



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Opera Interactive
Information Provider (IP):	Sprint Media
Service Type:	Subscription services
Complainant:	Public
Complaint Number:	15574
Code Version:	10.0
Advertising Rules Version:	2.3

Complaint

In essence, the complainant, a 70 year old woman, submitted that she had become subscribed to the SP's service without her knowledge or consent. She only became aware of the problem when she received her bill.

She did not feel that the matter was resolved by the SP's actions, and asked that a penalty be imposed against the SP as a deterrent against subscribing people against their will.

The complainant conceded that she deletes SMS's that she perceives to be advertising without reading them.

Service provider's response

The IP unsubscribed the complainant, and after some communication, gave her a refund.

The IP provided log records showing that the subscriber had opted in via a banner advertisement on a website, and had used the double opt-in process. It said:

. . . as the logs show, this user went through one of our banner adverts on 29th April 2011. Our disclaimer and Terms and

Conditions state the following: Mobmatic is a Subscrip_on Service at R7/Day where users can download premium content to their cell. Mobma_c has requested that your mobile number be made available. Clicking on Next you're declaring to be 16+ and are accepting both the terms and conditions and to receive free promotional SMS relating to this and other services operated by Sprint Media

S.L. To opt-out from promotions contact Support@mobma_c.com or call 0213002334. Privacy Policy.

This user clicked on the banner advert which took them to a landing page. By inputting their number on this landing page and clicking 'NEXT' they agreed to the terms and conditions of service - where it clearly states that they are agreeing that they are over 16 years of age and that they agree to the terms and conditions as well as the fact that they are happy to receive free promotional messages. . .

The IP submitted that all required reminder messages were sent to the complainant. Given this, the IP felt it had sufficiently addressed the issue with an unsubscribe action and refund, and questioned why WASPA was pursuing the matter.

The SP confirmed that the IP has addressed the issue, and that it can find no faults with the process.

At the request of the Adjudicator, the SP provided the wording of the landing pages and confirmation pages and said:

There is no 'banner' advert as the landing pages are associated to a WAP Push campaign which was detailed in the POS provided in November 2011.

Furthermore, in the adjudicator's report 15569, the adjudicator makes reference and considered cases 15568 and 15574 in making their decision whereby no sanctions were imposed on the IP.

Sections of the Code considered

As the date of the transaction was 29 April 2011, Version 10.0 of the Code applies.

The following sections of the Code were considered:

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.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

- 11.1.2. An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed, except as provided for in 11.1.3.
- 11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.
- 11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.
- 11.2.5. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:
[service activation instructions and/or activation code]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].

Advertising Rules considered

9.3.9 DISTRIBUTION LISTS:

If by requesting any Content or accessing a service, the consumer so doing is automatically placed on a distribution list that will continuously or periodically send that consumer further related or unrelated communications from that Content provider or any other Content provider or advertiser, then the T&C text must explicitly specify in the T&C that updates will be sent until cancelled.

Best Practice Suggestion

Display text: "Updates sent until cancelled"

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 sender to a distribution list must indicate the cost and T&C of access to a service in each and every communication, even the receiver was previously a user of that service. No assumption as to the knowledge of the recipient in respect of the costs and T&C of a service must be made for users who had previously used the service.

If using SMS as the Access Channel and where has been no communication to a user of that service from either the general participants in that service or the controllers of the service for a minimum of ten (10) calendar days, then any further communication to that user must, at the first communication to that user after the tenth (10th) day, must indicate who the service is provided by **and** how the user may unsubscribe from the service, and the cost thereof.

Decision

I start by noting that it appears that some sort of welcome and reminder messages were sent, and that the complainant simply deleted these without reading them. The

complainant therefore has to take some responsibility for the position that she found herself in. While I am sympathetic to the slew of unwanted spam that many consumers receive, with the right to be protected from unwanted services comes a duty to properly read attempts at communication. **The complainant is encouraged to take a more active role in managing her cell phone activity going forward.**

What is in issue here is the fact that the complainant believes that she at no time subscribed to this service. The IP provided indisputable logs showing that she did indeed subscribe, via a double opt in procedure. The question that this raised in my mind was whether the advertising to which the complainant responded was sufficiently clear as to its nature.

The first step involved checking the services that the provider offers. While remaining open minded, I find it extremely unlikely that the complainant willingly subscribed to the services in question, which seems to involve a dating and/or self provided photo rating service of mildly sexy self portraits, that from my cursory examination is aimed solely at young black people. The complainant does not appear to fit this profile.

I then turned to the original advertising and asked for a copy, based on the initial assertion that “. . . as the logs show, this user went through one of our banner adverts on 29th April 2011.” The response was “There is no 'banner' advert as the landing pages are associated to a WAP Push campaign which was detailed in the POS provided in November 2011.”

I once again reverted to the IP, asking for a copy of the material – whether banner or POS – and asking them to carefully check that they were responding on the correct file.

The IP somewhat bizarrely remained adamant that the material was POS material, but provided the following banner:

Graphic Banner



I found this banner somewhat confusing. It appears to have nothing to do with the offered service, and I questioned whether I had initially accessed the correct service. However, in the new material provided by the IP, the welcome sms clearly says, "Welcome. Meet local South African singles . . .". The banner therefore seems to be completely unrelated to the advertised service.

I am left with the impression, whether correct or not, that the IP is being deliberately evasive.

In any event, there appears to be a disconnect between the initial advertisement and the actual service, bringing the advertising into breach of Clause 11.1.2 of the Code.

I now turn to the records provided by the IP. On the 29 April 2012, whether by accident or design, I will accept that the complainant gave some sort of permission to receive marketing material.

On 25 June 2012, she was sent the following message:

You have been sent a a photo. Click to open: <http://ems.cx/w/?m=27829254030/2optout/click/r7/Day/subscr/>

Based on the submissions before me this was the first message she received between 29 April and 25 June.

Clause 9.3.9 of the Advertising Rules states:

If using SMS as the Access Channel and where has been no communication to a user of that service from either the general participants in that service or the controllers of the service for a minimum of ten (10) calendar days, then any further communication to that user must, at the first communication to that user after the

tenth (10th) day, must indicate who the service is provided by and how the user may unsubscribe from the service, and the cost thereof.

I find that the message that triggered the rest of the communication was sent after 10 days, and was completely non-compliant with both this clause and general WASPA rules about the format of messages.

In particular:

Clause 11.1 of the Code states:

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

The SMS in question says "subscr". This is insufficient.

Clause 11.2.5 states:

Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].

The message in question is not compliant.

Clause 5.1.2 states:

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.

The message in question says "2optout/click/r7". This is not only non-compliant, it is nonsensical.

While it appears that the welcome messages and reminders thereafter were compliant, this initial complete failure to correctly communicate with the complainant may account for her failure to realise what had happened in terms of the subscription service.

Sanctions

In light of the above, and in light of the contradictory and evasive responses by the IP, I sanction them as follows:

The sms promotions must be remedied with immediate effect to be Code compliant;

The IP is to pay a fine of R20 000 to WASPA within 7 days of receipt hereof.