



REPORT OF THE ADJUDICATOR

WASPA Member (SP): MIRA Networks
Information Provider (IP): TIM w.e. New Media Entertainment South Africa
Service Type: Subscription service
Complainant: Member of the public
Complaint Number: 7673
Code/Ad Rules version: 6.2 and 2.3 (version 7.0 also applied but see below)

Complaint

The complainant is a 67-year old man who was charged some R1027.60 for downloading ringtones by accessing the website of the IP. The complainant claims never to have accessed the service or to have subscribed, and more importantly failed to prove to his satisfaction that he had done so.

The only logs provided to him indicated that they had contacted him on SMS, but not that he had actively entered his number on their website, or replied to any text messages. He also claimed to have received messages perhaps once monthly and not as often as recorded on the IP's logs.

The complainant states "I have read about this sort of scam many times in the news papers and feel that this sort of scam should be made illegal. Vodacom just say that they are not responsible but as they do the deductions, they should be held equally guilty in my opinion"

On receiving a response of sorts from the IP, the complainant insists on a refund. It would appear from the correspondence that a refund was never made as the complaint was escalated to adjudication.

SP Response

The SP passed the matters onto the affiliated member, the IP, based in Portugal.

The IP replied initially to advise, "unsubscribed, in attached the proof of subscription (sic), done by web spot, our web spots have the conditions and costs of the service. There were no sms cancellation attempts".

The second response received from the IP enclosed logs dated from 19 January to 17 August 2009, indicating that a welcome message was sent to the complainant on 19 January 2009 which said "Welcome! U have joined Games Club. Games + 1 Tune per week, R4,00/day. Stop? Dial *120*33535hash and follow the menu (1c/sec). Helpline: (0)11 447 0357.Total TIM".

The message was sent to the complainant's cellphone at 13:24:46, immediately after a marketing message was also sent to the same cellphone, at 13:23:20, which read, "Insert your password borwol and receive 3 Games and 1 Truetone every week. Please check T&C at www.natta.com/web/za/tac".

The IP's final note to WASPA stated, "Pls find attached proof of subscription. The client inserted the number 3 times on the webpage and received the pin message 3 times before subscribing to our service. Our call center is operated by MIRA, we will check with them why this client didn't get the proper assistance. Although the client had all the information to unsubscribe and received the proof of subscription we'll refund the client. Hope this satisfies the client and WASPA and the complaint is closed."

Consideration of the WASPA Code

It is relevant to consider section 4.1. (Provision of information to customers) as overriding considerations, and in particular:

Section 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.

Section 4.1.3. Each member must provide their full contact details on the member's web site, including the registered company name, telephone and fax numbers, e-mail address and physical address.

Section 4.1.4. Members must make the terms and conditions of any of their services available to customers and potential customers, on request.

Section 4.1.5. Members must have a complaints procedure allowing their customers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.

Section 4.1.6. Customer support must be easily available, and must not be limited to a medium that the customer is unlikely to have access to (for example, support should not be limited to email if a significant number of customers do not have access to email).

Section 4.1.7. Any telephonic support must be provided via a South African telephone number and must function effectively. Should the member be unable to provide immediate support, a customer should be provided with the ability to leave a message. Support numbers may not forward to full voice mailboxes.

Section 4.1.8. Customer support may not be provided via premium rated numbers, and may only be provided via standard-rate or VAS-rate numbers.

Section 4.1.9. Members undertake to inform their wireless application service customers that they are bound by this Code of Conduct. Members also undertake to make these customers aware of the WASPA complaints procedure and the mechanism for making a complaint, should any customer wish to do so.

Section 4.1.10. Members' web sites must include a link to the WASPA web site and/or this Code of Conduct.

4.2. Privacy and confidentiality

Section 4.2.1. WASPA and its members must respect the constitutional right of consumers to personal privacy and privacy of communications.

Section 4.2.2. Members must respect the confidentiality of customers' personal information and will not sell or distribute such information to any other party without the explicit consent of the customer, except where required to do so by law.

Based on our investigations, the IP failed to comply with these provisions, or to the extent that they may have done so, it is no longer possible to determine this with certainty as the relevant web pages are blank at date of this adjudication (in relation to section 4.1), and without proof of a relationship between the parties initiated by subscription, it would appear that the IP failed to comply with the requirements of section 4.2 either.

The complaint is about subscription services, defined as “any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.”

The following sections of the Code are relevant to subscription services:

Section 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.

Section 11.1.3. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

Section 11.1.7: 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.

Section 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.

Section 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.

Section 11.1.11. The format of the both the initial notification message and the monthly reminder should comply with the relevant section of the WASPA Advertising Rules.

Without proof of subscription there appears to be little point examining the provisions of the Ad Rules or the pricing provisions applicable under section 6.2 of the Code, or considering version 7.0 of the Code which applied with effect from 25 March 2009.

Without proof of subscription, it is however, relevant to consider the provisions of section 5.2 (Sending commercial communications), relating to spam:

5.2. Identification of spam

Section 5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient’s contact information has the

recipient's explicit consent to do so.

Section 5.2.2. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

5.3. Prevention of spam

Section 5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

Section 5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

It is not clear to us on the facts that the IP had a commercial relationship with the complainant, nor that it had permission to send commercial messages to him without his consent. It would appear therefore that the IP was sending spam to the complainant.

Decision

The IP's website (www.timwe.com) indicates that TIM w.e. is a mobile and interactive global marketing company that provides mobile content and services for entertainment, marketing and advertising, to mobile operators, media, advertisers and end-consumers, on a global scale. The company claims to deal with phone users through its own sales channels and partnerships with over 200 Mobile Operators worldwide including in South Africa.

However, the website provided by the IP in its text messages to the complainant, namely www.za.natta.com, does not contain any content or text whatsoever. The Portuguese version contains terms and conditions. It is unclear to this adjudicator how the complainant might have entered his number on the South African version of the website as alleged by the IP since the current version does not allow such a possibility. Furthermore, referring to terms and conditions on a website that does not exist or to terms and conditions that are not available in English, amounts to non-compliance with the requirements of the Code.

The telephone number given by the IP in the messages sent to the complainant is engaged constantly so we were not able to ascertain whether or not it complies with the requirements of section 4 – and assume that it does not since it cannot be reached, if not by us then certainly not by users either.

In the absence of an explanation from the IP as to how the complainant was subscribed to the service, it is arguable that the complainant never actually subscribed to the service. Although the logs indicate that messages saying "Download now" were sent to the complainant frequently, there is no indication that he did in fact request any downloads. This raises important questions about how the IP obtained the complainant's number, continued to send messages, and billed the complainant without his having subscribed to the service. It is possible that the IP failed to comply therefore with sections 4, 5 and 11 as indicated above.

There is no evidence at this point that the complainant's version is not correct, and therefore no reason not to uphold the complaint.

Sanction

The IP is directed to:

1. refund the complainant in the amount of R1027.60 (together with any further amount that may have been billed after the date of the complaint in relation to the service) to his nominated bank account, within 3 days of the date of publication of this adjudication, and to confirm to WASPA that it has done so in writing; and
2. pay a fine to WASPA in relation to the breaches of each of sections 4, 5 and 11 in the manner set out above, in the amount of:
 - a. R50,000 in respect of the breach of section 4;
 - b. R50,000 in respect of the breach of section 5; and
 - c. R50,000 in respect of the breach of section 11;all amounts to be paid within 10 days of the date of publication of this adjudication; and
3. insofar as the IP continues to make this service available, to rectify its website so as to comply with the Code and Ad Rules, and to confirm to WASPA that it has done so within 30 days of the date of this publication.