the following categories, include, but are not limited to:*

5.5.2 Female Genitalia / Aroused male genitalia;

5.5.5 Oral-genital contact of any kind;

5.5.6 Penetration by finger, penis, tongue, or any object;

5.5.14 the above applies to both heterosexual and homosexual activities and cartoon imagery.

The member(s) have breached sub clause 22.3 in that the actual advertisement on the landing page clearly portrays female genitalia, penetration by finger all of which is homosexual in nature.

22.5. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Reasonable steps may include the customer confirming his or her age prior to or as part of initiating the service.

“WASPA takes a hard line on advertising to children in line with its goals of protecting kids from harmful content and promoting an ethical WASP industry. We insist that our members must adhere to our Code of Conduct as well as the specific guidelines and policies set out by the country’s broadcasters when they show adverts on television because ethical behaviour by WASPs is in the interests of consumers and the industry alike.” (http://waspa.org.za/press_release/waspa-lays-down-the-law-on-advertising-subscription-services-to-kids/). VODACOM ACM Policy Supra 5.7, WASPs should comply with WASPA Code of Conduct in terms of the provision of adult content services including the requirements of age verification.

Testing by the monitoring team indicated that:

Whilst the user was browsing the internet, the user was directed to a page promoting the HotJizz subscription service at R7/day.

The service offered “HOT MILF VIDEOS”, however, the landing page contained images that are not permitted on South African networks and the pricing was not prominent.

There was no display of 18+ only. The user then clicked on the “Play Now!” call to action button.

The user then received the Vodacom double opt-in SMS and subsequently replied with the keyword “Yes”.

The user then received the Welcome SMS on his mobile phone and proceeded to open the URL provided. The user was then directed to the homepage for HotJizz and proceeded to login with the credentials provided in the Welcome SMS.

The above is a clear indication that both the Vodacom ACM Policy as well as the Code have been significantly breached by the members, ***find attached the report and screenshots by the Media Monitor***, the images are a clear indication of the various violations. A recent survey by *our mobile planet* found that 29 million South Africans use a mobile phone, 20.5 million a smartphone. It's relatively easy to get a smartphone contract in South Africa and this has been good for the nation's internet penetration. The study found that of the country's mobile users, 57% hardly ever use a desktop computer, reinforcing the perspective that mobile is the key to SA's rapidly evolving digital scene. Children therefore may be able to access such content as there is no Adult Verification System in place.

22.11. Marketing material for any adult services may not make use of material which is classified as XX or X18 by the Film and Publication Board, or which has not yet been classified but which would likely be classified as XX or X18.

Any age restrictions on the content the WASP is providing must be clearly marked and the service provided must have an Adult Verification System in place for access to that content or service. (http://waspa.org.za/press_release/waspa-lays-down-the-law-on-advertising-subscription-services-to-kids/). This is a serious breach of the WASPA Code, and warrants a serious sanction that the WASP cannot ignore.

Sanctions

Clause 24.34 of the code was taken into account as well as the mitigating factors placed on record by the First Respondent, however the significant breach of the code is in relation to the actual product offering and the advertisement prominently displayed. Further, the Second respondent seemingly showed no remorse nor any indication to ensure future compliance, they further did not even bother asking for condonation for the late filing of their responses to the secretariat, the First Respondent indicated that there would be an internal investigation, this can be seen as mere lip service because there may have been a significant amount of revenue already generated.

My ruling therefore is that the following (*financial and non-financial*) sanctions are applicable;

1. Interband Enterprise LLC (1315) fined R 25 000.00 triggered by the continuous breach of clauses 4.2 and 12.1
2. SmartCall Technology Solutions (0090) fined R 10 000.00 for breach of clause 4.2.
3. R 100 000.00 Fine imposed on Interband Enterprise LLC (1315) and SmartCall Technology Solutions (0090) for breach of clauses 22.3, 22.5 and 22.11 jointly and severally payable on demand by WASPA Secretariat.
4. Interband Enterprise LLC (1315) 8 (eight) Month Suspension from WASPA triggered by monumental breach of clause 22.5.

Matters referred back to WASPA

NONE

Name: HotJizz

21 September 2015

SP: Smartcall Technology Solutions

IP: Interband

WASPA Member: Yes (Affiliate)

SMS Code: 44363

URL:

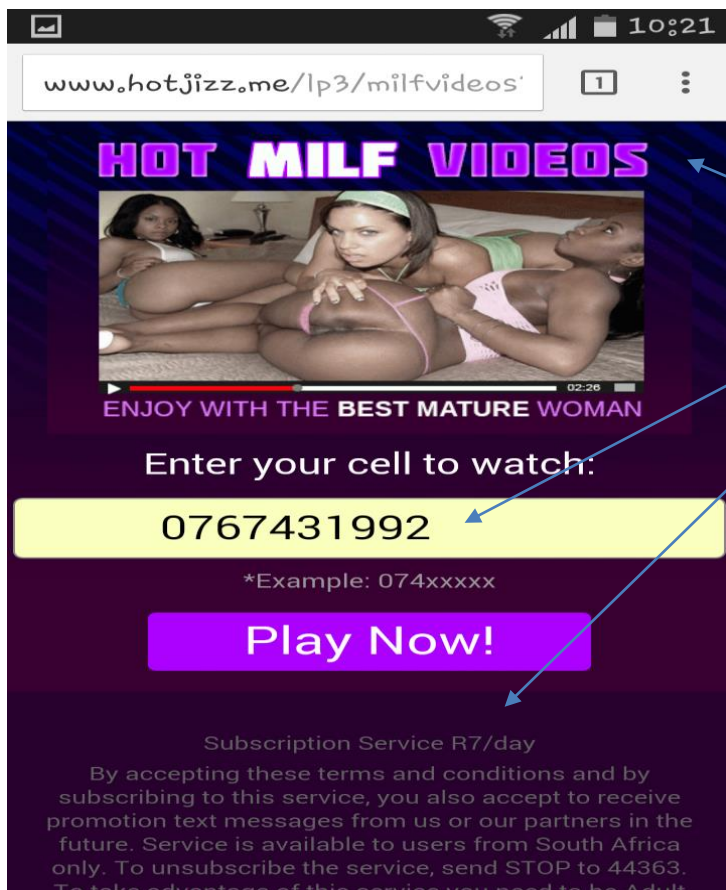
http://www.hotjizz.me/lp3/milfvideos3/nomsisdn.php?keyword=NEWMILFVID3&id_trans=&site_id=null&msisdnpin=

Please Note: All images have been resized to meet document needs. Original screenshots available on request.

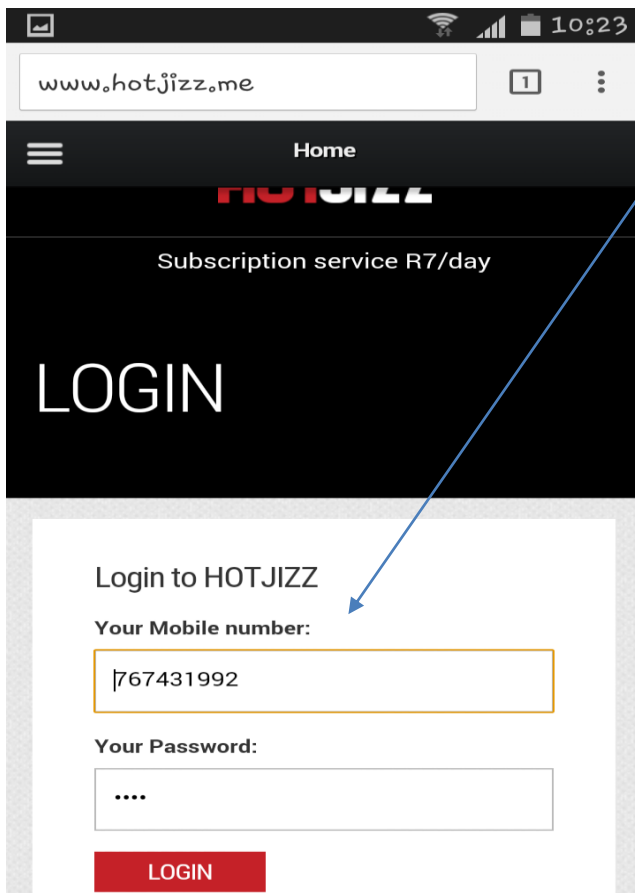
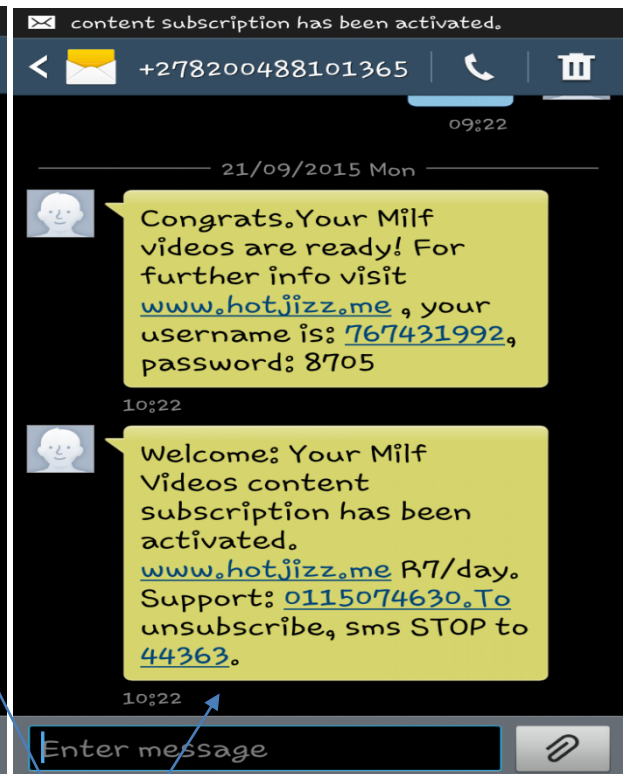
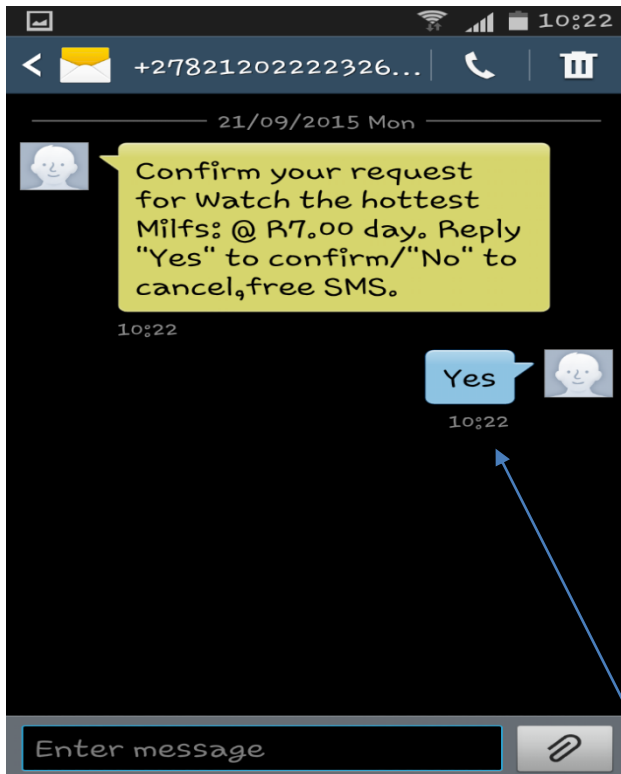
Vodacom

MSISDN: 27767131992

Handset: Galaxy Note 2



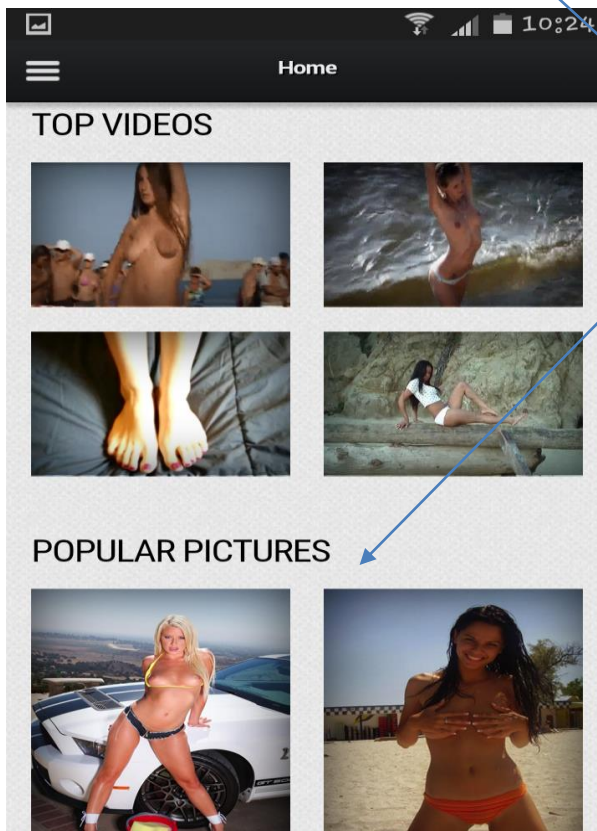
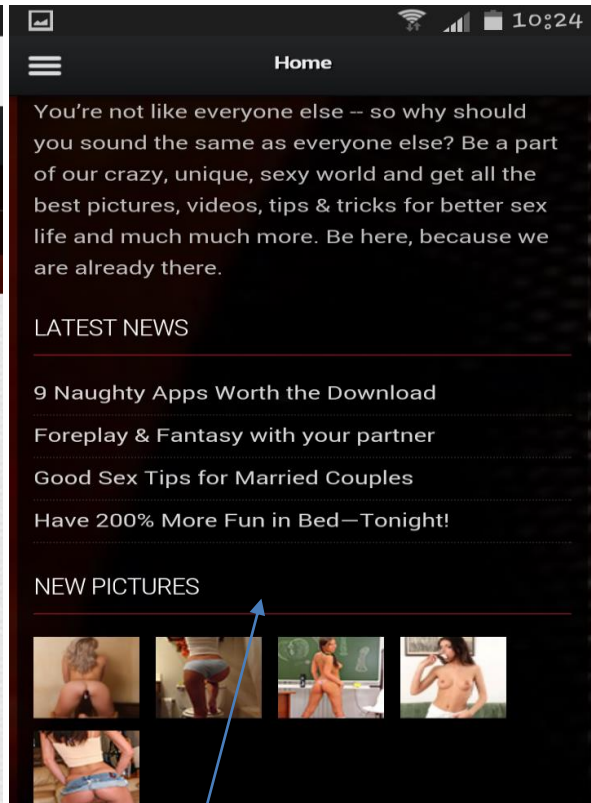
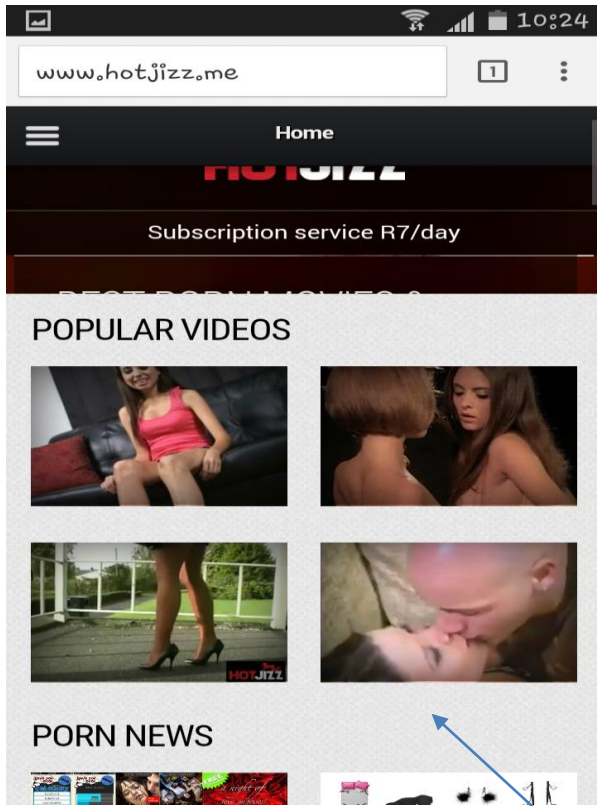
Whilst the user was browsing the internet, the user was directed to a page promoting the HotJizz subscription service at R7/day. The service offered "HOT MILF VIDEOS", however, the landing page contained images that is not permitted on the South African networks and the pricing was not prominent. There is also not a display of 18+ only. The user then clicked on the "Play Now!" call to action button.



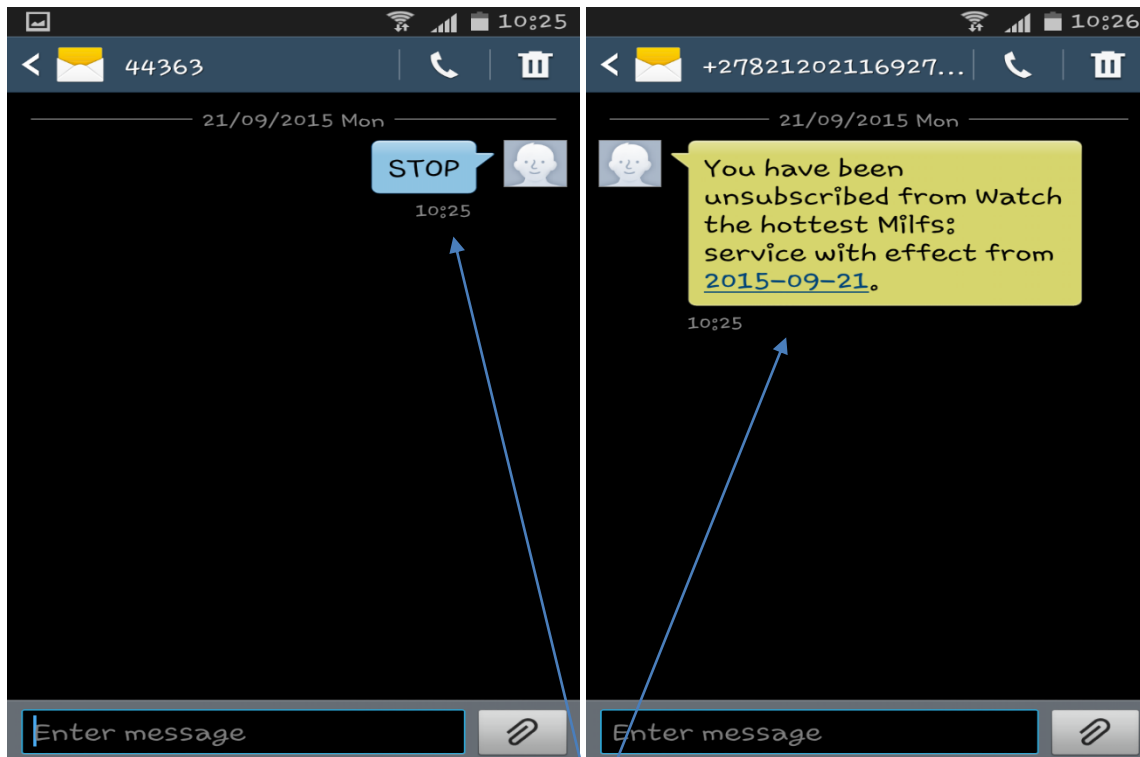
The user then received the Vodacom double opt-in SMS and subsequently replied with the keyword "Yes".

The user then received the Welcome SMS on his mobile phone and proceeded to open the URL provided.

The user was then directed to the homepage for HotJizz and proceeded to login with the credentials provided in the Welcome SMS.



The user was then logged in the HotJizz service which offered videos and pictures of non-explicit content. The service also offered App reviews, sex health tips for couples etc. The user could view the items offered by the service.



The user then elected to cancel the subscription by sending the keyword "STOP" to 44363 as indicated in the Welcome SMS. The user then received an SMS informing him that the subscription has been cancelled.

Conclusion:

Whilst the user was browsing the internet, the user was directed to a page promoting the HotJizz subscription service at R7/day. The service offered "HOT MILF VIDEOS", however, the landing page contained images that is not permitted on the South African networks. The pricing display was not prominent and there was no "18+" displayed.

The user then clicked on the "Play Now!" call to action button.

The user then received the Vodacom double opt-in SMS and subsequently replied with the keyword "Yes". The user then received the Welcome SMS on his mobile phone and proceeded to open the URL provided. The user was then directed to the homepage for HotJizz and proceeded to login with the credentials provided in the Welcome SMS.

The user was then logged in the HotJizz service which offered videos and pictures of non-explicit content. The service also offered App reviews, sex health tips for couples etc. The user could view the items offered by the service.

The user then elected to cancel the subscription by sending the keyword "STOP" to 44363 as indicated in the Welcome SMS.

The user then received an SMS informing him that the subscription has been cancelled.

General comments:

The landing page of this service is of great concern to WASPA. The adult images used, is not the work of an affiliate marketer pushing the boundaries, but adult images promoted by Interband themselves. This is viewed as a serious non-compliance. Furthermore, there is NO 18+ displayed.

These requirements (see clauses below) have been adopted by our industry for years and years. We find it alarming that a landing page like this is being promoted.

Possible breaches of the Code:

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

4.3. Members must conduct themselves lawfully at all times and must co-operate with law enforcement authorities where there is a legal obligation to do so.

4.9. Members must not provide any services or promotional material that:

(f) causes grave or widespread offence; or

(g) debases, degrades or demeans.

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

22.3. Any adult service must be clearly indicated as such in any promotional material and advertisement, and must contain the words "18+ only".

22.5. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Reasonable steps may include the customer confirming his or her age prior to or as part of initiating the service.

22.11. Marketing material for any adult services may not make use of material which is classified as XX or X18 by the Film and Publication Board, or which has not yet been classified but which would likely be classified as XX or X18.