



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	SMS Net
Information Provider (IP) (if any)	
Service Type	Adult subscription service
Source of Complaints	Mr E Le Roux
Complaint Number	6346
Date received	30 April 2009
Code of Conduct version	7.0

Complaint

The complainant logged an unsubscribe request on the WASPA unsubscribe system on 9 February 2009. The request has been escalated by the complainant because he has not received his refund.

The complainant originally stated that he had been receiving unsolicited adult SMS messages since December 08 with WAP links to adult-related sites. He denied having subscribed to any of these services.

The SMS's were sent with no sender identification or any unsubscribe functionality. An example of a message received reads as follows:

SEE MY HOME VID! <http://wap.mob365.net/ncsd0fso-z1vep5-s1aar-enwu.wml>

SP's response

The SP alleged in its response that the complainant had previously been subscribed to its service: hugemob.com but denied that it was responsible for sending any adult bulk SMS messages to the complainant, and in particular, the message referred to in the complaint.

The SP requested that the matter be investigated further but in the meantime, confirmed that the complainant had been unsubscribed and paid a refund of the charges levied to his cellphone account.

Complainant's reply

The complainant acknowledged receipt of the SP's refund into his bank account. However, as the refund was paid in cash, the complainant was charged a further R6.25 in bank charges. He is now claiming a refund in the amount of R6.25 from the SP.

Sections of the Code considered

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.

5.1. Sending of commercial communications

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

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.

5.1.3. For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent.

5.1.4. For SMS and MMS communications, a message recipient must be able to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). If replying 'STOP' as set out in 5.1.3 will result in a charge greater than the lowest tariffed rate available, then instructions for the lowest tariffed rate opt-out must be included in every message sent to the customer.

5.1.5. Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.

5.1.6. Where the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the service provider must honour the opt-out request as if the word 'STOP' had been used.

5.1.7. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.

8. Adult services

8.1. Required practices

8.1.1. Any adult service must be clearly indicated as such in any promotional material and advertisements.

8.1.2. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Explicit confirmation of a user's age must be obtained prior to the delivery of an adult content service.

8.1.4. Marketing messages (including commercial communications) may no longer be sent to a customer of an adult service if that customer has not made use of the service during the preceding three months. This is to prevent the accidental marketing of such services to children as a result of a recycled telephone number.

11. Subscription services

11.1. Manner of subscription

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. 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.

11.1.3. An advert for a 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.

11.1.4. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.5. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.1.6. Subscription services with different billing frequencies should not have a subscription mechanism likely to cause a customer to accidentally subscribe to a more frequent service.

11.1.7. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

11.1.8. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- (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.*

11.1.9. Once a customer has subscribed to a subscription service, neither the amount and frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

11.1.10. 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]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing]. Help? Call [call centre number + "(VAS)" if applicable]. To unsubscribe, [unsubscribe instructions].

Decision

There are 2 issues to be taken into account in this dispute:

In the initial unsubscribe request, the SP was asked to upload proof of subscription which the SP duly did. According to the SP's records, a subscription request to the SP's Hugemob.com service was received from the complainant's number on 15 November 2008 at 22h29. This has not been disputed by the complainant.

The complainant's number was then billed at a rate of R15 per week from 22 November 2008 to 22 February 2009. The complainant was unsubscribed from the service on 27 February 2009, pursuant to the unsubscribe request logged with WASPA.

The SP has denied that it is responsible for sending bulk promotional SMS's to the complainant as alleged in the complaint. No further proof has been provided to me challenging the SP's denial and I am therefore unable to make a ruling on this issue.

The SP has provided the complainant with a full refund. However the complainant has been charged a cash deposit fee of R6.25 which he is claiming from the SP. Again on the evidence placed before me, there are 2 contradictory versions as to whether the complainant requested that the refund take the form of a cash deposit or not. The balance of probabilities in this regard favour neither party. I am, therefore, unable to rule on this issue either.

The complainant is accordingly dismissed.
