



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP):</b>	Opera Interactive
<b>Information Provider (IP):</b>	Sprint Media
<b>Service Type:</b>	Subscription services
<b>Complainant:</b>	Public
<b>Complaint Number:</b>	18398
<b>Code Version:</b>	11.6
<b>Advertising Rules Version:</b>	2.3

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### Complaint

The complainant is lodging a complaint on behalf of her minor nephew.

It is reported that the nephew's cellular phone was stolen on 29 April 2012. On the same day, a promotional message was sent to the cell phone number. This message was accessed, and a subscription service was activated. The complainant denies that the subscription service was activated.

In her initial complaint the complainant states that the cell phone was stolen before the service was activated; she subsequently submitted that she was mistaken in this regard, and the subscription was activated before the theft.

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### Service provider's response

The IP, supported by the SP, provided a detailed account of the opt-in process including dates, records and the wording of the messages sent. Relevant details appear from the adjudication below.

Despite its belief that this was a *bona fide* subscription, it paid a full refund. The complainant initially indicated that she would regard the case as closed on payment of the refund, but subsequently urged WASPA to continue its investigation.

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### **Sections of the Code 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 direct marketing database, so as not to receive any further direct marketing messages from that message originator.
- 8.1.5. A marketing message sent to initiate or re-initiate adult services may not:
- (a) include any graphical or photographic content that includes full frontal images or portrayal of intimate parts of the body; or
  - (b) include any words or phrases that may be considered profane, including common popular or slang terms for excretory functions, sexual activity and genitalia; or
  - (c) include any links to any content described in (a) or (b).
- 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.
- 11.2.5. If a subscription service is initiated by a customer sending an SMS to the service provider, then a separate confirmation message must then be sent to the customer's mobile handset. Only once the customer has followed the activation instructions in the confirmation message can they be subscribed to the subscription service.
- 11.2.6. The confirmation message described in 11.2.5 must 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].
- 11.2.7. If the network is already undertaking any of the verification steps required in this chapter of the Code, then it is not necessary for members to repeat those particular steps again.
- 11.4. Subscription initiated via USSD**
- 11.4.1. After selecting the required service, the customer must be presented with a confirmation step.  
The subscription service may not begin until the customer follows the confirmation instructions. The following information must be presented as part of the confirmation step:
- (a) The name of the subscription service;
  - (b) The cost of the subscription service and the frequency of the charges;
  - (c) Instructions to follow to confirm the subscription (e.g. "1 - Confirm, 2 - Cancel")
- 11.5.1. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message should not be mistaken for an advert or marketing message. The customer may not be charged for this message.
- 11.5.2. The welcome message must start with the text "Welcome: " and must also be a clear notification of the following information, in the following order:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number.

### **11.6. Reminder messages**

11.6.1. A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter. The customer may not be charged for these reminder messages.

11.6.2. The reminder messages specified in 11.6.1 must adhere exactly to the following format, flow, wording and spacing:

Reminder: You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. SMS HELP [optional keyword] to [short code]/call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].

or

Reminder: You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].

11.6.3. The entire reminder message must be sent in a single SMS, may not contain any line breaks or carriage returns and may not include any additional characters other than those specified in 11.5.2.

11.6.4. The content/service description must be text describing the content, promotion or service (e.g. "tones" or "poems"). This text must not be worded in a way that attempts to deceive or mislead the customer from the purpose of the reminder which is to inform the user that they are subscribed to a service.

11.6.5. The cost of service and frequency of billing must use the format "RX/day", "RX/week"

or

"RX/month" (or RX.XX if the price includes cents). No abbreviations of "day", "week" or "month" may be used.

## **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.

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## Decision

There are several things that make this decision difficult. In the first place, the complainant's story is second if not third hand – the cell phone in question was her nephew's, and she appears to be getting her information from his mother. I accept that this explains, for example, an inconsistency between her initial version and her amended version of events.

The second issue is that this matter involves the question of pornographic material and a minor boy, his mother and his aunt. It is therefore not inconceivable that there may be some level of denial or deceit about the true chain of events. This is completely understandable. It must be said, however, that it is in this context I find myself particularly bothered by the fact that the cell phone was allegedly stolen on the very day that the first material was accessed.

According to the IP's records, on 10 March 2012 the user of the cell phone accessed a mobile advertisement and inputted their number, allowing for promotional material to be sent. The user, however, stopped the process prior to completing the final step of the double opt-in process. They were therefore at this stage not subscribed to the service, but had consented to receiving promotional material.

The terms and conditions that allowed this say:

The terms and conditions on the page:

***“hotmob.tv is a subscription service at R7/day that allows users to access adult mobile content through their mobile device. hotmob.tv has requested that your mobile number be made available. Clicking on the action link you're declaring to be 18+ 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. Compatible handsets only. Network charges may apply. Seek bill payers permission before using. To opt-out from promotions contact help@hotmob.tv or call 0213002334 or send STOP to 39327.”***

I believe that the wording of these terms is ambiguous. It appears as a step in the double opt in process, and could quite reasonably be read (if indeed it is read at all amid the more enticing visuals) as only giving this permission if the entire opt in process is completed.

I am therefore not convinced that the user knew that he had consented to the receipt of promotional material.

Clause 9.3.9 of the Advertising Rules states that:

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"**

There is nothing in the terms that advised the user accordingly.

**I believe that the terms and conditions are therefore specifically in breach of Clause 9.3.9 of the Advertising Rules, and generally in breach of the spirit of the WASPA Code in that the wording is ambiguous and potentially misleading.**

Against this background, the user then receives this message on the 28<sup>th</sup> of April 2012:

amanda69 sent you this image: 'do you like my naked body?'.  
Click to view <http://ems.cx/w/?m=27747522160> 18 plus only  
#optout:sms-stop-39327

The Advertising Rules, at Clause 9.3.9, go on to say that:

If using SMS as the Access Channel and where there 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.

**There is nothing before me that indicates that there was any communication between 10 March and 28 April 2012, and the SMS message should therefore have been prefaced with a reminder of the service provider.** I am particularly worried about this in the context of the opening wording that implies this is a personal

communication rather than an advertisement, although this does become a bit clearer with the opt-out information.

**I believe that the lack of clarity in this early stage of the communication to some extent contributed to the subsequent subscription.**

On 28 April 2012 – the day before the cell phone was allegedly stolen – a promotional message was sent and, for the first time, the material was accessed the next day. Records were provided of the relevant double opt-in process and messages.

I have carefully considered the promotional material and messages relating to the subscription itself. I am satisfied that the process and the relevant messages were materially compliant with the Code, and that the facts in this matter do not point to a situation where a subscriber has been mistakenly subscribed to a service.

What the facts read as a whole indicate, although this is speculation, is a minor user who has stumbled across some enticing promotional material. The lack of clarity in the initial material made him vulnerable to the second approach via SMS, which resulted in the subscription. The subscription itself, however, is supported by records of all reasonable precautions including the double opt-in process.

**The SP and IP are therefore found to be in breach of advertising rule 9.3.9 only.**

### **Sanctions**

The IP/SP is required to:

- Amend the relevant wording to clarify that continuing with the first step of the opt-in process will result in consent to further marketing material;
- Ensure vigilance with continued marketing messages after the 10 day period.

I am of the opinion, however, that as the bulk of the subscription process appears to have been compliant, the initial refund, which has already occurred, represents a fair resolution of the matter.