



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	iTouch/Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Subscription Service
Complainants:	Dee Fuller
Complaint Number:	6177
Code Version:	6.2 & 7.0
Advertising Rules Version:	2.3

Complaint

In the initial complaint The Complainant stated the following:

“I have become aware that MTN is deducting money from my account unlawfully, supposedly to pay a company called “World play” for a subscription that I have to their website. Prior to this I had never heard of Worldplay, Bongiorno or Blinko.

Firstly, as far as I am aware, I have never given MTN or any other service provider or company permission to deduct money on behalf of any other company from my cell phone account. If I have done so inadvertently, please send the supporting documentation (please see 26/09 content charge - R236.79 and 26/03 content charge R236.79)

Secondly, I have never taken out a “subscription” to any website that I am aware of and any claim that I have done so is fraudulent.

In order for MTN to be a part of this deal, they must be aware of who they’re dealing with and the implications thereof. For MTN to try and fob me off onto World play or whoever and try to neglect any responsibility in this instance is morally reprehensible. They are the ones unlawfully deducting money from my account (i.e. WITHOUT MY PERMISSION) and should therefore be accountable as well as the SP’s who are providing this unwanted ‘service’.

How this happened:

I was messing around on Facebook. A window popped up saying ‘TEST YOUR IQ’. I clicked on it, answered about 10 questions, they then asked for my cell number which I did put in (against my better judgement).

Then in order for them to send through the result, you had to subscribe to some website at which point I logged off. At no point had I agreed to any subscription or deduction of finances from my bank account.

The details:

Fri, 3rd April 2009. Checked my cell phone bill as it seemed rather high. Discovered a discrepancy of R200 odd rand and saw that it was 'content charge'. Had no idea what content charge referred to so I called the 808 number for MTN. They informed me that I was subscribed to a website called World Play and there was absolutely nothing they could do about it. They just

deduct the money on their behalf. MTN refused to take any responsibility and would not continue the conversation with me. Gave me a contact number – 086 113 1009 for a company called World play. Spoke to Celeste at Worldplay and she said that this company didn't have my subscription but she could see that I had one as they used to do the billing for a company called BLINCO. She gave me the number for this company who I called and tried to speak to a manager or team leader. When I phoned said company, I spoke to Innocentia, who told me the company was actually called Bongiorno iTouch and the team leader – Jandiswa Mguca was in a meeting. She refused to give out Jandiswa's cell number. To date I haven't heard from her. Funny that they don't feel a thing to use my cell number without my permission. Happened to be chatting to a colleague at work and he had been scammed in pretty much the same way. He gave me a number for a company called WASPA which stands for Wireless Application Service Providers' Association, contact person Dorcas (011) 476 7710). They are a governing body for a number of companies providing web links for wallpapers, ring tones, music, videos etc. She has recommended I speak to her manager – Jackie. I am still waiting for a response from Jackie. I cannot find a way to speak to anyone other than a call centre for MTN to try and resolve their side of this issue i.e. Unlawfully educing money from my bank account. I would like to press charges for my time spent as well as email and cell phone / telephone calls made in pursuing this issue, as well as being reimbursed the money I have been charged for this bogus "service."

In its feedback to the SP's initial response, the Complainant wrote:

"No, I'm absolutely NOT happy or impressed with the email below. AS stipulated, I had no knowledge that I was subscribing to a website - to this day I have no idea what I allegedly subscribed to. Below it refers to R10 a day. Nowhere, EVER, did I receive information to this effect even if I unsuspectingly subscribed to this website by sending this 0420 pin - which I'm pretty convinced I didn't. I cannot open any of the documents below - so I can't possibly see where they get this information from.

I have had absolutely no feedback from MTN either so they're not playing ball.

Quite a few sections of your code of conduct were violated in this instance, so

I don't think this has been satisfactorily addressed. Please inform me where we take this to from here.”

In its final response the Complainant stated:

“After quite a few days hard thought on this lot I thought I'd jot these pointers down from the SP's response and then give a response of my own:

<The user was subscribed via our third party Test You IQ advertisement online. Messages sent to the user had informed the user of the service he or she interacting with. The user did receive the pin on his or her cell phone, as there is no other way in which the subscription could have been initiated. We require the correct pin number, which in this instance was 0420 in order to subscribe the user.>

I just had a look at my itemised billing from MTN and this proves that I never sent an sms to Bonjorno with this pin no. So how did I initiate this service? Any company can get hold of any persons' cell number and send them unwarranted “pin no.'s” I get calls on my cell from other SP's all the time – so this certainly does not prove that I received a pin.

<The user did however unsubscribe by sending in the keyword Stop Fun to 31194, indicating that he or she did however get communication regarding the type of service he or she was interacting with.>

The only way I learnt how to do this was by phoning and speaking to Innocentia at Bonjorno iTouch – after contacting her on 3rd April 2009

<The Pages accessed via website shows the user that he or she is interacting with a subscription service and costing is R10 per day for joining the fun Club Service, as well as messages received on the day the subscription was started.>

This is also very curious as I have received 3 different amounts each month. If it was R10 per day surely there would be fairly fixed amount. For e.g. in January the “content charge” was R35.08 – feels like thumb sucks to me. For February it was R228.02 and for March R236.79. How on earth do they get to these charges? It just doesn't make any sense.

Finally, I have still no idea of what I have received for this money spent. I'd really love to know.”

Service provider's response

The SP wrote the following:

“The user was subscribed via our third party Test You IQ advertisement online. Messages sent to the user had informed the user of the service he or she interacting with. The user did receive the pin on his or her cell phone, as there is no other way in which the subscription could have been initiated. We require the correct pin number, which in this instance was 0420 in order to subscribe the user.

The Pages accessed via website shows the user that he or she is interacting with a subscription service and costing is R10 per day for joining the fun Club Service, as well as messages received on the day the subscription was started.

Below you will find messages sent to the user during his or her subscription period. The user did however unsubscribe by sending on the keyword Stop Fun to 31194, indicating that he or she did however get communication regarding the type of service he or she was interacting with.

In this regard, we do not feel that a refund is justified, as the user did get sms communication from our service, informing him or her of the service being subscribed too.”

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 indeed subscribed to its services through a website. A pin was subsequently issued and the Complainant, after allegedly entering the pin, became subscribed.

As can be seen on the logs and the SP's database, this was logged and subsequent services started.

The SP has provided proof of the fact that the Complainant in this matter has requested to stop its subscription services. Logs were also provided to indicate the sending of subsequent reminder messages. No other information was provided by the SP.

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 period 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 the same allegations alleged by the Complainant in this matter, complainants uttering their frustrations with either the "IQ test", or "Brain-age" service, 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.

In this specific matter the Complainant felt that he was misled into subscribing to a service, completing the "IQ test" under the pretense of only gaining knowledge to his IQ.

In light of these circumstances and the occurrence of similar events, manifesting itself over the same time period, having regard to evidence supplied by the SP, the Adjudicator has to ask him / herself whether such evidence can be relied upon and whether there might be a case of bundling and an instance of the SP misleading its customers?

Without having sufficient access to the said systems generating these logs, and therefore any mechanism to guarantee the fail-save operation of the SP's

operational system, the Adjudicator can also not merely imply that the SP is in breach of any section of the Code of Conduct.

The Adjudicator is however of the opinion, taking all the relevant circumstances into consideration, based on circumstantial evidence alone, that there must be an instance of malfunction on behalf of the SP, or at the very least, something to that extend.

This read together with the decisions provided in Adjudication 5921, 6039, 6112 and several others, 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 5921 refer:

1. The SP is required to suspend the service and access to the site it is hosted on until such time as it complies with the orders set out below. The SP may not initiate any new or existing billing transactions for the service during such period of suspension; however it may process any unsubscription requests;
2. The SP shall send an sms notification to all existing subscribers of the service in the format prescribed in 11.4 of the current Code (the SP shall furnish the WASPA Secretariat with confirmation that it has notified its subscribers);
3. The SP shall ensure that welcome messages sent to the service's subscribers comply with the requirements of 11.1.10 of the current Code;
4. The SP shall clearly indicate at the first point of contact with the service and all subsequent pages and sites that the service is a subscription service and further precisely what the subscription entails. These indications must be clearly visible and unambiguous.
5. The SP shall ensure that any reference to or implication of the availability of single items is removed from the service's site such that the site only makes reference to its subscription content in clear and unequivocal terms;

6. The SP shall ensure that its terms of use are amended in accordance with Rule 9.2 of the Advertising Rules;

7. The SP is fined:

7.1. R20 000 for its breach of 4.1.2 on the basis set out above; and

7.2. R30 000 for its non-compliance with 11.1.2 and 11.1.4 in that it bundled a single item with a subscription service and its failure to adequately differentiate between single items and subscription services.

The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this.