



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Mira Networks
Information Provider (IP) (if any)	AMV Holdings Ltd
Service Type	Content
Source of Complaints	Public
Complaint Number	4650
Date received	7 August 2008
Code of Conduct version	5.7

Complaint

The Complainant requested a refund from the IP after being billed R26.32 ex VAT.

“It seems as if no one understands that I never was subscribed to any of these or any other of these companies but I have paid an amount of R26.32 plus vat and I keep asking who is responsible for refunding the money. Am I ever going to get it back.”

Informal dispute resolution process

The Complainant provided correspondence entered into between her and the IP in an attempt to resolve the matter. The IP wrote:

“On the 25th May 2008 the user accessed our mobile content site through an advertisement on an affiliates website.

While browsing the internet on their SAMSUNG-SGH-J750 cellphone the user responded to an advert for our Play On WAP site.

The site states that:

Click here for your free tone

Free tone terms: Your FREE TONE must be download from the link above. This is a 100% no obligation FREE TONE. No questions asked! All other items on this page are charged at the standard rate of R15.

The user has then purchased the following items (I have highlighted these in bold) by selecting the item and accessing the download page where a user can then download their item directly to their handset.

2008-05-25 05:04:58 SA WAP Ad Play On [1090] Its The Most Wonderful Time Of The Year [42832]

2008-05-25 05:05:53 SA WAP Ad Play On [1090] Propane Nightmares [44687]

As a result the user was sent billing confirmations on 31434:

This is a billing confirmation for yr content access. See portal for terms.

We have now ensured the number has been removed from all future messages.

In your complaint you do not state how recently you incurred this charge.

It is therefore difficult to ascertain if it is in-fact our company that is responsible for the charge you are enquiring about.

Nevertheless any charges we have submitted to the handset are correct for the above purchases."

The Complainant replied in the following terms:

" Thank you for your email.

I do recall trying to download free ring tones via a website from my phone but it is so long ago that I really cannot say when.

I tried to download one ring tone (I do not remember the name) but before anything happened the Internet and the website I was on just disappeared.

I tried again but before anything happened again the phone "froze" (like when a computer hangs) and I had to turn off the phone to get everything back to normal. I never tried again.

I do not recall receiving any sms from any website with the billing confirmation as mentioned below. The names of the ring tones as you have them listed are totally unknown to me as well as the wording portal. What is a portal?

I most definitely do not have these ring tones on my phone and I cannot imagine that I would have bought any with names like those. There is very little music or ring tones that are available these days that I would like to have on my phone as all seem to cater only for young people. I am over 60 years old and don't listen to today's music and I would never want anything of it on my phone.

Do you not have an option to listen to music before one buys? If you had that then I would have listened first. I also do not recall seeing a buy option before clicking on the name of a ring tone. I was under the impression that the ring tones were free and as far as I remember there was nothing stated that I would be paying for something even if the ring tones are supposed to be free.

Your site is very misleading because as you said yourself below "Free tone terms: Your FREE TONE must be download from the link above. This is a 100% no obligation FREE TONE. No questions asked! All other items on this page are charged at the standard rate of R15."

I realise that downloading different items costs money and that is why I wanted to see what you have regarding the free tones.

If you insist that I downloaded these ring tones and that I received them even though I can assure you that I didn't then I suppose complaining about it isn't going to be much help because the "little people" don't stand a chance of getting anywhere with any of the big companies when complaining.

According to your email you have all the proof that I downloaded these items and all I can say is that I didn't. How can I prove that I don't have these items on my phone? I can't so I must assume that I am paying for something I don't have."

The Complainant provided the following further comment to the WASPA Secretariat:

"In light of the above you may as well cancel the complaint because I am positive that nobody is going to refund my money just because I cannot prove that I don't have the tones on my phone.

I would like to mention that the website I supposedly downloaded the tones from is very misleading as it specifically says free tones but then you have to pay for something else. I also think that their site is misleading because there is no where that it gives you the option to "buy" or "cancel".

What I can make out from their email is that if you select a tone name you have automatically bought it even though it wasn't downloaded. To me that does not sound fair and I feel one should have the choice of buying or cancelling.

Thank you for trying to help me but I have not learnt that I should not browse the Internet from my phone because I don't have any choice as to be able to buy or cancel or just browse."

SP Response

After it became apparent that the matter was not going to be resolved through the informal process the SP filed the following formal Response:

"The user accessed our Play On WAP site on 25th May at 05.01 using a SAMSUNG-SGH-J750 mobile handset.

As the user has decided to dispute browsing either site at the times above she should ask her network operator to provide full internet browsing data for 25th May so we can prove that access to blingmob.com took place at the above time."

Sections of the Code considered

The following sections of version 6.1 of the WASPA Code of Conduct were considered:

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

13.3.15. Unless otherwise specified in the adjudicator's report, any sanctions will be considered suspended if an appeal is lodged, until the appeal process is completed.

13.3.16. If no appeal is lodged, or if the adjudicator has specified certain sanctions as not being suspended pending an appeal, the failure of any member to comply with any sanction

imposed upon it will itself amount to a breach of the Code and may result in further sanctions being imposed.

13.5. Information provider notices

13.5.1. If the adjudicator has determined that an information provider is operating in breach of the Code of Conduct, and the adjudicator is of the reasonable opinion that the information provider may persist in such breach, whether through the member against whom the complaint was lodged or another member, the adjudicator may instruct the secretariat to issue a notice to WASPA's members.

13.5.2. The notice referred to in 13.5.1. must clearly identify the information provider and the relevant breach or breaches of the Code of Conduct, and must specify a date from which the notice applies.

13.5.3. Any member permitting the information provider to operate in breach of the Code of Conduct (in the same or substantially similar manner to that identified in the notice referred to in 13.5.1), after the date specified in the notice, will be automatically in breach of the same part or parts of the Code of Conduct as the information provider. Such members will be subject to sanctions determined by the adjudicator in accordance with section 13.4, read in conjunction with section 13.3.11.

Decision

The Adjudicator is of the view that the pricing and billing methods employed by the IP are misleading and are in breach of sections 4.1.1 & 4.1.2 of the WASPA Code of Conduct.

The central issue is that users are billed not for downloading content but for accessing pages from which content can be downloaded. This is certainly contrary to the standard practises employed in South Africa and as a result the employment of such a model would require an information or service provider to be extremely clear in communicating this fact.

If, moreover, the IP is going to charge a significant amount for accessing each of these pages then this needs to be made absolutely explicit and brought to the direct attention of the user.

The volume of complaints regarding the pricing and billing practises of this IP would appear to indicate that this has not occurred. Moreover it is abundantly clear from her communications that the Complainant in this matter was thoroughly confused by the manner in which the service was presented and billed for.

The Adjudicator has taken the further step of reviewing all matters involving the IP and is of the opinion that the complaints laid indicate that there is widespread confusion amongst the public regarding the manner in which its service operates. There are at least 14 pending complaints which have not been resolved in the informal resolution process

Fundamentally the practice employed by the IP deprives consumers of any choice prior to being billed. A user has no idea what videos will be displayed on any particular page, may not wish to download same but is nevertheless charged.

In the words of the Complainant:

“What I can make out from their email is that if you select a tone name you have automatically bought it even though it wasn't downloaded. **To me that does not sound fair and I feel one should have the choice of buying or cancelling.**”

The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. This confidence will be severely impaired where consumers are uncertain as to whether they will be billed prior to being able to exercise choice in the content they wish to download.

The IP falls short in this regard and is found to have breached sections 4.1.1. & 4.1.2 of the WASPA Code of Conduct. The service is provided does not constitute fair dealing with consumers and the manner in which users incur charges is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

In determining the appropriate sanctions the Adjudicator had reference to

- the large number of complaints laid against the IP in respect of contested billing and
- the existence of previous breaches with regard to practises employed by the IP.

In the Adjudication under Complaint 4486 the same IP received the following sanction:

“AMV is fined R 10 000,00. This fine is payable to the WASPA Secretariat within five (5) days of notification hereof. AMV is also ordered to refund the Complainant 50% for content downloaded within five (5) days of notification hereof.”

In the Adjudication under Complaint 4488 the same IP received the following sanction:

“AMV is fined R 10 000,00. This fine is payable to the WASPA Secretariat within five (5) days of notification hereof. AMV is also ordered to refund the Complainant 50% for content downloaded within five (5) days of notification hereof.”

In the Adjudication under Complaint 4499 the same IP received the following sanction for a breach of section 4.1.2 of the WASPA Code of Conduct:

“The SP is fined R 5 000-00. This amount has to be paid within 5 (five) working days to the WASPA Secretariat from the date of adjudication. The SP is further instructed to refund the Complainant in full within 5 (five) working days from the date of adjudication and to ensure its compliance with sections 4.1.2 and 6.2.11 in all current and future advertisements.”

The Adjudicator further had reference to the Advisory Note for Adjudicators circulated by the WASPA Management Committee on 17 October 2008, and which states, inter alia:

“2: WASPA Mancom Resolution of 18 August 2008 on Suspensions:

The Mancom believes that where widespread consumer harm is evident from the continuation of a particular service, or continued provision of services by a seemingly delinquent Information Provider, or the continued provision of service overall by a seemingly delinquent WASP, where there are obvious and consistent breaches of the Code, *prima facie* evidence of fraudulent behavior, as well as potential consumer harm, that immediate suspension should be recommended by Adjudicators.

As such, the Mancom has resolved to advise all Adjudicators that they should, where appropriate and considering the factors outline in this Advisory Note, consider recommending to the Mobile Network Operators (MNOs) in their adjudications the immediate suspension of any services, associated shortcodes, Information Providers, or WASPs found to have egregiously, consistently, and manifestly breached the WASP Code Of Conduct.

A recommendation of suspension may be recommended in addition to any financial sanction, corrective actions, and/or refunds, or withholding of, or total confiscation of revenue due to a WASP (and to the Information Provider) by the MNO that may be considered necessary by an Adjudicator.”

The Advisory Note then sets out a non-exhaustive list of criteria which can be taken into account as “additionally persuasive” in suspending a service, short code, IP or WASP before stating the following in respect of the suspension of services and Information Providers.

“a) Suspension of Specific Services:

Specific services run by a specific Information Provider/WASP rather than the whole bouquet of services offered by Information Providers and/or their WASPs may be considered for suspension.

This may take the form of suspending any new and continued billing whatsoever on a particular shortcode (and service-specific keyword associated with that shortcode) as well as suspension of any advertising of the specific, infringing service.

No other member of WASPA would be allowed to supply services to that Information Provider for that service.”

“c) Suspension Of Information Providers:

Suspension Of Information Providers and all their services rather than their WASPs may be considered for suspension where there are obvious and consistent breaches of the Code, *prima facie* evidence of fraudulent behavior, as well as potential consumer harm.

Suspension would imply that the Information Provider may not continue advertising any service, and that no OBS/EBB billing may take place. In the case of a PSMS where the PSMS is not shared amongst other Information Providers, the PSMS shortcode itself may be suspended, even if other services not under consideration in the instant adjudication are being suspended.”

No other member of WASPA would be allowed to supply services to that Information Provider.”

The Adjudicator is of the opinion that

- there is evidence of repeated infringements of section 4.1.2 of the WASPA Code of Conduct; and
- there is evidence of consumer harm on an ongoing basis.

In the circumstances the following sanction is imposed:

1. The IP is ordered to refund the Complainant in full for all costs billed as a result of the interactions listed by it in its Response.

The following sanctions are imposed in respect of this Complainant as well as Complaints

- 4593
- 4613
- 4630
- 4654
- 4658

- 4680
 - 4681
 - 4885
2. The IP is fined R250 000 in respect of the breaches of sections 4.1.1 & 4.1.2 of the WASPA Code of Conduct.
 3. So as to obviate further harm to consumers, any WAP site provided by the IP which employs a billing per view rather than per download billing methodology is suspended from date of notification of the IP of this Adjudication. This includes, but is not limited to, the Pleasure Palace, Naughty Celebrities, Play on, See Me, Babehouse, Wild Vids & Hot and Horny sites.
 4. The following is contemplated by the suspension of service:
 - 4.1. the suspension of any advertising of the service; and
 - 4.2. the cessation of billing relating to the service.
 5. In order to give effect to such suspension the WASPA Secretariat is requested to send a notification under section 13.5 of the WASPA Code of Conduct to all other WASPA members notifying them that any services provided to the IP with regard to the WAP sites and related services set out above will constitute an offence under the WASPA Code of Conduct.
 6. The Adjudicator wishes to place on record his view that the breaches of the Code are serious and that any further breaches of the same nature involving a failure to make pricing and billing clear and to obtain the user's confirmation thereto where required should lead to the suspension of the IP.

It is further ordered that the sanction listed in item 3 (read with 4 and 5) shall not be suspended by the lodging of an appeal against all or part of this Adjudication by the IP.