



**Wireless Application Service Providers' Association**

## **Report of the Adjudicator**

Complaint number	30977
Cited WASPA members	txtNation Ltd (1096)
Notifiable WASPA members	Netsmart SA (0126) (Aggregator)
Source of the complaint	WASPA Media Monitor
Complaint short description	Failure to provide T&Cs and support; Publication of pornographic material
Date complaint lodged	8 July 2016
Date of alleged breach	4 July 2016
Applicable version of the Code	14.5
Clauses of the Code cited	4.2, 4.8, 5.7, 5.8 (a-d) &(f-i), 5.11, 5.12, 12.1, 12.4, 12.1, 12.5 (a & b), 22.3, and 22.10
Related complaints considered	None
Fines imposed	R50 000 (suspended)
Other sanctions	Formal reprimand
Is this report notable?	No
Summary of notability	

## 1. Initial complaint and responses

- 1.1. On the 8<sup>th</sup> of July 2016 the WASPA Media Monitor lodged a complaint against the member in the following terms:

*The media monitoring team tested an adult service that charges a once-off fee of R5 for 24 hours access. The content of this service, which is labelled XXX, is in breach of the WASPA code of conduct and offers adult content that is not permitted.*

*The service is offered by Netsmart, but from the start of testing we found various IP names throughout the testing exercise: MCP (WASPA supplier tool) labels them as Blackdog, the LP says 2Girrafes, and the SMS received for the pin purchase says Txtnation.*

*We would like to request that this service is immediately de-activated on all member sites.*

*Problem areas are:*

- 1. No link to T&C's*
- 2. No short T&C's*
- 3. No customer care number*
- 4. Pricing not adjacent to the CTA button*
- 5. No 18+*
- 6. Offering XXX content*

*We request an EMERGENCY PANEL reviews this complaint.*

- 1.2. The complainant also provided a test result, which is attached as Annexure A.
- 1.3. The complaint was sent to the respondent on the 11<sup>th</sup> of July. The aggregator was also notified.
- 1.4. The respondent replied the same day in the following terms:

*This is an old client that never went live but it appears that their system was still active.*

*I can assure you that this service isn't making any revenue via txtNation or Netsmart I cant see that they only have 1 or 2 transactions. I have removed the keyword from the system so no more transactions can take place, this seems to have been an oversight from when we did not approve the promotion as it was adult content.*

*Please let us know if this satisfies WASPA as this is not a live service generating traffic and was an isolated incident.*

- 1.5. On the basis of this reply the WASPA Secretariat determined not to proceed with an emergency panel hearing, but advised the respondent to reply to the complaint.
- 1.6. The complainant rejected the respondent's contentions in an email of 14 July:

*I'm afraid we do not agree with Netsmart in claiming this service is not being promoted.*

*Attached are screenshots, retrieved from our Media monitoring tool MCP, that clearly shows continuous and daily activity. The service is being promoted.*

*Dates of promotion are seen on the right hand side of images 2 and 3.*

*Please proceed to adjudication.*

- 1.7. On the 12<sup>th</sup> of August the member responded as follows:

*The service can still appear in the MCP panel if its marketed or not as if it has any prs presence due to the way to trawls the internet for traffic I can also prove that the service has a very limited number of purchases, and by the very fact we have deleted the keywords the service is not active.*

- 1.8. I requested the WASPA Secretariat to obtain further input from the aggregator.

*Can Netsmart indeed confirm that the keyword has not been used? Was this true at the time of the complaint?*

*If the aggregator can track use of the keyword before it was deleted it can presumably give an indication of traffic to the site?*

- 1.9. The aggregator's feedback regarding the keyword was as follows:

*This keyword was set up on our IP txtNation's behalf in February 2015. We can confirm that it generated a very small amount of transactions up until July 11th 2016 when our IP deleted the keyword.*

- 1.10. I also requested further information from the complainant to establish whether the campaign was dormant, unavailable, or otherwise that it was of such limited accessibility that little harm could have come from it. I list my questions and the answers below.

***Can the Media Monitor explain how the contents of the files [documents provided by the complainant] show that the site complained of was live being marketed at the time of the complaint? Just a screenshot without an explanation is not sufficient.***

*Attachment A indicates the amount of times the service in question has been recorded on their system, or clicked on. Their Veriscanner platform is actively fed a list of website URL's to monitor. The system uses a "Bot" which also, actively clicks each and every banner advertisement found on every web page monitored, and a database is then compiled for every IP that was recorded in the real time monitoring environment.*

*That data is then made available either in 24-hour format, which lists every IP, every banner and every subscription recorded for the day, whether its Premium or Non – Premium rated services, this can also be filtered.*

*The user can also search an IP individually and view the entire history from when that IP was recorded for the first time up until the last recording captured.*

*Attachment B displays all the different times the bot was directed to the landing page for the subscription in question. Information displayed is the banner, landing page and landing page URL, quick view.*

*Attachment C is in reference to B, displays information to the bottom of the page.*

***How did the Media Monitor come across the site? Via an advertisement or by some other means?***

*Via MCP (Monitoring Compliance Partners)*

**Was it at all likely that a member of the public could have stumbled across the site? If so how?**

*MCP clicked on their banner in excess of 300 times. Yes, it is most definitely possible that members of the public had access to this site by clicking on banners that were being promoted.*

**What is PRS and can its operation explain the activity reflected in the MCP panel?**

*The definition of PRS is "Premium Rated Service", this would be a service billed to your cellphone number / account. The MCP / Veriscanner platform records every single banner and landing page associated with it. Whether it may be Premium Rated or Non-Premium Rated (credit card subscriptions).*

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## **2. Sections of the Code considered**

2.1. The conduct complained of took place on the 4<sup>th</sup> of July 2016 (or at least it was discovered by the complainant on that date), and consequently version 14.5 of the Code applies.

2.2. The relevant clauses of the Code of Conduct, which the member is alleged to have breached, read as follows:

*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.*

*4.8. Members must co-operate with any content orders lawfully issued by enforcement authorities.*

*5.7. A web page containing the full terms and conditions of a service must be readily available to current and potential customers of that service.*

*5.8. The full terms and conditions for any service provided by a member must contain:*

*(a) the registered company name of the WASPA member providing the service;*

*(b) a customer support number;*

*(c) unsubscribe instructions (for subscription services);*

*(d) any handset compatibility requirements for the service;*

*(e) ...*

*(f) an indication of how billing errors are handled;*

*(g) a statement that the service must only be used with the permission of the bill-payer (for paid services);*

*(h) a statement that the service must only be used with the permission of a parent or guardian (for children's services); and*

*(i) the following statement: "[member name] is a member of WASPA and is bound by the WASPA Code of Conduct. Customers have the right to approach WASPA to lodge a complaint in accordance with the WASPA complaints procedure. [member name] may be required to share information relating to a service or a customer with WASPA for the purpose of resolving a complaint. WASPA web site: [www.waspa.org.za](http://www.waspa.org.za)".*

*5.11. Customer support must be easily available, and must not be limited to a medium that the customer is unlikely to have access to. (Example: support should not be limited to email if a significant number of customers do not have access to email).*

*5.12. Telephonic support must be provided via a South African telephone number and must function effectively. Customer support must be provided via standard rated numbers, and may not be provided via premium rated numbers. Should the member be unable to provide immediate support, a customer should be provided with the ability to leave a message. Support numbers must not forward to full voice mailboxes.*

*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.*

*12.4. For any web page advertising a service for which there is not a subsequent confirmation step containing a link to the terms and conditions, the minimum terms and conditions for the use of the service must be clearly displayed.*

*12.5. The minimum terms and conditions displayed on any web page must include at least the following information:*

*(a) a customer support number, and*

*(b) a link to a web page where the full terms and conditions for the service are available.*

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

*22.10. Members may not offer adult content 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.*

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### **3. Decision**

3.1. The first issue to decide is whether the website complained of was being promoted, and if not, whether it was nonetheless readily accessible to the public. In doing so I must weigh up the evidence given by the member that the site was set up for "... old client that never went live but it appears that their system was still active" against the complainant's contention that its monitoring systems show that it was being promoted.

3.2. I find the complainant's evidence persuasive only insofar as it shows that the site in question COULD have been accessed via a banner ad on one of the sites being monitored by its system.

The fact that the site complained of generated a certain number of clicks shows that the complainant's system could access it, but does not show either that it was being actively marketed or that the public was at all likely to access it from the site concerned. Moreover the evidence of the aggregator appears to back the member's version that very little traffic was generated to this site.

3.3. The member's record with WASPA is a good one, this being only the second formal complaint against it, the first one having been brought in 2009, and I cannot see any habitual tendency to pull the wool over WASPA's eyes.

3.4. For these reasons I will prefer the member's version: that the site was not actively promoted, and that very little traffic was directed to it.

3.5. However, the site was nonetheless accessible by the public, so I must still examine the alleged infringements. To deal with these in order:

#### Clause 4.2

3.6. I cannot see anything in the record that even remotely supports such an allegation.

3.7. The complainant must not make allegations that are unmotivated and / or unsupported by evidence.

#### Clause 4.8

3.8. Again the complainant has provided no support for this contention. Perhaps this refers to unlawful publication of adult material, but without substantiation I am not prepared to make a ruling.

#### Clause 5.7 & 5.8

3.9. The member has infringed these clauses – there are indeed no terms and conditions displayed or linked to, so the member has infringed clause 5.7, and hence the member has also infringed clause 5.8 as the required detail is clearly not present.

#### Clause 5.11 & 5.12

3.10. There is no indication from the screenshots provided that customer support or telephonic support were provided, so the member has infringed these clauses too.

#### Clause 12.1

3.11. The pricing information for the service is provided prominently enough on the "landing page". I can see no infringement of this clause.

#### Clause 12.4 & 12.5

- 3.12. No terms and conditions are displayed on the “web page advertising [the] service”, and none are shown subsequently either. Clearly then the minimum terms are also not shown, so the member has infringed both of these clauses.

#### Clause 22.3

- 3.13. The term “18+” is nowhere displayed, and consequently the member has infringed this clause.

#### Clause 22.10

- 3.14. Turning now to the content offered by the service complained of, clause 22.10 forbids the member from offering any material that is, or that would likely be classified as XX or X18 by the Film and Publication Board.

- 3.15. Examining the definition of X18 in the classification guidelines promulgated in terms of the Film and Publications Act 65 of 1996 we find:

*(2) Any material that contains explicit sexual conduct between consenting adults must be classified as X18 unless it is, judged within context, a bona fide documentary or is of scientific, dramatic or artistic merit, in which case it must be classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials.*

- 3.16. I have examined the products peddled through the offending website, and I am not convinced of their scientific, dramatic or artistic merit. Accordingly, the member has infringed clause 22.10 by offering such content via the website.
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## **4. Sanctions**

- 4.1. In respect of the member’s infringements of clauses 5.7, 5.8, 5.11, 5.12, 12.4, 12.5 and 22.3, I am inclined to be lenient. In all likelihood the member never intended the site and campaign as viewed by the complainant to see the light of day in that form. I am also swayed by the member’s good disciplinary record with WASPA. However, the site WAS accessible to the public, however unlikely such access was. Consequently, the member is issued with a formal reprimand in respect of these infringements.
- 4.2. The member’s infringement of clause 22.10 is more serious. The member clearly intended to publish pornographic material which was likely classified “X18”, which is clearly forbidden under the code. There is no way that complying with the regulatory requirements under the code, such as terms and conditions, proper labelling etc, could have ameliorated the offence.
- 4.3. In other words, I am prepared to accept that the other infringements arose from the campaign being half finished and were failures in execution. However the infringement of clause 22.10 was fundamental to the campaign itself in that it set out with the intention to publish X18 classified content.

4.4. The member is fined an amount of R50 000 for its infringement of clause 22.10, which is wholly suspended for a period of six (6) months on condition that it does not infringe this section again during that period.

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**5. Matters referred back to WASPA**

None

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# Annexure A

Name: XxxMoby

4 July 2016

SP: Netsmart

IP: TheBlackDogCommunications / Txtnation / 2 Giraffes

WASPA Member: Yes (SP/full)

SMS Code: 42375

URL: <http://xxxmobyprem.com/payment/sms>

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

## MTN

MSISDN: [REDACTED]

Handset: Z1 Compact



Whilst browsing the Internet, the user has clicked on a banner promoting "XXX Premium" which had directed him to a page promoting the XXXMoby adult service for a once off payment of R5 for 24hrs access.

The user then opened his SMS application.

Note: no link to terms, no short terms displayed, no customer care line, only the option to leave feedback via email.



