

WASPA Member (SP)	Buorngiorno
Information Provider (IP)	Blinck Mobile
Service Type	Various Irregularities
Source of Complaint	Phillip Bateman
Complaint Number	#4463
Code of Conduct Version	5.7
Date of Adjudication	20/08/2008

Complaint

The Complainant in this matter lodged the following complaint:

"I wish to complain in the strongest terms about a host of debits from yourselves put on to my Vodacom account. (102231445-8).

This is under "Content services" and the amount is R228.05. The dates are between 1.5.2008 and 30.5.2008. There are many debits for R8.77 for 'blink' on Mira Networks and worse still, three debits of R26.32 for "Loadin subscriptions" on Buongiorno. These are totally irregular and I am NOT prepared to pay for these.

Vodacom has denied responsibility and says that you are responsible as you no doubt received money from them for this.

On investigation it appears my young daughter watched a TV ad which spoke about FREE screen savers. She apparently did as the ad instructed on the understanding that the service was free. I STRESS THAT THE SERVICE WAS ADVERTISED AS FREE AND MY DAUGHTER WAS CERTAINLY UNDER THE IMPRESSION THAT THIS WAS SO.

This is obviously not the case.

I hereby demand a refund on the basis that:

1. The advertising was misleading and did not cater for the gullibility of a youngster. (She is 12). She was led to believe there was no charge. This is disgusting.

2. There is no contract as she is under age and did not have the capacity to contract. No parental permission was granted.
3. You did not establish whether my daughter had the means to service this alleged 'contract'.
4. No terms and conditions were specified or communicated either to her or the account holder. For instance she had no idea of the length of the so-called 'subscription' or cost.
5. It is possible that the subscriptions (for what?) are triplicated as the amounts are the same.
6. As the service was not expected or ordered one has a common law right to cancel the sale.
7. The terms and conditions were not available to the subscriber - mainly myself - nor the user. Where is the contract?

Please answer within 4 working days and provide a refund for R228.05 immediately. I also demand a refund for any further such debits which I have not as yet been informed about.

If you do not do so within the stipulated time, then I shall be compelled to:

1. Lay a complaint with the Department of Trade and Industries for misleading advertising and a contravention of various acts that pertain to this. These provide for criminal sanctions.
2. Lay a complaint with the ASA for misleading advertising, moreover directed at children.
3. Provide my consumer journalist colleagues with a copy of this complaint for publication in the public interest.

This type of advertising directed at minors is outrageous.”

The Complainant was then offered a refund but continued his complaint by stating the following:

“I recently approached you with details of numerous debits made to my cell phone account #####.

These were unauthorised, inter alia, for the following reasons:

1. The user was under age.
2. The terms and conditions were not expressed nor agreed to.
3. The unauthorised debits were non-compliant with legislation.

Since then it emerged that Buorngiorno triplicated the so-called subscription fees.

The debits in favour of Mira and Buorngiorno amounted to about R228.

Since then I have been contacted by both suppliers who are refunding part of the fees in each case.

Mira R90
Buongiorno R60.

As this is far below the amount demanded I therefore place on record that the complaint has not been resolved.

Should the full fees not be refunded within 5 working days then the matter will be taken further.

Please confirm that the full debits will be refunded immediately.”

SP Response Background

Initially it was indicated that MIRA Networks was responsible for some of the content delivered. MIRA Networks has however clarified the position and indicated that Blinck Mobile was the responsible party. MIRA also explained that the refund was never made by them and that this probably originated from Blinck Mobile. MIRA Networks however took it upon itself to submit the complainant's mobile logs to WASPA. To MIRA's knowledge there were two subscriptions to Blinck. The Secretariat decided that MIRA should be withdrawn from the Complaint as a respondent and that Blinck Mobile should be added. No response was however received from Blinck Mobile.

SP (Buorngiorno) Response

The SP's response is here reproduced in full:

“Due to the fact that we only have access to 6 months data immediately, we had to request the data from storage in Italy hence the lateness of the reply which now has been escalated from the Unsubscribe System.

On the 4th of August 2007 at 10:16, the keyword ‘go’ was texted to the short code ‘30123’ from MSISDN number. A few seconds later, a WAP message was delivered to the MSISDN: **“Hi! U’re a member of LOADIN! Click here 4 Entertainment Anytime!”**. Shortly thereafter, a normal SMS message was delivered to the MSISDN: **“Welcome 2 LOADIN! Entertainment Anytime! 60 downloads 4 ur fone monthly! Help:0822327400 [R30/month Subscription.2 end sms stop loadin to 30123]”**. 8 minutes later, another SMS was delivered to the MSISDN: **“LOADIN. We sent you a link to our WAP site where you can download ur 60 items. Trouble accessing? Contact Vodacom on 111 to request WAP settings”**. On the same day, a reminder message was sent: **“Reminder: you are a member of LOADIN!. R30 per month for 60 COOL downloads! You are entered into monthly PLASMA TV draw! 0822803333 (VAS rates)”**. If the complainant peruses the itemized billing of MSISDN +27827768866 for the period August / September 2007, it can be verified that the initiating subscription SMS was sent on the 4th of August 2007.

By sending in that keyword to that specific short code, the MSISDN is subscribed to the Loadin Service. The Loadin Service is a subscription service that allows the subscriber to download 60 pieces of content (wallpapers, ringtones, java games, etc) from the Loadin WAP site. The first month has no charge.

The first month free allows the subscriber to “test-drive” the service and if the subscriber is not interested in the service, a simple sms with the words STOP is sent to the short code 30123. If no unsubscription occurs during that free month, the subscription fee (paid in advance) is applicable.

On the 24th of October 2007 at 15:09:30, the Loadin Service WAP site was accessed using a Samsung e340 handset. If the complainant peruses the itemized billing for the period October / November 2007, it can be verified that there are WAP charges for the 24th of October 2007 at the time mentioned.

The Loadin Service television advertisement at the time of subscription, displayed the following information:

**SMS GO to 30123 (First month FREE, then R30 per month)
Helpline: 082 280 3333 (VAS Rates Apply) This subscription service is charged at R1 per day.
To unsubscribe, SMS STOP LOADIN to 30123 (free SMS) Please note that you require a WAP enabled handset to make use of the Loadin Service.
E&OE. We regret no refunds.
Loadin may contact you with special offers.”**

The SP then provided a detailed log and continued with the following explanation:

“No STOP was sent in to the short code ‘30123’ between the free period (4th of August 2007 - 3rd of September 2007) from the MSISDN.

On the 21st of May 2008 at 07:52:14 and again on the 26th of May 2008 at 23:23:10, R30 was billed twice to the MSISDN in error. During this period, a modification was done to the service which caused 37,657 subscribers to be billed. The person who caused this has been reprimanded. These affected subscribers are being contacted telephonically one by one to arrange for a refund. No billing occurred on the 2nd of June 2008 as it was given as a free month due to the incorrect billing the previous month.

Therefore, until the MSISDN was unsubscribed from the Loadin Service on the 16th of June 2008 at 08:44:40 by one of our Customer Care Agents, the following billing occurred:

- 03.09.2007 – R 30.00 [correctly billed]
- 04.10.2007 – R 30.00 [correctly billed]
- 04.11.2007 – R 30.00 [correctly billed]
- 03.01.2008 – R 30.00 [correctly billed]
- 02.02.2008 – R 30.00 [correctly billed]
- 03.03.2008 – R 30.00 [correctly billed]
- 02.04.2008 – R 30.00 [correctly billed]
- 02.05.2008 – R 30.00 [**correctly billed - to be refunded**]
- 21.05.2008 – R 30.00 [**incorrectly billed – to be refunded**]
- 26.05.2008 – R 30.00 [**incorrectly billed – to be refunded**]
- 02.06.2008 – R 0.00 [**free month given due to incorrect billing previous month**]

Upon contacting the complainant on the 23rd of June 2008, Yandi was given an alternative number to contact: A message was left.

Today, Yandi again called the number, no answer but a message was left. Yandi then called another number and spoke to the complainants wife, Mrs. Caroline Bateman. Mrs. Bateman was informed of the refund that will be processed by our Finance Department on Friday. Mrs. Bateman stated that she would inform her husband of the refund.”

Sections of the Code considered

Without the Complainant specifying which sections of the Code were breached, the Adjudicator, after reviewing the Complaint, considered the following sections of version 5.7 of the Code of Conduct:

2.8. “Children’s services” are those which, either wholly or in part, are aimed at, or would reasonably be expected to be particularly attractive to children.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

7.2.1. Children’s services must not contain anything that is likely to result in harm to children or which exploits their credulity, lack of experience or sense of loyalty.

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.

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

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. In this matter the Adjudicator has ascertained that the SP named MIRA Networks has had no involvement in this matter and is therefore found to be wrongfully identified as a respondent. Buorngiorno was identified as the SP and Blinck Mobile as the IP. No response however was received from the IP in this matter.

The Adjudicator has reviewed the response from this SP. Although the SP has complied with most aspects of the WASPA Code associated with services particularly related to subscriptions, the SP has failed to provide the Adjudicator with any proof that the services were not indeed children services, or services aimed at children. The Code clearly stipulates that children services are those services which, either wholly or in part, are aimed at, or **would reasonably be expected to be particularly attractive to children**. Wallpapers that are advertised as free and might seem attractive to children might validate the assumption that such services are indeed aimed at children and could be rendered as an exploitation of such a child’s credulity, therefore, due to the child’s lack of experience, misleading the child into unknowingly subscribing to a service due to the use of the word “free”. Concomitantly members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission. From a child’s perspective this proved to be the case and the Adjudicator finds the SP in breach of section 7.2.1 read with section 4.1.2.

However, the SP in this matter did follow procedures in following protocol by subsequently sending various reminders to the user that she was indeed

subscribed. Notwithstanding this fact, the SP failed in complying with section 11.1.6 where members are reminded to ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so. The SP did not provide any proof that this was indeed the case and the Adjudicator is of the opinion that there was a clear breach of this section.

Parents however who allow their children access to any form of technology that is coupled with the media, whether it is TV, Internet or Mobile Services do carry a strong sense of responsibility when providing such children with access. Although this onus can't be fully placed on the shoulders of the parents, their ability to assess monthly accounts should be able to raise alarms if any inconsistencies surface which are out of the ordinary. In this matter it is rather unique that the Complainant only picked up on this at such a late stage. Having that being said, SPs and IPs alike need to carry a bigger responsibility in assuring that its services are not rendered to the public in such a way that the innocence of children are exploited. With any form of subscription service, or any services that have age restrictions, age verification systems or procedures must be followed.

The Complaint is upheld.

In determining sanctions against Buorngiorno the following factors are considered:

- The prior record of Buorngiorno with regard to breaches of the various sections of the WASPA Code of Conduct; and
- The actions taken on behalf of the client.

Buorngiorno is fined R 20 000,00. This fine is payable to the WASPA Secretariat within five (5) days of notification hereof. Buorngiorno is also ordered to refund the Complainant 100% for content downloaded within five (5) days of notification hereof.

In determining sanctions against Blink Mobile the following factors were considered:

- Its failure to respond and ill-regard of the process

Blink Mobile is fined R 30 000.00. This fine is payable to the WASPA Secretariat within five (5) days of notification hereof. Buorngiorno is also ordered to refund the Complainant 100% for content downloaded within five (5) days of notification hereof.
