



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Exactmobile
Information Provider (IP): (if applicable)	N/A
Service Type:	Subscription
Complainant:	Consumer
Complaint Number:	4672
Code version:	Code v6.1 and Ad Rules v1.6
Date of Report:	9 September 2008

Complaint

1. This complaint was originally made to the Advertising Standards Authority, which referred the Complainant to WASPA. On the 12th of August 2008 the Complainant lodged the complaint in the form of an e-mail enclosing correspondence between her and the SP's representative.
2. The Complainant alleges in the correspondence that she was subscribed to a download subscription service without her knowledge. While the correspondence itself is too voluminous to include here, an extract from an e-mail of the 17th of July 2008 from the Complainant serves as a fair summary of her grievances:

I wish to further place the following on record:

1. I have never received an SMS confirming that I had been subscribed to free me;
2. Your SMS referring to the fact that you welcomed me to free me 2 days after I allegedly forwarded an sms to Free Me is an indication it was done mala fide;
3. Anyone could have without my consent used my cellphone to send that SMS;
4. That SMS did not indicate to me that I was subscribing to anything I would have seen same and relied on it being a general sms;
5. I did not go on the link nor did I accept any terms and conditions nor see any terms;

6. Monies were taken without my knowledge and consent;
 7. Exact mobile has never informed me that monies will be deducted;
 8. When monies were deducted I was not informed by sms about it;
 9. Exact mobile and the intention of taken monies and assumed I would not notice.
-

Response

3. While the SP responded to all of the Complainant's e-mails bar the final one quoted above, it is largely sufficient for the purposes of the adjudication merely to quote the SP's formal response to the complaint:

The subscriber responded to an Exactmobile TV ad on the 15th March 2008 by sending in the keyword FREE to the short code 32829. A copy of the ad is attached. The ad fully complies with the WASPA Code of Conduct as a complaint was lodged by the WASPA monitor previously on the format of this ad. The adjudicator found the ad to comply with the WASPA Code of Conduct and advertising guidelines.

The subscriber was billed on the 18th March 2008 for this service and was immediately sent 2 welcome SMS.

2008-03-18 19:38:59 - Welcome to Free Me! To access all the specials, go to www.exactmobile.mobi/freeme (on WAP). Cost R10/week (R7.50/week for NOW! Club Members). Enjoy!

2008-03-18 19:38:59 - See full FreeMe terms & conditions at www.exactmobile.co.za. To unsubscribe, send STOP FREE to 32829(R1/SMS). Helpline: 0822 302222, VAS Rates/No free mins.

The user was further sent reminder SMS as follows:

2008-04-18 19:39:40 - Dear eXactmobile user, you re a member of FreeMe! Cost R10/ week. Help: 0822 302222 (VAS Rates). Go to www.exactmobile.mobi on yr phone. Content updated daily!

2008-05-18 19:44:21 - Dear eXactmobile user, you re a member of FreeMe! Cost R10/ week. Help: 0822 302222 (VAS Rates). Go to www.exactmobile.mobi on yr phone. Content updated daily!

2008-06-18 19:46:04 - Dear eXactmobile user, you re a member of FreeMe! Cost R10/ week. Help: 0822 302222 (VAS Rates). Go to www.exactmobile.mobi on yr phone. Content updated daily!

And then a cancellation SMS as follows:

2008-07-16 11:48:28 - Dear user, your FreeMe! access has now been cancelled. To reinstate it, please send FREE to 3 28 29 (Cost: R10/week, R7.50/week for Club members). Thank you

Therefore Exactmobile believes it has fully complied with the WASPA Code of conduct and advertising guidelines.

4. It is however also important to note that the SP listed the following transaction in an email to the Complainant of 16 July 2008:

27723780482

Transaction ID Date SMS Mobile Number Sent to Extra Digits Queue 93764641
2008/03/15 07:19:00 PM Free 27723780482 32829 UNREALSUBSCRIPTIONS

Portion of the Code Considered

5. The following portions of the Code of Conduct are relevant:

3.1. Professional and lawful conduct

3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

3.1.2. Members are committed to lawful conduct at all times.

11. Subscription services

11.1. Manner of subscription

...

11.1.7. Once a customer has subscribed to a subscription service, a notification message must be sent to the customer containing the following information:

- (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.

11.1.8. A monthly reminder SMS must be sent to all subscription service customers containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) The service provider's telephone number.

11.1.9. The monthly reminder SMS must adhere to the following format:

(a) The monthly reminder must begin with either "Reminder: You are a member of NAME OF SERVICE" or "You are subscribed to NAME OF SERVICE".

(b) Any marketing for a new service must appear after the cost and frequency of the existing service and the service provider's telephone number.

Decision

6. This matter is unfortunately a case of he-said-she-said. The Complainant alleges that she did not subscribe to the service in question but can furnish no proof that she did not or could not have subscribed to the service. She can also not show that a third party, acting without her consent, subscribed using her cellphone or by other means. The SP on the other hand has submitted clear records of the subscription instruction, welcome and reminder messages and unsubscribe instruction. The SP is a major player in the WASP market and I can see little benefit to the SP in fabrication records here, given the extremely serious consequences that would follow if it were established that such record were in fact fabricated. I deal with the Complainant's grievances as set out above *seriatim*:
- 6.1. While the Complainant alleges that she never received an SMS confirming that she had been subscribed to the service, the SP's records show that she subscribed on the 15th of March 2008 and was sent welcome messages on the 18th. The SP's explanation for the delay of three days in sending the welcome message is that while the Complainant subscribed on the 15th, she was only billed on the 18th and hence the welcome messages were only sent on that date. While I accept that the welcome messages were sent, I find the delay of three days in sending the confirmation of subscription problematic and will deal with this further below. However there is in my opinion no indication whatever that this lapse was in any way an indication of bad faith on the part of the SP.
- 6.2. While the Complainant alleges that anyone could have subscribed to the service by using her cellphone, it would clearly be unworkable for the industry if any consumer of WASPA services could escape charges by making the bare allegation that he or she did not order the service in question but that somebody else must have done so using his or her cellphone without their consent. The practical lesson to be learned from this is that the Complainant must not allow third parties access to her cellphone.
- 6.3. The two SMSes sent on the 18th of March to the Complainant can in my opinion not be interpreted in any other way but that she had subscribed to a subscription service. It is especially clear from the phrase "Cost R10/week" (R7.50/week for NOW! Club Members)" that the Complainant could expect to be charged a certain amount per week for a service. Even if she were ignorant as to what the service entailed, it should have been clear to her from the above that she was to be subject to periodic charges. I further note that

the content of the two welcome SMSes between them meet the requirements of section 11.1.7 of the Code of Conduct.

- 6.4. It is a requirement of the WASPA Code of Conduct that advertising for WASP services should contain the applicable terms and conditions. The Code of Conduct does not require that the consumer should actually have read these terms and conditions in order for a valid subscription service to be entered into. Accordingly, the fact that the Complainant did not go to link, accept terms and conditions or indeed see any terms and conditions at all is not sufficient to excuse her from liability for the charges, nor to indicate any wrongdoing on the part of the SP.
- 6.5. By subscribing to the service, the Complainant consented to paying certain monies in respect of the service. As set out above, if a third party made use of the Complainant's cellphone and subscribed to the service, it is for the Complainant to recover any such charges from that third party.
- 6.6. The cost of the subscription service was clearly set out in the welcome SMSes, as well as the reminder SMSes sent to the Complainant on the 18th of April, 18th of May and 18th of June 2008.
- 6.7. There is no requirement in the Code of Conduct that consumers should be advised by SMS each time a charge is made in respect of a service
- 6.8. The allegation that the SP had the intention of taking money from the Complainant in bad faith on the assumption that she would not notice is not supported by the facts before me.
7. Accordingly the complaint as raised by the Complainant is dismissed.
8. There is one further point to address however. The SP stated in an email to the Complainant on the 16th of July 2008 that it had sent the subscription confirmation messages as required by section 11.1.7 to her on the 18th rather than the 15th because while the subscription took place on the 15th, she was only billed for the first time on the 18th. Section 11.1.7 states that this message must be sent once the consumer has subscribed, not upon the first billing of the consumer for that service.
9. While this appears to be a purely technical matter, the possibility for abuse exists here, and the SP must thus modify its systems to make them compliant with the Code of Conduct.

Sanction

10. As the Complainant had apparently not suffered any prejudice by the late notification, the SP is issued with a formal reprimand for its breach of section 11.1.7 of the Code of Conduct.

11. The SP is directed to modify its systems to ensure that messages confirming subscriptions to subscription services are sent upon registration of the consumer for the subscription service and NOT only upon the first billing of the consumer for the service concerned. This change is to be effected within 14 days of the date hereof and the WASPA Monitor is requested to ensure compliance.

-----00000O00000-----