

WASPA appeals panel
Complaint 10787

REPORT OF THE APPEALS PANEL

Date: 5 March 2012

Service Provider: Buongiorno SA

Appellant and Information Provider (IP): n/a

Complaint Number: 10787

Applicable versions: 9

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a unsubscribe request lodged on 21 July 2010, by an individual against Buongiorno.

1.2 The complaint relate to subscription services, which the complainant denies subscribing to. The adjudicator's decision revolves around breaches of clause 11.1.2 of the WASPA Code of Conduct (Code) which seeks to prevent "bundling" of content with a subscription service.

1.3 The complaints, the findings of the Adjudicator, the IP'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 appeal relates to alleged breaches of section 11.1.2 of the Code, which reads:

2.1.1 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.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

The Adjudicator stated: “While the SP appears to have complied with the Code’s requirements for messages sent to prospective and new subscribers to its service, its initial offering as depicted in the SP’s response to the complaint remains problematic in that it is ostensibly an offer for a single content item which disguises the service’s true nature: a subscription service. In this particular case, the enticement to subscribe is, itself, in violation of the Code (sections 11.2.1 and 11.2.2 in particular), even as the process followed after the Complainant became a subscriber appears to be compliant.

The Complainant was faced with an offer to download a song and he likely supplied his phone number and responded to the subsequent message in order to obtain the song. The messages the Complainant received from the SP as part of his subscription process indicated the subscription nature of the service and afforded the Complainant an opportunity to unsubscribe. He only did so approximately a month and a half after subscribing to the service despite receiving at least two messages with instructions on how to unsubscribe on 2010-06-08 (the day he became a subscriber) and on 2010-07-13.

That said, the manner in which the SP enticed the Complainant is in violation of the Code for the reasons I stated above. This form of violation is becoming a cliché and is unfortunately not uncommon.”

3.2 Sanctions

The following “sanctions” were given:

Given my finding that the Complainant was reasonably made aware of the service's subscription nature, notwithstanding the service's violation of the Code, and the Complainant's failure to take reasonable steps to unsubscribe from the service on more than one occasion, I dismiss the complaint.

On the other hand, the service is in violation of the Code and the SP is ordered to immediately cease all instances of the service as well as variations of the service which entice prospective subscribers through offers of single content items which are not clearly and explicitly identified as being part of a subscription service. It is not sufficient to mention that a subscription service exists without explicitly linking the subscription nature of the service to the content items on offer through the service. Prospective subscribers must be reasonably aware that, furnishing their phone number and requesting a content item download, they are opting into a subscription service.

4. GROUNDS OF APPEAL

4.1 Grounds of appeal for complaint 10787

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 3 legs:

- A procedural irregularity
- An incorrect finding on the merits
- That the sanction was "grossly unreasonable"

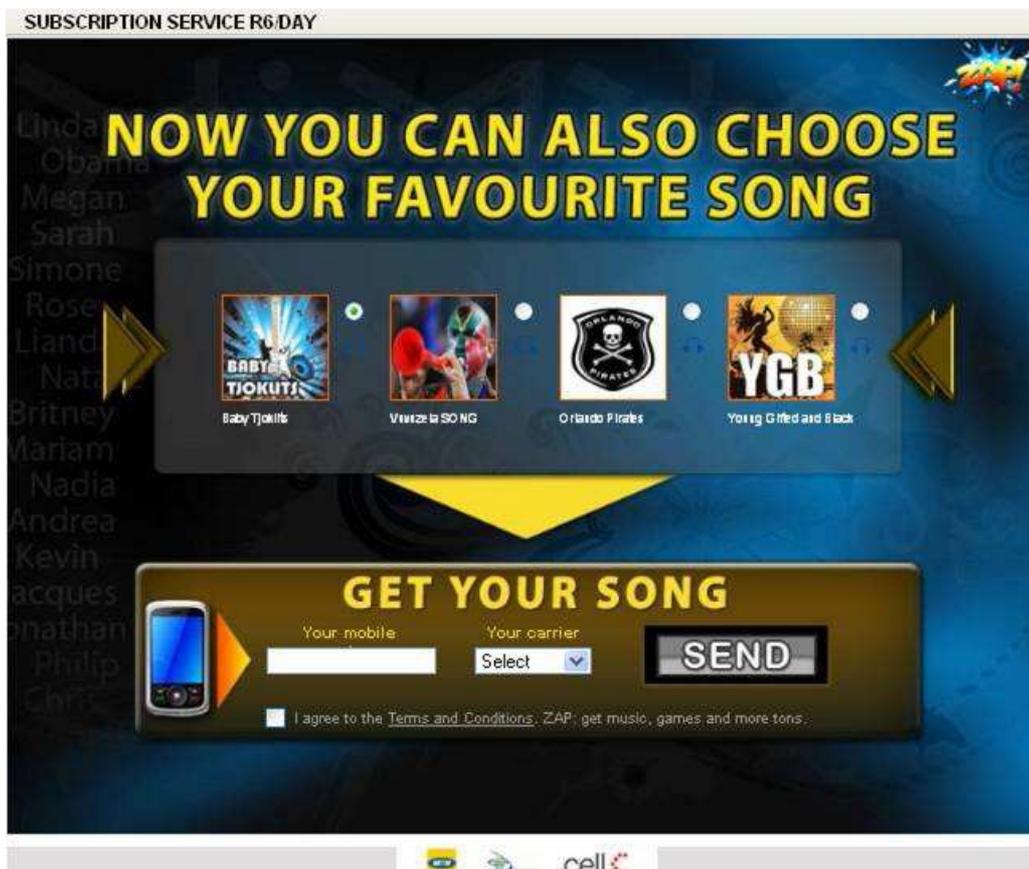
5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 Version 9.0 of the Code, in use from 31 March 2010 to 13 October 2010, applies.

5.2 Finding

- 5.2.1 The Appellant indicated that it believed there was a procedural irregularity, and gave a detailed legal discourse on the nature of natural justice. However, it failed to actually identify in what respect the decision was flawed.
- 5.2.2 We are therefore unable to consider this aspect of the appeal.
- 5.2.3 The appeal on the merits is based on the submission that the landing page clearly “illustrates the fact that the service is a subscription service”.
- 5.2.4 This is the landing page in question



Subscription service: ZAP. By entering the PIN that was sent to your cellphone you will be entered into ZAP subscription service, and you acknowledge that you are subscribing to the service. This subscription service is available to MTN, Vodacom and Cell C users. You will be billed R6 every day. You will receive a WAP link in your welcome messages. By clicking on the WAP link you will be able to download unlimited items for your phone. These items are not charged for separately from your daily subscription fee. Download charges apply and standard text messaging rates may apply. The shown item(s) form(s) part of the subscription service and is/are indicative of the content items that will be received. You may stop this subscription service at any time by sending a text message with the words STOP FUN to 38080. You must be the owner of the device or you need to acquire the bill payers permission to join this subscription service. For help call 0214178001. Your cellphone handset must be WAP enabled to download the products. You will have the option to download as

5.2.5 This is followed by a page that looks as follows:



- 5.2.6 The reference to a subscription service appears once, at the top of the page, and appears to have no relation to the offering.
- 5.2.7 Indeed, the Panel can think of no more “classic” example of a breach of Clause 11.1.2 – the consumer thinks that they are going to “get your song” as offered by the first page, and that “the content is about to be yours” as offered by the second page.
- 5.2.8 The mention of subscription is in no way linked to this offer of content. It is entirely foreseeable that a consumer would complete this process and be most surprised to find themselves subscribed to a regular service.

5.2.9 **The Panel therefore finds that this is an overt and flagrant breach of Clause 11.1.2.**

5.2.10 We agree with the Adjudicator too that the complainant should, on receiving the compliant welcome messages, have realised that an error had occurred and immediately unsubscribed. The blame for the subsequent charges therefore does rest somewhat on the complainant's shoulders.

5.2.11 This having been said, we find that the Adjudicator attached too much weight to this failure on the complainant's part in the face of such a flagrant breach of Clause 11.1.2.

5.2.12 **We therefore order the Appellant to refund the complainant all charges relating to this service.**

We are most sorely tempted to impose a punitive sanction in addition to this refund. There are many cases where advertisers have been severely sanctioned for lesser transgressions of this clause. **However, we will content ourselves with a warning that any future breaches of this nature will be regarded most severely by this panel.** In this respect, we uphold the comments of the Adjudicator that, "the SP is ordered to immediately cease all instances of the service as well as variations of the service which entice prospective subscribers through offers of single content items which are not clearly and explicitly identified as being part of a subscription service. It is not sufficient to mention that a subscription service exists without explicitly linking the subscription nature of the service to the content items on offer through the service. Prospective subscribers must be reasonably aware that, furnishing their phone number and requesting a content item download, they are opting into a subscription service."

5.2.13 The cost of appeal is non-refundable.