



REPORT OF THE ADJUDICATOR

WASPA Member (SP) AMV

Information Provider (IP) Blingmob
(if any)

Service Type Content subscription service

Source of Complaints WASPA Monitor

Complaint Number 3864

Date received March/April 2008

Code of Conduct version 5.7

Complaint

The following complaint against the SP was submitted on 13 April 2008:

"Blingmob are aggressively marketing via a sms campaign promoting FREE cellphone downloads. However, when going onto the wapsite, and I confirmed this with their callcentre, it appears that when you get your free downloads, you're hooked into a subscription service, charging R30 every 3 days.

Therefore, when accepting the free downloads, the subscriber needs to send \"stop\" to the shortcode in order to NOT have R30 deducted off their airtime every 3 days, thereafter. This is unentical and misleading advertising that \"trick\" consumers into joining a club.

The sms read: \"FREE CELL DOWNLOADS! Tones, Games, Vids and Pics! Reply

GIFT to this sms to download your bonus items! 16+ sms STOP to quit subscription, R30/3 day 011-4610317"

The complaint alleges that Clauses 6.2.3 and 6.2.4 have been breached.

SP Response

The SP only responded to the complaint on 21 May2008. In its response, the SP acknowledged that its promotional message did not contain any statement with regard to the standard network charges for replying to the message, nor the extent of any GPRS WAP browsing charges as is required by the Code.

In mitigation, the SP stated that SMS promotions have, by their nature, limited wording because of the constraints of this medium (i.e. limited to 160 characters of text). They believe that it would be unfeasible to include text relating to "standard network charges apply" as this would take up 30 characters or 20% of the promotional space. They argue that the inclusion of terms such as the existence of bearer charges, or standard network operator charges are not applicable for inclusion on 160 character SMS promotional messages.

The SP believes that it is more important to provide the following information about the service promoted:

- a) that it is subscription based;
- b) that it costs R30 every 3 days;
- c) how to stop the service;
- d) how to call for help; and
- e) that under 16's are not allowed.

The SP also believes that the wording of its message could have been more clearly worded with reference to the words: *sms STOP to quit subscription, R30/3day*. They propose using the words: *Subscription service, R30/3day. sms STOP to quit* instead.

The SP disagrees that the promotional text used constitutes misleading advertising under Clause 6.2.4.

Sections of the Code considered

4. Customer relations

4.1. Provision of information to customers

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.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

6.2. Pricing of services

6.2.1. All advertised prices must include VAT.

6.2.2. All advertisements for services must include the full retail price of that service.

6.2.3. Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.

6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.

Advertising Rules

11.3 TEXT DISPLAY

11.3.1 Display Text with full pricing information must be displayed on the SMS/MMS

11.3.2 The SMS must contain contact details of the sender, preferably a web site address

11.3.3 If the recipient of the email requests to the sender that the sender provide details of how the sender obtained the recipients email address, it is a legal requirement according to s42(b) of the ECT Act 2002 that this information be provided.

11.15 PRICING: Show component, bearer and total cost //

Cannot use term Standard Rate when no free/discounted SMS/Minutes cannot be utilised

Overview:

The display text must show the full or potential cost of access for fully obtaining the advertised Content and/or service.

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(a) Bearer Costs:

If additional WAP/GPRS bearer charges may be incurred over and above any other Access Channel costs, the possibility thereof must be indicated.

eg "2x R5 SMS = Total R10 + WAP Charges"

- [See also "TOTAL ACCESS REQUIREMENTS" below]

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(d) SMS:

- The cost of a single (or component) SMS used for access to a service must be indicated.
- If more than one SMS is required to access the service/Content, then the number of SMSs so required and their individual cost for access must be indicated. The total cost involved in accessing the full service based on the cumulative number of SMSs required must also be disclosed.

For example, if a number of SMSs are required for registration before full access and use of an advertised service becomes available to a user, then the possibility thereof and then the number of required SMSs must be indicated.

Eg "2x R5 SMS = Total R10 + WAP Charges"

Eg “3 x R5 SMSs required for service registration. Total cost R15”

11.16 SUBSCRIPTION SERVICES: Show Total Subscription Charge, Frequency of Charge, any bearer charges and any additional charge/s

(i) Must Use The Words “Subscription Service”

If the Content provider is providing a continuous, subscription-like or subscription-based service, then the words “Subscription Service” must be prominently displayed at the top section of the advertisement as well as at each Content or service section in the advertisement where various subscription types are displayed.

No acronym, letter (eg “S”), number, abbreviation (eg “Subs”), icon, or any other mark may be used as an alternative to the words “Subscription Service” anywhere in the advertisement when that Content is only available at all and/or at a particular cost as part of a subscription service.

(ii) Must Indicate Charge/s:

The advertisement must indicate:

- (a) The TOTAL charge that the consumer will incur for the subscription component of their access to that subscription service.
- (b) The frequency (and the minimum frequency, if applicable) at which they will be charged for the subscription component of access to that subscription service.
- (c) Whether, in addition to the periodic subscription charges in (a) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement. [See (iii) below]

This indication must include the potential and cost of any (additional) bearer charges.

(iii) Must Indicate Cost Of Any (Additional) Per-Content Access

If in addition to a periodic subscription charge the consumer could additionally be charged on a per-access basis for access to any particular service, Content or class of Content on the advertisement within the subscription period and terms, then the advertiser must make it clear to the consumer that access this Content or service will, over and above the periodic subscription cost, incur additional charges per Content or service access.

The periodic subscription cost, the frequency of the periodic charge, and where applicable, the additional access cost must all be displayed clearly and TOGETHER,

in a position immediately above, below, or to the side of the Content, service, or class of Content. There must in particular be an indication whether bearer charges are included or not in the access cost.

[See also 'BEARER CHARGES' above]

iv) Must Differentiate Clearly Between Multiple Subscription Types

If in any advertisement there may exist the possibility to subscribe to a number of individual subscription services which would ordinarily each carry a separate but additional subscription charge and associated charging frequency or additional per-Content access charge, then this possibility of the consumer being charged at multiple prices and charging frequency must be clearly indicated.

(v) Must clearly Differentiate Between Non-subscription and subscription Types if both available in the same advertisement

ADDITIONAL BACKGROUND NOTES TO SUBSCRIPTION SERVICES:

Any request to be subscribed to a subscription service must be an INDEPENDENT TRANSACTION (see s11.1.2 of v3.2 of the WASPA Code of Conduct). Hence subscribers cannot be subscribed to a subscription service through having requested specific Content, or having being made to believe by a (practically) confusing ad design that they are requesting Content on a once-off (non-subscription) basis.

Confusion by consumers may arise in cases where a single advert may indicate the availability of Content to users (usually on a network that has not enabled subscription services) on a once-off basis, as well as on a subscription basis (to users on a network that has enabled subscription services), even though the subscription and non-subscription services may be on a different number range.

If confusing, this may create the scenario where the consumer lacks a specific intention of subscribing to a service (s11.1.2).

To avoid this scenario, advertisers must avoid advertising material designs where subscription service access can be confused with non-subscription services for the same or same type of Content in the same ad. Unless this distinction is made clear, the non-subscription portion of an ad which has as its center the requesting of specific Content (on a once-off basis to users on a network that does not have subscription services) may have the effect of (possibly inadvertently) breaching the

'independent transaction' criteria of the subscription portion of the code of conduct
(See also s11.1.4 of v3.2 of the Code of Conduct)

11.17 TECHNICAL CONDITIONS FOR ACCESS: Indicate which users and/or phones can access services

- The display text must indicate whether the service can only be accessed by:
- Phones with any particular technical specification(s)
- Any particular time period [See also "AVAILABILITY OF SERVICES/CONTENT" above]
- Any particular bearers [See also "BEARER CHARGES" above]
- Any particular mobile operator networks [See also "NETWORK COMPATIBILITY" above]
- Any particular mobile operator subscription types [See "also NETWORK COMPATIBILITY" above]

However, because there are numerous phones on the market each with different technical specifications, it may be impractical to list all these handsets in media which is non-permanent (eg TV/Radio). These must however be shown in permanent media (eg Web/Print)

11.18 TOTAL ACCESS REQUIREMENTS

For SMSs: Indicate Number Of SMSs required for full access to Content or for registration to allow full use of the advertised service.

For IVR: If over 60 seconds, indicate the minimum number of minutes for required for obtaining the advertised Content or access to service proper // Include possibility of bearer charges if applicable.

11.19 USSD ACCESS: Show Initial USSD Access Charges and Minimum Access times (if over 90 seconds)

- For menu-driven services such as USSD, the price for the initial service must clearly be stated, along with the minimum time reasonable persons would require to access the service

Decision

Much has been made by the SP of the absence of certain required information in the promotional message and in the juxtapositioning of the existing wording. However I

believe the point of the complaint has been missed by the SP. It is the use of the word "FREE CELL DOWNLOADS" in relation to a subscription service which is deceptive and is likely to mislead consumers into thinking that content can be obtained at no charge when in fact they are automatically subscribed to a content subscription service costing R30 every 3 days.

The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The current wording of the message in this complaint falls foul of the Code.

Insofar as the complaint and SP's response refers to sections 6.2.3 and 6.2.4, I will also address these issues. The provisions of the Code relating to compulsory information, including full disclosure of all pricing information, that must be displayed in promotional messages of this nature are pre-emptory and not discretionary. While the difficulties of space confronting advertisers when using this medium are understood, this offers no excuse or justification for non-compliance with the Code, read together with the Advertising Rules. It cannot be left to members to decide what information should or should not be included in promotional messages.

It does not help the SP to move around the wording of the message in its current format. In order to remove the cause for confusion, the words "Free Cell Downloads" must be removed.

I therefore find that the SP has breached section 4.1 and 6.2 of the Code, read together with the Advertising Rules.

Sanction

The SP is ordered to:

1. immediately suspend this promotion until the words "Free Cell Downloads" has been removed;
2. provide written confirmation to the WASPA Secretariat that the necessary changes have been made;

3. refund all subscription charges to subscribers who have responded to the promotional message from the date of commencement of the promotion until the date of suspension;
4. provide the WASPA Secretariat with written confirmation that it has done so;
and
5. the SP is fined R15 000.00.