

WASPA appeals panel
Complaint 10486

REPORT OF THE APPEALS PANEL

Date: 30 July 2011

Service Provider: Buongiorno South Africa

Appellant and Service Provider (SP): Buongiorno South Africa

Complaint Number: 10486

Applicable versions: 8.0

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 09 September 2010 for an unsubscribed request against Buongiorno South Africa, a Service Provider (SP).

1.2 The SP is a member of WASPA.

1.3 The complaint relates to an unrequested subscription.

1.4 The complaints, the findings of the Adjudicator, the SP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

2. CLAUSES OF THE CODE CONSIDERED

2.1 The following clauses of the Code were considered:

2.1.1 Section 11.1 Manner of Subscription

2.1.1.1 Section 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 a request for a specific content item and may not be an entry into a competition or quiz.

2.1.2 Section 11.2 Reminder messages

2.1.2.1 Section 11.2.1. A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR (Please note that this extract is a verbatim copy of part of the Adjudicator's Report)

3.1 Whilst I cannot infer that the absence of content downloads on the part of the complainant (as represented in the complainant's itemised billing) indicates that the complainant did not subscribe to the service, I can infer that the complainant had no interest in the service.

3.2 Read with the numerous complaints against the SP, however, I call into question the subscription process used by the SP and, find that the complainant did not subscribe to the service notwithstanding the records produced by the SP.

3.3I find, in respect of the logs produced by the SP that no reminder message was sent to the complainant in June in direct contravention of 11.5.1 [sic] (11.2.1 – *own insertion*). The delivery of the reminder message in April reads as an error message and I abstain from a pronouncement in respect of actual delivery of such message. I further view the failure of the SP's systems to adequately address the requirements of the WASPA Code of Conduct discouraging...

3.4 Sanctions imposed

3.4.1 The SP is:

3.4.2 Fined the sum of R 30 000.00 payable to WASPA Secretariat within five (5) days of the date of notification of this Adjudication;

3.4.3 Ordered to take immediate steps to ensure that the complainant is refunded in full; and in any event confirm in writing to the WASPA Secretariat that it has done so within five (5) days of the date of notification of this Adjudication; and

3.4.4 The SP shall ensure that all reminder messages are sent to the SP's customers in compliance with the requirements of the current Code of Conduct.

3.4.5 Further, the WASPA Secretariat is to instruct the WASPA Monitor to investigate and report to the Secretariat regarding the accuracy of the logs produced by the SP in this complaint. In this regard, the SP shall:

3.4.5.1 Provide the WASPA Monitor with access to all logs and information necessary for the WASPA Monitor to determine to the Monitor's satisfaction the accuracy of the logs produced by the SP in this complaint.

4. **GROUND OF APPEAL**

4.1 Grounds of appeal for complaint 10486

4.1.1 Attorneys DLA Cliffe, Dekker, Hofmeyr, on behalf of the Appellant submitted detailed grounds of complaint which will not be recanvassed in full here.

4.1.2 It summarised its appeal as resting on:

A procedural flaw; and

An incorrect finding on the merits.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 The Adjudicator applied Version 10.0 of the Code.

5.1.2 The Appellant has objected to this.

5.1.3 The relevant date is 09 September 2010, when the unsubscribe request was lodged, and the alleged breach occurred over the February to August period of 2010.

5.1.4 **Version 8.0 of the Code, in use from October 2009 to 31 March 2010, therefore applies.**

5.1.5 Although an oversight and administrative error, this Panel is unable to pick up any potential prejudice from the error.

5.1.6 This having been said, any potential prejudice would in any event now be addressed by the Panel applying the correct version of the Code.

5.2 Decision

5.2.1 The Appellant raised various aspects in its appeal ranging from procedural irregularity to wrongful reasoning.

5.2.2 The Appellant also raised the issue of not being afforded the opportunity to review the Complainant's logs and therefore claimed that its rights to be heard and treated fairly in the process were infringed.

5.2.3 It is not the intention of this Panel to make a finding on the extent to which the provisions of PAJA and the rules of natural justice are applicable to the WASPA process.

5.2.4 However this Panel does not believe that the provision of logs from the Complainant in this matter should have provided any additional substance as to what was already confirmed by the logs provided by the Appellant in this matter.

5.2.5 If in fact, it only raised proof of the subscription.

5.2.6 The Panel is therefore of the opinion that access to the logs by the Appellant would not have triggered the Appellant to alter its initial response to the formal complaint and therefore did not prejudice the SP from a procedural perspective.

5.2.7 Although it substantiates the fact that the Complainant did not utilise the service, it most definitely does not prove that the Complainant did not initiate subscription – referenced herein as paragraph 3.1.

5.2.8 The Panel therefore finds it unreasonable that the Adjudicator in this matter, used this exact point at issue to substantiate the claim of the Complainant - referenced herein as paragraph 3.2 – contrary to its finding in paragraph 3.1.

5.2.9 This Panel therefore agrees that the Adjudicator failed in its reasoning but at the same time, is not of the opinion that the Appellant complied in its methods of subscribing consumers.

5.2.10 The question that the Panel has to ask is how it has occurred that the complainant appears to have subscribed to the service, but remains totally adamant that she did not.

5.2.11 After careful analysis of the webpage provided by the SP in its formal response, the Panel is of the opinion that this is where the problem arises. The first page simply offers particular song content, saying, 'NOW YOU CAN ALSO CHOOSE YOUR FAVOURITE SONG', and providing a space for the cell number.

5.2.12 The next page asks for the pin confirmation. This aspect is highlighted, and says “THE CONTENT IS ABOUT TO BE YOURS”. In small print at the top of the page it refers to “subscription service” and again in small print below the pin confirmation block. The question of whether a reasonable person would have noticed the link to the subscription service is academic, as Clause 11.1.2 is unambiguous in that a subscription service cannot be linked to a request for a specific content item. The Panel believes that this is the source of the complainant’s confusion.

5.2.13 There was a definite breach of clause 11.1.2 which states that 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 a request for a specific content item and may not be an entry into a competition or quiz.

5.2.14 With regard to reminder messages, the Appellant concurred that it failed to deliver same in June, which is a breach of section 11.2.1.

6. The finding of the Appeals Panel is:

- 6.1 The Adjudicator’s decision is amended by way of reasoning to reflect a breach of sections 11.1.2 and 11.2.1.
- 6.2 This Panel is of the opinion that the sanctions are reasonable and are similarly ruled to be upheld.
- 6.3 Due to the number of complaints the Panel does also feel it justified that the Appellant’s logs and processes must be tested and verified as per the original sanction.

The cost of appeal is non-refundable.