



REPORT OF THE ADJUDICATOR

Complaint reference number:	17373
WASPA member(s):	Viamedia
Membership number(s):	043
Complainant:	Public
Type of complaint:	Subscription Service
Date complaint was lodged:	5/6/2012
Date of the alleged offence:	21/12/2011
Relevant version of the Code:	11.6
Clauses considered:	11.2.1
Relevant version of the Ad. Rules:	Not Applicable
Clauses considered:	Not Applicable
Related cases considered:	None

Complaint & Response

1. On the 25th of May 2012 the complainant, a member of the public, lodged the following complaint on WASPA's web-based unsubscribe facility:

I RECENTLY REALISED THAT MONEY WAS BEING DEDUCTED FROM MY CELL PHONE ACCOUNT ([removed]). I DISCOVERED THAT VIA MEDIA WAS RESPONSIBLE FOR THIS AND THEY CLAIM THAT I SUBSCRIBED TO THEIR SERVICE BY ENTERING A BLACKBERRY COMPETITION. I HAVE NO RECOLLECTION OF DOING THIS. I ASKED THEM FOR PROOF THAT I SUBSCRIBED TO THEIR SERVICE. THEY HAVE NEVER PROVIDED ME WITH THE PROOF. THIS IS WHAT I EMAILED TO THEM: I demand that you send me copy of email where I subscribed to blackberry competition and a proof that I responded to this competition on [removed].

Should you not be able to provide this I will be laying charges of fraud against your company.

2. The complainant was duly unsubscribed from the relevant service, and the member provided proof of subscription in the form of an Excel spreadsheet reflecting SMS communications to the complainant, which read as follows (in reverse order):

Sender	Recipient	Message	TimeStamp
27839200440	[removed]	Dear Sir/Madam, yr clubs have been stopped. 4more details & great deals on tones, logos etc just dial *120*31314# (USSD60c/min).	24/04/2012 15:26
27839202270	[removed]	Reminder, Ur a member of an Xcite Club.Cost R5/R7/R10/week or R5/day.To unsubscribe, dial *120*31314# (60c/min) Help? cc 0861111106	21/04/2012 09:40
27839202270	[removed]	Reminder, Ur a member of the Xcite Club. Help? dial *120*31314# (60c/min).Cost R5/R7/R10/week or R5/day.To unsubscribe, dial *120*31314# (60c/min) cc 0861111106	21/03/2012 09:40
27839202270	[removed]	Reminder, Ur a member of the Xcite Club. Help? dial *120*31314# (60c/min).Cost R5/R7/R10/week or R5/day.To unsubscribe, dial *120*31314# (60c/min) cc 0861111106	21/02/2012 09:41
27839202270	[removed]	Reminder, Ur a member of the Xcite Club. Help? dial *120*31314# (60c/min).Cost R5/R7/R10/week or R5/day.To unsubscribe, dial *120*31314# (60c/min) cc 0861111106	21/01/2012 09:11
27839202270	[removed]	http://31314.mobi/dl.php?cell=[removed]&tk=25446949	21/12/2011 09:27
27839202270	[removed]	Welcome, u joined the Buffet Club! Get your content: http://31314.mobi 2 stop dial *120*31314#(60c/min).Club R3/daily, CC:0861111106	21/12/2011 09:25
27839200443	[removed]	Hi! Your pin is: 11248 - Come join the fun! U could win NOW! Entering the PIN will subscribe you to content.	21/12/2011 09:25

3. I note that the recipient's number is the same as that listed in the complaint.
4. No refund was offered to the complainant.
5. The complainant was not satisfied with the member's response, with his response recorded on WASPA's systems on 5 June as "...unfortunately, I do not believe that a excel spread sheet without dates times or the agreement that I supposedly subscribed to would stand up in court."
6. A formal complaint was opened the same day, and transmitted to the member per email on the 6th of June 2012.
7. As an aside, it is not clear what the relationship is between the member and the information provider (IP). On investigation I noted that the IP, which is named as "Opportune Trading 117 CC" but apparently trades as "Xcite Mobile", sets out its connection with the member on its website at URL www.xcitemobile.co.za:

Opportune Trading CC provides its services by means of Viamedia (Pty) Ltd which is an accredited member of the Wireless Applications Service Providers Association (WASPA) and has agreed to abide by

the Rules, Advertising Rules, Regulations and Code of Conduct of WASPA. Should you have a comment, complaint or query please visit the WASPA website: www.waspa.org.za or to view the Code of Conduct go to <http://www.waspa.org.za/code/index.shtml>

8. It thus appears that the IP is not a member of WASPA, and that accordingly the complainant was correctly directed against the member.
9. On the 14th of June the member submitted the IP's response to the complaint. The relevant content thereof reads as follows:

It must be noted by the adjudicators that the subscription was web based and in order for the user to obtain this service the user would have had to click through from a banner and arrive at our landing page. The user would then, after taking careful care to read our terms and conditions, enter his or her cell phone number into the designated area and the check box would have to be ticked to acknowledge they have read the T's and C's.

The user then received a sms containing a unique pin code [11248], this pin code was then inserted into the designated area (were the cell phone number was placed) and confirm was clicked.

The mobile pin must be inserted to join the club, without the insertion of the pin there can be no club membership.

...

The user then received a welcome message followed by another sms containing a link to their first item of content. Within the terms and conditions, the landing page and the welcome message the user is informed that it is a subscription service.

Therefore the IP humbly requests that this complaint be withdrawn on the following basis;

- 1. The user validly requested the IP's services, namely those available on the Buffet Club, which is part of the Xcite Club Group;*
- 2. A welcome message was sent and received by the MSISDN as stipulated under the code,*
- 3. Monthly reminder messages were sent to the user informing him or her of the club membership, on the anniversary of his subscription.*

The IP has duly complied with this clause and the format, flow and wording of the clause is adhered to

Further, the IP;

- complied with the request for the un subscription of services*
- sent, an SMS confirming same to the user's MSISDN on the 24/04/2012.*

It is humbly submitted that the instructions for terminating the services that the user had subscribed to, were clear, easy to understand and readily available. The user consciously subscribed to the service.

10. On the 15th of June the complainant responded to the above as follows:

I am still not satisfied with this. They have not come up with evidence that will stand up in a court of law proving that I personally subscribed to their service.

11. Finally, the member provided further comments from the IP on the 25th of June:

The IP finds it vital to restate that the club membership would not have been activated had the uniquely generated pin number not have been inserted onto the WEB page. The first message received by the user informed her that she will be subscribed to the content. The mobile pin must be inserted to join the club, without the insertion of the pin there can be no club membership.

Further and most pertinently, the IP would like to point out to the adjudicator the numerous times the user is informed that the service is in fact a subscription service;

- 1. The top left hand corner of the landing page*
- 2. The end of the landing page [which further informs of the insertion of the pin as well]*
- 3. The terms and conditions the user is required to read*
- 4. In the first message received that includes the unique pin number*
- 5. All reminder messages received on the anniversary of subscription provides the user with a USSD String, which [when clicked] further takes the user to a drop down menu that has the terms and conditions.*

This in essence shows us that the user consciously entered her pin knowing that she was in fact contracting with the IP or that she blatantly and wilfully ignored the subscription service wording. The first paragraph of the terms and conditions on the XciteMobile page state,

Terms and Conditions

These are the Terms for the Service. Before you use the service, you must read the Terms carefully. We recommend you print these out. By using the service, you agree to these Terms.

If you don't agree then you must not use the service. If you do not understand these terms and conditions, you may call in to our Customer Care centre on 0861 11 11 06 for a simple explanation.

The explanation is clear and easy to understand.

The IP therefore humbly submits that this complaint be withdrawn as the user was validly subscribed to the service and there was no breach in the CoC.

Sections of the Code considered

12. The subscription was effected on the 21/12/2011, and accordingly version 11.6 of the WASPA Code of Conduct was in force at the time. The following clauses have relevance:

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.

Decision

13. The allegation made by the complainant is that she was subscribed to a subscription service operated by the member without her knowledge and / or consent. As the parties made further submissions the complainant's case does not widen in ambit, and remains the simple assertion that she did not subscribe to the service complained of.
14. The complainant does not make specific allegations surrounding the process followed in facilitating subscriptions, nor does she allege that the relevant marketing material was misleading or otherwise in conflict with the Code of Conduct; nor does she allege that the member did not send her SMS welcome or reminder messages as required by section 11.6 of the Code of Conduct.
15. Accordingly the only matter before me is the broad allegation that the complainant was subscribed without her consent, in other words that the member breached clause 11.2.1 of the Code of Conduct.
16. In ruling on this matter, I must make use of the evidence that has been provided to me. The member has provided logs which purport to show that a PIN code was SMSed to the complainant on the 21st of December 2011 requesting her to confirm her subscription to the service complained of. The record also shows that a confirmation message was sent to the complainant shortly thereafter.
17. While members of WASPA have been known to tinker with transaction and communication logs, doing so is a very serious matter and an adjudicator will not lightly find that this has occurred. I have no reason on the facts before me to believe that the member amended its records to show that the complainant subscribed to its service when she did not in fact subscribe. The IP has further provided a detailed description of the subscription process followed, and in the absence of any evidence from the complainant to the contrary, I have no reason to doubt the truth of this description.
18. Accordingly I have no grounds to make a finding that the member has infringed clause 11.2.1 of the WASPA Code of Conduct.
19. The complaint is dismissed.
20. Finally, I noted that the reminder messages sent to the complainant as set out above are probably not compliant with clause 11.6.2 of the Code of Conduct,

in that the member seems to list the cost of ALL services rather than the service subscribed to. The WASPA Media Monitor is requested to investigate.