First High Court verdict on meaning of 'opted-in'

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Topic: Direct marketing

Who: Playup Interactive Entertainment (UK) Pty Ltd (PU) vs Givemefootball Ltd (GMF)

Where: Queen's Bench Division of the High Court, London

When: July 2011

Law stated as at: 5 September 2011

What happened

- GMF hosts the PFA's website 'Givemefootball' where fans vote for their favourite players to receive PFA Fan Awards.
- PU runs a digital gaming business where punters bet on sports events by mobile/pc.
- PU pays GMF £1 m for sole and exclusive right to be sponsor of PFA Fan Awards.
- For the fee, GMF also agrees to 'provide or procure targeted marketing opportunities and benefits to [PU]' including the following to be sent to 'opted-in recipients who are contained in databases owned or controlled by [GMF]':
 - 12 email shot programmes to be sent to email addresses of at least 1 m
 - Six SMS programmes to be sent to mobiles of at least 250k
- GMF warranted that all campaign recipients 'have provided [GMF] with prior notifications of their consent to receiving [DM] from [PU]'.
- Email and SMS campaign results not good.
- It turned out that GMF's own opted-in fans numbered:
 - 260k email addresses instead of 1 m
 - 39,450 mobile nos instead of 250k
- GMF bought in third party lists to make up the numbers
- Also query were all SMSs actually received?
- PU terminated for repudiatory breach and sued for repayment of £340k + damages

Givemeemailaddresses

The Verdict

- Essential purpose of agreement was to give PU access to commercial opportunities associated with the PFA Fans Awards.
- This + 'targeted marketing opportunity' wording meant that 'opted-in recipients' could only be those who had opted in via the GMF website, NOT data bought in from third parties.

- As PU didn't get exclusive rights in the third party data, this was inconsistent with 'sole and exclusive rights' grant.
- Databases 'owned or controlled' by GMF did not extend to bought-in lists.
- 'Sent to mobile devices' did not mean guaranteed delivery, but GMF must be able to show that messages were sent to actual mobile devices.
- The consent warranty (all campaign recipients have provided [GMF] with prior notifications of their consent to receiving [DM] from [PU]) meant consent must have been
 - provided direct to GMF not a third party and
 - to receive DM from PU or a class of which PU was a member
- GMF ordered to pay PU £393,251.14 plus costs

Proof of delivery

Why this matters

This judgement focuses on a number of areas of key importance to marketers, which to this author's knowledge have never before been considered in such depth by the English High Court.

The judgement is first instance of course and may be appealed, and inevitably there should be caution in regarding a court's finding on specific facts as henceforth Holy Writ on any particular issue.

However, the following points suggest themselves:

- to avoid future misunderstandings and potential dispute, any use in contracts of 'opted-in' to describe leads or prospects to be supplied as part of deliverables should be accompanied by more detail as to precisely what this means in context, for instance 'opted-in' to what exactly?;
- if an advertiser wants an SMS campaign provider to ensure that the SMSs are actually delivered to the mobiles in question, then more specific wording will be needed in the contract than 'SMS programmes to be sent to mobiles of at least X recipients';
- ESPs who want to be able to include contact details that have been bought in from third parties when fulfilling a contractual commitment to send a 'targeted' digital campaign to 'opted-in' recipients should ensure that the contract expressly allows them to do this;
- an obligation to use only lists 'owned or controlled' by the campaign provider is unlikely to allow the provider to use bought in third party lists in which they have only non-exclusive rights.

Defining 'opted-in'

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