



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Integrat Mobile Aggregation Services
Information Provider (IP) (if any)	TOTALTim
Service Type	Subscription services
Source of Complaints	Anonymous
Complaint Number	1316
Date received	8 May 2007
Code of Conduct version	4.92

Complaint

An anonymous complainant lodged a complaint via the WASPA website on 8 May 2007. The complainant, a previous subscriber to the IP's love service on the same short code, was sent the following SMS from +27820070303067:

Hey! Download now your favourite music hits at anytime you want! Do you want Kelly Clarkson hits? Send Kelly to 31606! Helpline: 0822350466 Cheers: Total Tim

The complainant sent "Kelly" to 31606 with the intention of downloading a Kelly Clarkson ring tone. He/she then received the following reply from +27820070303412:

You have joined Kelly Club. 6 dancing hits + 2 wallpapers per week for R4.99 per day until you send Stop Kelly to 31606. Helpline 0822350466 Cheers: Total Tim

The complainant alleges in his/her complaint that the initial message contravened section 6.2.2 and 11.1.1 of the Code in that it did not include any pricing information and did not communicate that the service was a subscription service.

It is alleged further that the message communicated an offer for a specific item instead of a subscription service in contravention of section 11.1.2 of the Code.

Furthermore, the complainant requested a single item but received confirmation that he/she had been subscribed to a subscription service.

SP Response

The SP has responded to the complaint as follows:

1. The SP argues that as the complainant has referred to the initial message sent to him or her as a “commercial message” then section 5 of the Code should apply. The SP submits that there is no requirement in terms of this section that pricing information must be indicated in the commercial message.
2. The SP states further that the Code does not define what is meant by the word “advert”, which is used throughout section 6, and more particularly, whether the terms “advert” and “commercial message” are synonymous or can be used interchangeably. It argues that as a result of this uncertainty, the commercial message should not be evaluated on the criteria required for adverts.
3. The SP states further in its response that
“the message in question has the effect of confirming and thereby reactivating an already existing subscription to a particular service. By this we mean that the services are 'renewed' weekly although billing takes place daily. Since the commercial message is sent every 7 days this means that the user's credits are replenished for the following week. In effect the commercial message is merely reloading credits for an existing service. Therefore it is not exclusively a commercial message or marketing message, as it serves a technological purpose as well”.
4. The SP alleges that the IP’s services are centred on subscription services and as the complainant was an existing customer of the IP, he/she was aware or should have been aware of the fact that a subscription services was being offered and not a single item download.

The SP has stated that it has advised the IP to insert the words “subscription service” and pricing information in all future messages of this nature.

Sections of the Code considered

Section 6 and 11 of the Code have been considered and in particular:

6. Advertising and pricing

6.2. Pricing of services

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

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”.

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 bundled with a request for a specific content item.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

I have also taken account of Rule 11.16 of the Advertising Rules:

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)

Decision

Commercial messages and adverts

It is correct that the Code does not define the word "advert" or "advertisement". However I do not accept that because there is no definition and/or because the complainant has referred to the initial message received by him or her as being a "commercial message" that there does not need to be compliance with section 6 of the Code read together with the Advertising Rules.

Section 6 and the Advertising Rules are quite clearly aimed at regulating the content of promotional material used to promote wireless application services to the public. It is also clear from Rule 11 of the Advertising Rules that promotional SMS's fall within the ambit of section 6.

Section 5, on the other hand, is aimed at regulating the privacy and data protection aspects of sending commercial messages.

Absence of pricing information and identification of subscription services

The initial message sent to the complainant contravenes both section 6.1.2 read together with Rule 11.16 of the Advertising Rules in that it does not contain any information regarding the pricing of the content subscription services being offered to the complainant.

The initial message also contravenes section 11.1.1 in that it fails to explicitly identify the services on offer as subscription services.

The complainant has stated that when he/she responded to the initial message, it was his/her intention to download a Kelly Clarkson ring tone and not to subscribe to a subscription service. The SP has argued that because the complainant was an existing customer of the IP, whose predominant business is subscription services, the complainant should have known that the services on offer would be subscription services.

It appears from the complaint that the complainant was indeed an existing subscriber to the IP's love service. However I don't accept that because of this fact alone, the complainant should have known that the promotional SMS he or she received was in respect of another subscription service even though this was not indicated in the message.

With reference to the "Additional Background notes to subscription services" contained in Rule 11.16 of the Advertising Rules (see above) it is clear that members must ensure that their promotional material around subscription services is not confusing. I believe that the message sent to the complainant is indeed confusing

and that such confusion could have been easily alleviated by simply indicating that it was a subscription service on offer.

I find that the message sent by the IP contravenes section 6.2.2 and 11.1.1 of the Code as well as Rule 11.16 of the Advertising Rules in that it does not disclose any pricing information for the service on offer and it does not indicate that such services are subscription based.

Automatic subscription when complainant intending to download individual content item

The complainant indicated in his/her complaint that it was their intention to download one ring tone. By responding to the message, they automatically joined a club. The SP's explanation that this was a reactivation or a renewal of an existing subscription is not accepted. The complainant had subscribed to a completely different service before which was not related to content downloads.

I therefore find that there has been a contravention of section 11.4 of the Code also.

Sanction

Bundling is regarded in a serious light by WASPA. It is very clear from the provisions of the Code and the Advertising Rules what is required of promotional SMS's used for offering subscription services to the public.

I have taken into account that the SP has advised the IP to insert the words "subscription services" and to include pricing information in future messages of this nature.

The SP is fined R25 000 for the contravention of section 6.2.2, read together with 11.16 of the Advertising Rules, and section 11.1 and 11.4.