



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	iTouch / Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Subscription Service
Complainants:	Peter John Stevens
Complaint Number:	6105
Code Version:	6.2 / 7.0
Advertising Rules Version:	2.3

Complaint

In the initial complaint The Complainant stated the following:

“I find with horror that Vodacom has charged me for your service from 18th January 2009 called Buongiorno or some such and then it changed to iTouch, neither of whom I have subscribed to as I do not have a clue as to who they are. Please reverse these charges immediately and credit my Vodacom account XXXXXXXX Acc. I04XXXXX. This should present no problem to you as you were very adapt at debiting it without my permission.

This is to include all debits from the 18th January 2009 up to today when all further debits will be cancelled.

And as I did not receive a reply but saw a message on my phone on the 18th March 2009 and was now wise to the situation, so sent another SMS Stop Fun and sent another mail on the 19th March 2009, again not receiving a reply.”

After a week’s time the Complainant wrote:

“It is a week now and I have not had the courtesy of a reply or confirmation of the crediting of my account. Please respond immediately. Then as I was not getting any satisfaction I found your telephone number and asked for the office address and consequently met with Craig on the 24th March 2009 and explained the situation to him.

I find the whole exercise very sneaky and an underhand way of stealing money from gullible people without them knowing what they have done, and in not answering my mail or even stopping the subscription on the 9th March 2009 as requested makes your company even more culpable of the

theft.

Stating that you are a full member of WASPA does not absolve you, when you stick to the guidelines but do not observe the spirit of legislation when you skate on such thin ice.

Please immediately credit my Vodacom account with all the debits taken and confirm to me in writing that it has been done.”

After the SP's reply the Complainant wrote the following:

“Unfortunately, Yandiswa I find it totally unacceptable and demand the repayment of all sums taken from my Vodacom account, which effectively were taken from my account without my written permission, a matter I will also take up with Vodacom directly. I remember the Brain Age popping up on my computer and out of idle curiosity filled it in but nothing happened, so being somewhat naïve in these matters I filled it in again and still nothing happened so I closed it off and thought no more about it.

As I explained to Craig my cell-phone is only used for business purposes and any advertising or offers that pop up on it I immediately delete without even reading them and that is probably what happened in your case and it only came to my attention when I received my Vodacom invoice which was unusually high. On checking with Vodacom they told me it was a subscription service I had subscribed to and as I had not subscribed to any service on my cell phone I blew my top with them and asked how they could debit my account without my written permission, for a service I did not even order. The supervisor said they would cancel it and also sent me an SMS saying I must take it up with iTouch and gave me the e-mail address and also the SMS number for cancelling, which I duly sent Stop Fun on 9th March 2009 as listed on my sent items on my phone. I wrote an e-mail to you on the 12th March 2009 to claim my money back and ensure the service was cancelled.”

As an answer to the SP's second response in their correspondence the Complainant stated the following:

“Dear Yandiswa:

1. You miss the point entirely. It is perfectly plain to anyone that I did not have a clue what was happening between the computer and my phone until I saw my bill and then I reacted fast, cancelling the subscription on the 9th March 2009 (not the 18th March 2009 as stated in your letter, proof is on my phone!) but if your company thinks that it is ethical to take advantage of my misunderstanding (not once having used the service being paid for because I did not know I had it) and can justify it by saying “We have abided by the WASPA rules if (sic) conduct.” Then you have just legalised blatant theft which seems to be the trend in this country nowadays.

2. I asked a younger colleague of mine, 58 yrs old, to read the Brain Age puzzle all the way through and not once did he pick up the subscription service line as neither did I, particularly as I am colour blind, with reds greens and blues, so find it very hard to pick up the

writing. But that does not worry your company because you have abided by the WASPA rules to the letter but not in the spirit of why they were drafted! They were drafted to protect old codgers like me who make mistakes and clearly did not mean to subscribe.

When speaking to Craig I did warn him that the last time I got annoyed like this the Spur and Black Steer groups had to change their menu's at great cost because of false advertising and I feel inclined to follow this up too and believe me it will cost you a lot more than it has me!

If you still feel inclined to hide behind WASPA and not refund me then I do not expect to see any debits after the 9th March 2009."

In its final response the Complainant wrote:

"Thank you for the message. They have observed the letter of the code of conduct but there is no allowance for mistakes being made and the rectification thereof. They effectively plundered my Vodacom account without me finding out until I received my account and wondered why it was so high. I had no idea by finding out my brain age that I was agreeing to a subscription service. I understand that there are complaints every day about this veiled theft and I would like to redesign the page so that no-one could have any doubt that they were subscribing to a paying service because at the moment it is very effectively camouflaged. If the adjudicator is only judging on the letter of the code rather than the spirit then I can see I am going to have to take this further as it is unethical in the basest form."

Service provider's response

In its initial correspondence with the Complainant the SP states the following:

"This is a Fun Club page that is created by our online advertising agency and is served on a variety of South African websites.

As a full member of WASPA we pride ourselves in remaining above board without misleading our customers.

As can be seen in the WASPA code of conduct, clause 3.1.1:

3.1.1: Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

On all our pages we have included the text "subscription service R10/day" and the full terms and conditions. In the terms on conditions it instructs the user how to unsubscribe to the service.

Below it can be seen (blocked in red) that it is mentioned 3 times on the advertising landing page that it is a subscription service and that it is billed at R10/day. It is Arial font as to ensure clarity on a website. This information is also on every page in the process of the subscription.

Top banner on the landing page Terms and Conditions:

Below are screenshots of the entire process that the user would have take part in, before being subscribed.

1. The banners that the user sees.

1. They enter their age and the number of hours that they sleep.

2. They get a banner that says, the result is on your mobile.

The user is not subscribed at this stage and is sent to our web splash page.

3. On the splash page we have that it is a subscription service with terms and conditions. We are now trying to make the advertising space smaller so that all users don't have to scroll. Currently some users, depending on their screen will have to scroll to see the full T&C's. Still at this point the customer isn't subscribed.

1. After the user has entered in his phone number he is sent a pin number to his phone. Still on screen is the subscription service caption and the terms and conditions.

At this stage the user has still not been subscribed to the service. On this screen the game can be seen in the corner. The game comes to the front of the page and is enlarged. The user has to enter the pin number that is sent from his / her phone before he / she can be subscribed to the service.

2. We give the user his / her brain age results and then notify them that with the brain trainer they can calculate their own brain age. This page is being modified to say "WELCOME TO FUN CLUB. At this point the user is subscribed and received his welcome message, the brain age game and the link to the web site. Based on the above mention we do not feel that we are in breach of any clauses of the code of conduct. We have no intention on misleading the public in any way and therefore give the customer all necessary details on the subscription, including a website where full terms and conditions are available (as seen in the terms and conditions outlined below). Full terms and conditions are available on both the website and website with the call centre number is if he | she wishes to unsubscribe or find out more information.

The banner on the top of the advert as well as the terms and conditions are included on every page of the subscription as can be seen below. This ensures that the customer is aware through the entire process on any information that they may require. Upon subscription the customer is sent a welcome message stating that they are part of the FUN CLUB and how to unsubscribe, what the billing is as well as the call centre number.

After the welcome message they are sent the web link to download content where it states in the terms and conditions and frequently asked questions on the web site what the billing is and that it is a subscription service and how to unsubscribe. This welcome message is as below:

"welcome to the Fun Club! U get unlimited game, tones, vids & more! Start Downloading now! Help: 0214178001 (R10/day subscription service. Sms STOP FUN to 31194 to end)

Please be advised that your subscription has been cancelled as per your sms request on 18th March 2009.

Below please see a screenshot with the welcoming message that was sent to your mobile number, xxxxxxxxxx on the day of subscription, 2008/01/18:

Also below please find reminders that were sent to your mobile number, xxxxxxxxxxx, for the month of February 2009.

Also below please find reminders that were sent to your mobile number, xxxxxxxxxxx, for the month of March 2009. Also by looking at the screenshot below you will see the sms sent from your number, xxxxxxxxxxx on the 18th March 2009 to unsubscribe from our service, Fun Club.

Please note that all messages i.e.: welcoming messages and reminder messages were delivered to your mobile number, xxxxxxxxxxx. It is for this reason that we unfortunately cannot issue a refund.”

In its final response to the Complainant the SP wrote:

“Thank you for your email and please accept my apologies for late response. Mr. Stevens I have escalated the issue of a refund and unfortunately we cannot offer you a refund because:

3. Your number was entered onto the “Calculate your Brain age game via internet.
4. We have did advise you of the subscription via a welcoming message delivered to your number via sms.
5. We also sent you a pin number which you used to enter into the subscription.
6. As per WASPA rules and regulations we have sent you monthly reminders informing you of the subscription and also with details of how to cancel the subscription.
7. We have abided by the WASPA rules of conduct.”

In its final response the SP stated:

“We do apologize for the delay to this formal procedure but, feel that we are not in breach of the code of conduct. Messages sent to the user was informative in notifying the user, that he or she did join the subscription service on the day he or she interacted with the webpage for the brain age advertisement, as previous proven in our correspondence below.

We do not feel a refund justified, as all messages sent to the user did in fact inform the user of his or her subscription. The messages sent to the handset also clearly show the users how to unsubscribe from the service. The user states that they had unsubscribed on the 9th, which was not the case, as the user did in fact unsubscribe on the 18th March 2009 by sending in the stop fun to 31194, as show in the attachment. We have no intension of misleading the public with our web or web advertisements.”

Sections of the Code considered

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

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.

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.

11.2.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

11.2.2. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'.

11.2.3. The 'STOP' request described above must be charged at the lowest tariffed rate available (with the exception of reverse billed rates).

11.2.4. Members must ensure that the termination mechanism is functional and accessible at all times.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent response.

The SP has provided proof of the fact that the Complainant in this matter has requested to stop its subscription services. No other information was provided by the SP.

The SP did however provide a detailed explanation of how its "brain-age" quizzes works.

At some stage it became evident that the Complainant was indeed not happy with events and he conveyed the same in a text message sent to the SP on the 9th of March 2009, unsubscribing himself.

Although the Adjudicator is not implying that the Complainant in this matter is not providing facts true to the best of his knowledge and hence his subsequent recollection of events, it has to be stated that in the absence of any real evidence on behalf of the Complainant, the facts would under normal circumstances amount to mere speculation.

However, should there be some overriding factor(s) which might alter the opinion of the Adjudicator, mention thereof must be made, and this is indeed what is unfolding here.

It has come to the attention of the Adjudicator that there have been several complaints in the same month pertaining to the same services.

These were all lodged as formal complaints against the SP in this matter.

All complaints have its origins based on similar allegations, ranging from frustrations with the “brain-age” service, users stating that they either did not receive a pin, or when receiving the pin, did not enter the pin and therefore did not consent to a subscription service, to other complaints, as can be seen in this specific matter where the Complainant felt that he was misled into subscribing to a service, completing the quiz under the pretense of gaining knowledge to his brain-age.

In light of these circumstances and the occurrence of similar events, manifesting itself over the same time period, the Adjudicator has to ask him / herself whether there is a case of bundling and an instance of the SP misleading its customers.

This read together with the decision provided in Adjudication 5921, leaves the Adjudicator with no alternative but to find the SP in breach of sections 4.1.2, 11.1.2, 11.1.4 of version 6.2 of the Code and 11.1.5 of version 7.0 of the Code.

The Complaint is upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;

The SP is instructed to refund the Complainant in full;

In addition, the sanctions provided in Adjudication 6039 refer.