



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	W2M GmbH
Information Provider (IP):	Opera Interactive
Service Type:	Subscription
Complainant:	"Public"
Complaint Number:	22832
Code Version:	12.4
Advertising Rules Version:	Not applicable

Complaint

In essence, the complainant submits that he was subscribed to an adult content service without his knowledge. He strongly avers that this amounts to fraud on the part of the IP.

Service provider's response

The IP responded to this matter, providing in depth explanations, logs and copies of the material in question.

I will discuss this in more detail below.

Sections of the Code considered

The complainant identifies the following sections of the Code as relevant:

clause 4.3.1. Any refunds provided by members to customers must be provided in a for acceptable to the customer :

clause 6.2.11. During any calendar month, if the total cost of any service exceeds R200 for that month:

(a) Where the WASP is in control of the billing (e.g. an OBS), a notification must be sent to the customer that they have reached this limit and a communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.

(b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number)

6.2.12. During any calendar month, after the first threshold notification, when the total cost of any service reaches R400, and when it reaches any multiple of R200 thereafter, an additional notification must be sent to the customer notifying them of the total cost incurred for that service so far.

6.2.13. The member providing the service must keep a record of the confirmation provided by the customer (for 6.2.11 (a)) or the notification sent to the customer (for 6.2.11 (b)).

6.2.14. For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:

(a) If the transaction is billed at R10 or more, the member initiating this transaction must

(b) If the transaction is billed at less than R10, the price for the transaction must be clearly

(c) If the transaction is to initiate a subscription service, then the price and frequency of the obtain specific confirmation from the customer and keep a record of such confirmation.

indicated as part of, or immediately next to, the link or option that will initiate the transaction and must be visible on the same screen as the link.

service must be included directly in the text of the WAP link or immediately adjacent to it and must be visible on the same screen as the link.

6.3.2. For services which are likely to have a shelf-life of three months or more, a statement must be included in any advertisement that the information given is correct as at the date of publication, and that date must also be stated.

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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.

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

11.3.1. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset

number. This message may either:

(a) contain a PIN which is then confirmed or validated on the web page, or

(b) contain the name of the service, an explanation of the confirmation process, and a URL with a unique identifier, which, when clicked, validates the handset number.

11.5.1. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message should not be mistaken for an advert or marketing message. The customer may not be charged for this message.

Decision

I start by noting that the bulk of the clauses cited by the complainant are irrelevant to the matter at hand, having to do with situations that are not present in the current matter.

The question before me is essentially whether the complainant was indeed subscribed to the service without his knowledge and through non-compliant behaviour on the part of the WASP.

The WASP has responded to all allegations in this drawn out matter politely and completely, taking WASPA into their confidence at each point. They have provided proof of the double opt in process, of every message sent, and copies of the original banner advertisement. They have offered a refund of the subscription fees.

The original banner advertisement clearly states that the service is a “subscription service”. I can therefore rule out that this is a Clause 11.1.1 situation where the complainant has been misled in surfing the internet, as is often the case with this type of matter.

The WASP has also provided complete and coherent logs, and I have no reason to doubt the veracity thereof. All messages and opt-in processes appear to be in place. The evidence indicates that someone with access to the complainant's data card did indeed subscribe to this service.

For me, the most interesting thing about this matter is the pattern of activity. The subscription was activated late at night on 11 July 2013. The content service was then used repeatedly in the next 24 hours, indicating a user who was partial to the content of that service. However, after 12 July 2013, the content is never viewed again. I think this pattern of use would be unlikely if the complainant himself had subscribed to the service – having found it of such interest in the first 24 hours, he would have returned.

It seems self-evident to me that a third party has in some manner accessed the internet on the complainant's data card, subscribed to the service, and used it for a short time. The complainant therefore has *ex facie* been the victim of fraud or abuse of his hospitality, but based in the evidence before me, this is not through any fraudulent conduct on the part of the WASP.

The WASP is therefore not in breach of any of the cited clauses.

Sanctions

In the circumstances, I believe that the WASP's offer of a refund of the R6 subscription fees is reasonable. In addition, given that the WASP is not situated in South Africa, I think the complainant's insistence on being paid by cheque is unreasonable. An EFT should suffice, and the complainant is asked to give relevant details to WASPA.