



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	ViaMedia
Information Provider (IP)	Opportune Trading 117 CC t/a Xcite Mobile
Service Type	SMS Advertising
Source of Complaints	Competitor
Complaint Number	#0626
Code of Conduct Version	4.6

Complaint

A complaint was received from a competitor of the SP regarding an SMS advertisement received from the IP, through the SP. The complainant states:

SMS received after receiving content from 31314

Code_Breached: Code of conduct - 11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

Ad Guidelines - 11.16 Show Total Subscription Charge, any bearer data charges and any additional charges.

Ad guidelines - 11.2.4 Contact details of the sender are obligatory.

Ad guidelines - 11.1.1 Text showing Access Cost and T&C for each service or content type offered.

Detailed_Description_Complaint: I requested a content item from an ad placed in the Huisgenoot during the week 2 Nov 2006. I Sent the content code to the number 31314. I received a follow up SMS with the following:

Why pay R5 for Top TONES? U can get them for ONLY R1 each. Just SMS TONE to the number 31314 & join da club. U get 5 of the latest TONES each week 4 only R5.

Within this SMS there is no wording to say Subscription Service, No bearer charges indicated. I believe that USSD at 60c per minute is required plus GPRS in some cases.

There are no contact details.

There are no terms and conditions. The ad does not give the access cost eg (USSD cost)

The complainant referred to Clause 11.1.1 of the WASPA Code of Conduct, as well as clauses 11.2.1 (incorrectly noted as 11.1.1), 11.2.4 and 11.16 of the WASPA Advertising Rules. These respectively provide:

Code of Conduct

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

Advertising Rules

11.2 OBLIGATORY COMPONENTS:

11.2.1 Text clearly Showing Access Cost and T&C for each service or Content type offered.

11.2.4 Contact details of the sender are obligatory. The contact details must not use any premium rated fax, PSMS, USSD, WAP, or IVR lines. A web site address is the preferred method.

11.16 **SUBSCRIPTION SERVICES:** Show Total Subscription Charge, Frequency of Charge, any bearer charges and any additional charge/s

(i) Must Use The Words "Subscription Service"

If the Content provider is providing a continuous, subscription-like or subscription-based service, then the words "Subscription Service" must be prominently displayed at the top section of the advertisement as well as at each Content or service section in the advertisement where various subscription types are displayed.

No acronym, letter (eg "S"), number, abbreviation (eg "Subs"), icon, or any other mark may be used as an alternative to the words "Subscription Service" anywhere in the advertisement when that Content is only available at all and/or at a particular cost as part of a subscription service.

(ii) Must Indicate Charge/s:

The advertisement must indicate:

(a) The TOTAL charge that the consumer will incur for the subscription component of their access to that subscription service.

(b) The frequency (and the minimum frequency, if applicable) at which they will be charged for the subscription component of access to that subscription service.

(c) Whether, in addition to the periodic subscription charges in (a) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement. [See (iii) below]

This indication must include the potential and cost of any (additional) bearer charges.

(iii) Must Indicate Cost Of Any (Additional) Per-Content Access

If in addition to a periodic subscription charge the consumer could additionally be charged on a per-access basis for access to any particular service, Content or class of Content on the advertisement within the subscription period and terms, then the advertiser must make it clear to the consumer that access this Content or service will, over and above the periodic subscription cost, incur additional charges per Content or service access.

The periodic subscription cost, the frequency of the periodic charge, and where applicable, the additional access cost must all be displayed clearly and TOGETHER, in a position immediately above, below, or to the side of the Content, service, or class of Content. There must in particular be an indication whether bearer charges are included or not in the access cost.

o [See also 'BEARER CHARGES' above)

(iv) Must Differentiate Clearly Between Multiple Subscription Types

If in any advertisement there may exist the possibility to subscribe to a number of individual subscription services which would ordinarily each carry a separate but additional subscription charge and associated charging frequency or additional per-Content access charge, then this possibility of the consumer being charged at multiple prices and charging frequency must be clearly indicated.

(v) Must clearly Differentiate Between Non-subscription and subscription Types if both available in the same advertisement

SP Response

The SP provided the following response from the IP:

This is a multipart complaint and we'll try to address it part by part.

The complainant cites

*>Code_Breached: Code of conduct - 11.1.1. Promotional material for all
>subscription services must prominently and explicitly identify the
>services as "subscription services".*

1. As acknowledged by the complainant, the messages in question was sent as a DIRECT result of the complainant downloading a content item (using a specific code) from a print advert. The code used would not have been available ANYWHERE other than in a SIMILAR advert. The code used (e.g. 9033483) is not predictable and it is therefore HIGHLY unlikely that the user would use the code in any context EXCEPT from such an advert. The message is thus only sent in conjunction with a similar advert. In ALL these adverts, there is clear communication of the Subscription Service in question. The words "Subscription Service" appears in bold red in the advert associated with the joining of a club, and in the terms and conditions.

2. Regardless, these messages usually do include the words "Subscription service". This is one of 200 or so variants and the brand manager updating the messages must have omitted it in this case. We have since updated it.

3. The message does clearly communicate in itself, that the service will result in repeat billing and club membership.

4. Any user acting on the message would immediately be sent a Welcome message clearly stating that the service is a subscription service, how to download, how to stop, the costs of various bearers etc.

5. Any user who is subscribed furthermore receives a monthly comfort message with a reminder of how to stop, download and the costs.

Here is an example of Exactmobile own SMS, which appears to fall foul of this complaint:

14:40

10/08/2006

SMS

Reply to this SMS with 'CLUB' to join the eXactmobile NOW! Club. U get a sign on bonus of 120 eXactcredits, save up to 25% on all content & more. Cost R10/month

The complainant cites

>Ad Guidelines - 11.16 Show Total Subscription Charge, any bearer data charges and any additional charges.

The complainant suggests that no USSD and GPRS charges are indicated. No USSD or WAP links are advertised here! A Club is being advertised. Regardless, the product is a mono tone which is sent via MT SMS unlike polyphonics, real tones or full track downloads which might require WAP and cost the user more.

In Mr Penkin's own sms's, that should require the communication of bearer charges, he happily omits these. So we're not sure why he's complaining about an sms that doesn't require these. In the case of Exactmobile's wap downloads, specifically the full track downloads, advertised in the sms's below, the GPRS charges could be in excess of R6, additionally. This is not communicated.

Exactmobile SMS's:

19:15

19/08/2006

SMS

Reply YES to this SMS for a new Alarm Tone (e.g. Traffic Cop, Kom Nou Frikkie & .) or Weird Sound (Groen Knoppie, Ticking Bomb & .) from eXactmobile. R5/item

11-Sep-06

SMS

Open up a new world by going to www.exactmobile.co.za/now on yr phone. Get instant access to the latest content, Full Track Downloads, Chat NOW! & so much more!

18:41

17-Oct-06

SMS

Kry die Robbie Wessels Leeuloop Polyphonic (R5), True Tone (R15) of Full Track Download (R20) deur LEEU terug te SMS na hierdie nommer. Slegs by eXactmobile!

The complainant cites

>Ad guidelines - 11.2.4 Contact details of the sender are obligatory.

The complainant suggests that no contact details are present. However, in section 5.1.1 of the Code of Conduct relating to the sending of commercial communications via SMS, it is acknowledged that a valid originating number is sufficient requirement to allow the identification and contacting of the originator. Our message had a valid originating number. We believe that in this case, this originating number is sufficient to conform to clause 11.2.4. However as stated before, this download would ONLY have been made in conjunction with one of our adverts due to the complicated code and therefore the detailed contact details would have been directly available in that advert.

You'll notice that 3 of the Exactmobile SMS's above, don't include any contact details either except for the originating number. It's therefore strange that he's complaining about this very thing.

The complainant cites

>Ad guidelines - 11.1.1 Text showing Access Cost and T&C for each service or content type offered.

We believe the complainant incorrectly refers to Clause 11.2.1 (not 11.1.1) of the Advertising rules.

As explained before, the download would be been in conjunction with an Advert that contained the required terms and conditions. It would be impossible to included more Terms in an SMS and not necessary. The cost of the Club service (i.e. R5 for 5 items per week) was included in the message. Any other access costs would be communicated where they are advertised e.g. should a USSD string be advertised, there would be a clear communication that USSD costs 60c/minute. But no such string is advertised in this case.

None of Mr Penkin's SMS's above include access costs although ALL advertise WAP products and therefore should at least suggest that WAP or GPRS costs apply. These messages were NOT sent in conjunction with an advert or even a website request. These were sent as completely independent commercial communications and therefore, more details terms and conditions were not necessarily available.

From the explanations and the examples above we hope we've been able to demonstrate that Mr. Penkin is trying to use technicalities in an attempt to undermine his competition. He is clearly not too concerned about these so called infractions as he is clearly in 'violation' of them himself. We believe our services are not in violation of the Code of Conduct or the Advertising Rules. We furthermore request that this case is dismissed and that Mr Penkin be reprimanded for wasting both our time and WASPAs time and money.

Should you, however, disagree on any point, we'd like this response to act as a formal complaint against the complainant on that particular point.

Decision

The Adjudicator noted that the practice (adopted by the IP amongst others) of responding to a complaint by highlighting contraventions of the same alleged breaches by the complainant, is not desirable. However it is understandable, in order to demonstrate that a complaint is brought for ulterior reasons and demonstrates hypocrisy on the part of the complainant. This cannot be a defence to the complaint itself and the IP is correct in indicating that if breaches of the Code of Conduct or Advertising Rules are found, as alleged, then examples of the complainant's own breaches should similarly be investigated.

With regard the alleged breaches:

Clause 11.1.1 of the WASPA Code of Conduct

The Adjudicator found a breach of this clause of the WASPA Code of Conduct. The IP's contention in the paragraph numbered 2 of its response, to the effect that this is one of approximately 200 messages and the omission of the term "subscription service" was unintentional, is noted and will be taken into account in mitigation of any sanction to be imposed.

Similarly, the IP's statements number 1, 3, 4 and 5 of its response do not indicate that a breach has not occurred, but rather that the IP's advertising is not intended to be misleading and that there is minimal potential harm to consumers and will thus be taken into account in mitigation of any sanction that may be imposed. Clause 11.1.1 of the WASPA Code of Conduct is a strict requirement that does not for any variation or interpretation and must be followed accordingly.

The Secretariat is instructed to institute a complaint against the complainant in respect of a breach of clause 11.1.1 of the WASPA Code of Conduct with regard to the example SMS advertisement dated 10 August 2006 provided by the IP and emanating from the complainant.

Clause 11.2.1 of the WASPA Advertising Rules

The Adjudicator accepted the IP's response and did not find a breach of Clause 11.2.1 of the WASPA Advertising Rules.

The Adjudicator noted the distinction that the IP drew between its SMS advertisement, which is platform independent and the three examples of messages sent by the complainant, where WAP or GPRS access is required and the Secretariat is further instructed to institute a complaint against the complainant in respect of a breach of clause 11.2.1 of the WASPA Advertising Rules with regard to the three example SMS advertisements, dated 19 August, 11 September and 17 October 2006, provided by the IP and emanating from the complainant.

Clause 11.2.4 of the WASPA Advertising Rules

The IP's contention in this regard is noted, however the Adjudicator did not regard compliance with Clause 5.1.1 of the WASPA Code of Conduct by including a valid originating number as sufficient to indicate the contact details of the IP. The IP's contention regarding the connected nature of the SMS message received and the IP's advertisement, which advertisement contains the IP's contact information, is noted and relevant with regard to possible harm to a consumer, however is not sufficient to show adherence to the obligatory requirements of Clause 11.2.4 of the Advertising Rules.

The Adjudicator accordingly found a breach of Clause 11.2.4 of the WASPA Advertising Rules.

The Secretariat is instructed to institute a complaint against the complainant with regards a breach of Clause 11.2.4 of the WASPA Advertising Rules in respect of the three SMS messages dated 10 August, 19 August and 17 October 2006, , provided by the IP and emanating from the complainant.

Clause 11.16 of the WASPA Advertising Rules

The possible breach of Clause 11.16 of the WASPA Advertising Rules overlaps to some extent Clause 11.2 of the Advertising Rules as well as reflecting the

requirements of the WASPA Code of Conduct. Specifically, the breach of Clause 11.1.1 of the WASPA Code of Conduct is also a breach of Clause 11.16(i) Advertising Rules, while the absence of a breach of Clause 11.2.1 of the WASPA Advertising Rules is indicative that there is no breach of Clause 11.16(ii) thereof.

Save for the breach of Clause 11.16(i) WASPA Advertising Rules, already determined in terms of Clause 11.1.1 of the WASPA Code of Conduct, no further breach of Clause 11.16 was identified.

The Adjudicator considered the IP's submissions regarding potential harm to consumers and the direct connection between an advertisement which contained the missing information and the subsequent SMS message, in mitigation of any sanction to be imposed in respect of the breaches identified. In this regard, the Adjudicator was of the view that there was very little significance in the fact that the initial interaction between a consumer and the IP may result from an advertisement that complies with the Advertising Rules and Code of Conduct and this in no way excuses subsequent breaches by the IP.

The IP's submissions regarding the complainant have been referred to the Secretariat for further action and were not considered as either mitigating or aggravating factors in determining sanctions.

The Adjudicator imposed the following sanctions:

- The SP is ordered to pay a fine in the amount of R20 000 in respect of its breach of Clause 11.1.1 of the WASPA Code of Conduct. The fact that this requirement is also clearly set out in Clause 11.16(i) of the WASPA Advertising Rules, was considered as an aggravating factor in determining the amount of such fine;
- The SP is ordered to pay the amount of R2 500 in respect of its breach of Clause 11.2.4 of the WASPA Advertising Rules.

The sanctions are to be will be suspended should the SP appeal this decision.