



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Mobimex GmbH
Information Provider (IP) (if any)	
Service Type	Subscription
Source of Complaints	Mr A B Davies
Complaint Number	7285
Date received	7 August 2009
Code of Conduct version	7.4

Complaint

The complainant logged an unsubscribe request on the WASPA unsubscribe system on 2 July 2009. However, the complainant has indicated that he is not satisfied with the SP's response and the complaint has been escalated to the formal complaint procedure.

The complainant alleges that he have been billed an amount of R 1 145.00 for subscription services he had not subscribed for during the period 3 August 2008 to 3 June 2009.

The complainant had only received a credit of R20.00 prior to the complaint being made.

The complainant also stated that, with the assistance of his network operator, he had ascertained that he had a twin call facility on his sim card, with a slave number that could only be operated once the primary phone had been disconnected or switched off.

The complainant states that he has received no evidence from the SP verifying his request to subscribe to the relevant service. In the meantime, the complainant had instructed his network operator to block the twin call facility.

SP's response

The SP responded to the complaint by stating that the complainant subscribed to the service on 18 October 2008 via its African Music Portal and provided its log for the complainant's number, including details of the date, number, handset model and IP address for the opt-in request.

The complainant visited the SP's web site on the said date. The landing page on the site contains the SP's terms and conditions for using its services and describes the subscription terms. The complainant could only access the site once the terms had been accepted.

The SP also confirmed that content had been downloaded to the complainant's number after the subscription became active. Referring to its logs, the SP alleged that there were multiple uses of the service in October, November, December and more.

The SP confirmed that the complainant's subscription was terminated on 6 July 2009 after an unsubscribe request was received at the SP's customer support centre. The complainant was notified via SMS that his subscription had been terminated on that same day.

No billable SMS's had been sent to the number since 2 July 2009. The SP confirmed that the complainant had been advised, after he placed a call to the SP's call centre, that no refund would be offered because there had been a valid subscription request and content had been downloaded using the service.

The SP denied the amount charged to the complainant and stated that an amount of R 120.00 was charged to the complainant's account during the period 3 June 2009 to 2 July 2009. After 2 July 2009, there were no further charges made.

The SP alleges that the complainant's number must have been subscribed to other services offered by other providers and that the majority of the charges made within that period were not for the SP.

Complainant's reply

The complainant denied that he had ever visited the SP's web site or that he had read any terms and conditions pertaining to the subscription service. The complainant also alleges that the print-out of the SP's log is not an authentic document.

The complainant believes that a fraud has been committed but he is left at a disadvantage by not being able to disprove that he subscribed to the service.

The complainant insists on a credit being passed as he had no knowledge of the SP's services and disputes that there is any evidence to substantiate that he requested the services.

The list of charges forwarded by the complainant reflects what appeared on his cellphone account statement. The complainant also sent further notification that he had been billed for further amounts after this complaint had been lodged. However these charges were for content downloaded on 2 July 2009 and the complainant has been correctly advised by the WASPA Secretariat that these charges fall into the period already under review for this complaint.

Sections of the Code considered

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 and may not be an entry into a competition or quiz.

11.1.3. 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.

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].

11.1.11. If a subscription service can be initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation must be obtained from that customer's mobile handset before any billing may take place for that service.

11.2. Reminder messages

11.2.1. 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.

11.2.2. The reminder messages specified in 11.2.1 must adhere exactly to the following format, flow, wording and spacing:

U r subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

or

U r 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 unsubscribe, sms STOP [service keyword] to [short code].

11.2.3. 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 11.2.2.

11.2.4. 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.

11.2.5. 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.

11.2.6. The text “(VAS)” must be included after any VAS-rated phone number. It does not need to be included after phone numbers which are not VAS-rated.

11.2.7. Members must test reminder messages on a range of phones to ensure that all characters and lines are displayed identically.

11.6. Subscription service directory and logs

11.6.2. When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:

- (a) proof that the customer has opted in to a service or services;
- (b) proof that all required reminder messages have been sent to that customer;
- (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and
- (d) any record of successful or unsuccessful unsubscribe requests.

Decision

The SP has stated that it received an opt-in request from the complainant’s handset on 18 October 2009 for the subscription service in question. The SP alleges that the

service was accessed via its African Music Portal WAP site on that date by the complainant's handset. The complainant has denied that he ever visited this site and/or that he opted-in to the subscription service on offer at this site.

In order to resolve the dispute on this issue, the SP was requested to provide clear logs pertaining to the complainant as per section 11.6.2 of the Code. The SP has provided a printout reflecting the following information:

1. Cellphone number and handset details for subscriber;
2. IP address;
3. Date and time of transactions;
4. Product;
5. Type; and
6. Session ID.

The log provided does offer *prima facie* proof that the complainant's number and handset was used to subscribe to the SP's service on 18 October 2008.

However, the log does not provide proof that all required welcome and reminder messages were sent to the complainant after the subscription was activated. It also does not indicate all charges levied and the service or content item applicable for each charge.

The SP has contravened section 11.6.2 of the Code.

In terms of section 11.1.11 of the Code, where a subscription service can be initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation must be obtained from that customer's mobile handset before any billing may take place for that service. It is not clear from the evidence presented whether such confirmation was obtained by the SP.

Furthermore, a monthly reminder message must be sent by the SP to the subscriber confirming the details of his subscription. This was not done.

Based on the evidence presented, the SP has also breached sections 11.1.11 and 11.2.1 the Code.

There is also a dispute between the parties regarding the exact amount of charges levied to the complainant's account. The complainant alleges that he has been billed an amount of R 1 145.00 over the period 3 August 2008 to 3 June 2009. The SP denies that this is the amount charged to the complainant and states that the actual amount charged by it was R 120.00 (for the period 3 June 2009 to 2 July 2009)

The SP believes that the complainant's number was subscribed to other services offered by other WASPs and that the majority of the charges made within that period were not for the SP's services.

Based on the evidence that has been presented, I cannot conclusively decide what amounts have been charged by the SP to the complainant's account. However, on the SP's own version, the complainant was charged R120.00. If the complainant can produce further proof that amounts in excess of R120.00 have been charged to his account by the SP, he may refer this complaint back to WASPA for further adjudication.

Sanction

In determining an appropriate sanction, I have taken into account previous complaints against the SP for the same or similar contraventions. In particular, I refer to the adjudication report for complaint 6303 which was handed down on 31 January 2010.

The adjudicator in that complaint stated the following:

The breaches by the SP go to the heart of the Code and undermine the reputation of the wireless application services industry as a whole. In considering an appropriate sanction to be applied in this matter I have also had regard for previous breaches of the Code upheld against the SP including in complaints 5696 and 5954 where similar breaches of the Code were upheld against the SP.

I have noted that the date on which the adjudication reports in the aforementioned matters was delivered is after the date on which the present complaint arose, however the facts of those complaints indicate that the SP has repeatedly breached the Code in a very serious manner.

The sanctions delivered in complaint 6303 included the immediate suspension of all the SP's subscription services offered in South Africa and all billing for any such services.

The adjudicator indicated in his/her report that further sanctions against the SP for further contraventions of the Code would be suspension of its membership by WASPA and a request to all relevant cellular network operators to bar the SP's access to its billing platforms and services as contemplated by the provisions of section 13.4.3(d) of the Code for a period of 180 days.

The following sanctions are now given:

1. SP is directed to:
 - 1.1 Provide the WASPA Secretariat with proper logs that comply with section 11.6.2 of the Code within 5 (five) days of receiving notice of this adjudication report;
 - 1.2 Refund all charges levied to the complainant's account within 5 (five) days of receiving notice of this adjudication report;
2. The SP's membership of WASPA is suspended for a period of 180 (one hundred and eighty) days from the date of this report.
3. All network operators and/or other WASPA members who provide billing or other services to the SP are requested to suspend such services for a period of 180 (one hundred and eighty) days.