

WASPA appeals panel
Complaint 11040

REPORT OF THE APPEALS PANEL

Date: 13 December 2011

Service Provider: Buongiorno SA

Appellant and Information Provider (IP): n/a

Complaint Number: 11040

Applicable versions: 6.2

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a subscription service. The relevant advertisement ran on 7 January 2009, and the complaint was lodged on 5 November 2010, by an individual against Buongiorno.

1.2 The complaint relate to an advertisement for subscription services and the question of whether the advertisement clearly showed that the advertised service was in fact 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 the following sections:

11.2.1. Customers may not be automatically subscribed to a subscription service as a

result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

• 11.2.2. 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.

• 11.2.4. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

The Adjudicator stated: “In this particular case, the service has infringed sections 11.2.1 and 11.2.2 of the Code in that -

- The Complainant’s daughter accessed the service under an apparent perception of the service as a single item and non-subscription content download service, with the apparent intention to download a song, rather than to subscribe to a content service. She further misunderstood the nature of the service and lacked a specific intention to subscribe to it. The service therefore violates section 11.2.2 of the Code.

- The service ostensibly linked requests to download single content items with a subscription service with the result that a person requesting a content item download will become a subscriber as a result of that request. This subscription mechanism falls foul of section 11.2.1 of the Code.

In addition to the above grounds, the SP does not appear to have taken steps to ensure that the Complainant’s daughter has consent from her father, the Complainant, to subscribe to the service. Given the nature of the content on offer and its likely intended market, the SP should have taken further steps to address this issue as well as the likelihood of non-English speaking viewers looking to access the service based on their overall impression of that service. In this case, that overall impression was not of the service as a subscription service..”

3.2 Sanctions

The following sanctions were given:

“The service is in violation of the Code and the Advertising Rules 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 items on offer through the service. Prospective subscribers must be reasonably aware that, furnishing their phone number and requesting the item on offer, they are opting into a subscription service. The SP is required to withdraw the Web pages intended to promote the service from public view until such time as they are compliant with the Code’s requirements as stated above.

In respect of the Complainant and his complaint, the SP is ordered to -

- send a reminder message to all current subscribers of the service that forms the subject matter of this complaint in the format specified in section 11.6 of the current version of the Code no later than 48 hours after being notified of my findings;
- refund all charges levied against the Complainant’s account for the period of her subscription to the extent such an order is feasible in the WASPA Secretariat’s opinion.”

4. **GROUNDS OF APPEAL**

4.1 Grounds of appeal for complaint 11040

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 One of the procedural irregularities raised by the Appellant relates to the version of the Code. The Adjudicator applied version 10 of the Code, while the Appellant alleges that the correct version is 6.2, being the version that was in use on the date of the advertisement.
- 5.1.2 Version 6.2 of the Code, in use from 14 August 2008 to 25 March 2009, indeed applies.
- 5.1.3 In so far as there are variations in the wording of the relevant sections, we will apply version 6.2. We note that the Appellant has addressed itself to this version. In addition, we are not convinced that the finding was influenced by the additional wording found in Version 10.
- 5.1.4 We are therefore satisfied that any potential inequity in this matter being addressed on the wrong version of the Code are now addressed.

5.2 Finding

- 5.2.1 The matter before the Panel is, despite the best efforts of the Appellant's attorneys, in fact a very simple one.
- 5.2.2 The Complainant bought her minor, non-English speaking daughter a cell phone contract. The daughter, whether deliberately or by mistake, subscribed to the Fun Club service.
- 5.2.3 It is not disputed that reminder and confirmation messages were sent. The Complainant and her daughter chose to ignore these.
- 5.2.4 It is the opinion of this Panel that when a parent chooses to give a minor child unrestricted access to a cell phone, they take on a certain risk. How they manage this risk is entirely their business, but the service providers in this industry cannot be expected to operate on the presumption that every cell phone is operated by a minor who is not supervised.

- 5.2.5 The decision of the Complainant and her daughter to ignore reminder messages is not the fault of the Appellant. The Complainant submitted that one often receives such messages and ignores them – we would advise the Complainant to take all such messages, if in the compliant format, seriously as she may in fact be subscribed to other services.
- 5.2.6 We also find it somewhat extraordinary that it took over a year to notice the subscription which must have amounted to about R300 a month. In addition, the daughter was presumably receiving content during this time. This should have raised her and the Complainant’s suspicions that the reminder messages were genuine.
- 5.2.7 **Given the above, the only question for us is whether the original advertisement for the service made it sufficiently clear that the service was a subscription service. In other words, this matter is a straight forward application of Clause 11.2.2 of Version 6.2 of the Code.**
- 5.2.8 Clause 11.2.2 reads, “Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing a service. A request from a subscriber to join a subscription service may not be a request for a specific content item.”
- 5.2.9 In other words, by responding to a specific content offer, the customer must not be lured into the subscription service. Because of this, the subscription service must be offered separately.
- 5.2.10 The relevant screen shot of the television commercial is:



- 5.2.11 We do not agree with the Adjudicator that this creates the impression of a single content download. There are several reasons for this:

- There are 6 content items listed on the screen. The service is therefore clearly not a single content service.
- The advertisement clearly contains the words “R10 per day” and “Subscription service”. We understand that the child in question is not a first language English speaker. However, anybody who understands the words “sms HOT 31194” sufficiently to follow directions can also understand the words “R10 per day”.

5.2.12 We have some sympathy for the Complainant, but unfortunately we believe that her plight is the result of her decision to allow her daughter unmonitored access to a cell phone contract, unmonitored viewing of television and her decision not to monitor the bill.

5.2.13 **We do not believe that the behaviour of the Appellant was responsible for the situation, and we more specifically do not find that there was a breach of Clause 11.2.2. The Adjudicator’s decision is overturned.**

5.2.14 The cost of appeal is refundable.