



REPORT OF THE ADJUDICATOR

Service Provider (SP):	MIRA Networks
Information Provider (IP):	Flexiba
Service Type:	Subscription
Complainant:	Public
Complaint Number:	22519
Code Version:	12.4
Advertising Rules Version:	Not applicable

Complaint

The complainant submitted, in essence, that he was subscribed to the service in question, which is adult in nature, without his knowledge.

Information provider's response

The WASP offered a full refund which the complainant refused.

The WASP subsequently provided extracts from the relevant logs, showing the double opt in process.

On request, the WASP clarified the following:

With regard to the Banner the user was clicking on, unfortunately we cannot give you the exact one due to the fact that we have no exact records about such step on our system.

However, please find hereunder the screenshot of the banner layout that was potentially related with the above-mentioned campaign:



The nature of the service, the relevant price and the billing frequency were clearly stated on the Banner top left corner.

Sections of the Code considered

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.

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.

Decision

In a matter such as this, where the complainant claims to have been auto subscribed, I find myself having to consider that one of the following has occurred:

- [The complainant is lying, possibly because of the nature of the service;
- [The complainant was indeed auto subscribed;
- [The advertising is unclear and the complainant didn't realise they were subscribing;
- [More often, with data cards, someone used the complainant's data card to subscribe.

In this matter, the WASP has provided logs of the double opt-in process. While I always remain alert to the fact that the falsification of these logs is not impossible, it does create a *prima facie* proof that the subscription did occur.

Similarly, I find the complainant's insistence on seeing this matter through a *prima facie* indication that he did not actively and knowingly subscribe.

This therefore leaves us with two possibilities. It is possible that somebody else used the complainant's data card. This would not be the fault of the WASP, and is for me a concern that the industry needs to investigate with the increase in data cards and unsecured access.

However, it is also possible that the complainant or someone using the complainant's card subscribed because he thought that he was accessing ONE item.

This is the problem that is addressed by Clauses 11.2.1 and 11.2.2:

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.

In other words, it must be absolutely clear to the consumer that they are subscribing and not getting a particular item.

As the WASP has stated, in the banner in question, it is stated that it is a subscription service at R7 a day. However, this is in small print on the top left. The much more overwhelming communication of the banner is the "striking" visual, and the large blue words "PLAY".

I am of the opinion that a consumer could click on the link in the belief that they are receiving ONE content item – a video involving the pictured visual.

This misconception would be exacerbated by the following landing page:

18+ Subscription Service R7/sms 28sms/m
Cellspice Sexy Pics & Vids



Big ass house wives caught on tape!

Enter Cell:

CONTINUE

cellspice.com is a subscription service at R7/sms 28sms/m that allows users to access adult mobile content through their mobile device. cellspice.com has requested that your mobile number be made available. #6462#. Clicking on the action link you're declaring to be 18+ and are accepting both the terms and conditions and to receive free promotional SMS relating to this and other services operated by Flexiba until cancelled. Compatible handsets only. Network charges may apply. Seek bill payers permission before using. To opt-out from promotions contact help@cellspice.com or call 0213002831 or send STOP to 43887. Privacy Policy.

In both the banner ad and the landing page, the subscription information is badly placed and indistinct. The overwhelming impression of both is that one is accessing ONE item.

The material is therefore in breach of Clause 11.2.1 and 11.2.2.

The fact that it is unclear if this is indeed what happened in this matter does not change the fact that this material is in breach, and that this complaint has brought WASPA's attention to it.

Sanctions

The WASP has a relatively good record with WASPA, and no previous findings on the clauses in question. Therefore, in respect of the breach of Clause 11.2.1 and 11.2.2 I sanction only as follows:

- [A fine of R5 000;
- [A suspended fine of R25 000 should the WASP again be found guilty of a breach of these clauses on this basis.

