



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Automatic subscription service with no reminder messages
Complainants:	Jurica Lewies
Complaint Number:	6263
Code Version:	6.2
Advertising Rules Version:	2.3

Complaint

The Complainant lodged the following complaint:

“I have been charged for a subscription to pornography. I have phoned 15/04 and sent an e-mail 16/04. I have not received any response. I contacted the call centre and after a big fight was told that they will ask somebody to phone me.”

The letter was sent to I-touch stating the following:

“I contacted the I-touch call centre yesterday regarding an amount for Data Services on my Vodacom account for the amount of R 157.92.

I was informed that on 27 January 2009 I signed up to a pornography site. I am billed monthly for this service. Like I explained to the call centre agent I am totally unaware of this subscription to any site. I have never downloaded any pornographic contents form any site, ever.

The call centre agent said that he will log a request to see if my money could be refunded but he is not sure. I find this totally unacceptable. I was never contacted by anybody to inform me of any subscription asking permission to bill me (the account holder) for any pornographic content.

Even after the alleged subscription I was not given any information or reminder to inform me of this amount going to be added to my Vodacom account.

After speaking to the Vodacom call centre yesterday they also informed me that I have been billed for 3 SMS sent to me in this month (3, 8, 13 April). As my phone was switched off since the beginning of the month I turned it on last night and to my surprise NO sms's for pornographic links or content was sent to my phone at all. I request the cost for these sms's that was NOT even sent to me be rectified on my Vodacom account immediately.

I can not believe that with NO permission with the account holder of this contract you can deduct any money just as you please. If I subscribed for any porn I would have been aware of these costs and would have downloaded data regularly. I am sure that you will be able to see that I have not downloaded content to this nature. I request that the money be returned to me immediately as I have NEVER given you permission

to debit my account.

I hope that you will see this matter as extremely URGENT, I await your response.”

Later on the Complainant wrote the following:

“I have not received any correspondence on my e-mail or telephone call. The call centre agents aren't prepared to help me. PLEASE get back to me ASAP!!!!!!!!!!”

In its response to the SP and as a reason for escalation to a formal complaint the Complainant wrote:

“I received a request from Brenda Mabalela on 21 April requesting a copy of my Itemised billing for January which I have forwarded to her. I have attached this e-mail. As per the billing log it does reflect that my cell was not connected during the times they claim I joined. I also did not send any sms from that number during the month of January. I have not received any feedback on this.”

Service provider's response

The SP in its initial response to the informal complaint stated the following:

“Please be advised that the user was subscribed on the 27th Jan 2009 via our Sexy Cherry Wap Advertisement. The subscription can be verified as per the reporting information window.

The mobile traffic report shows that messages were sent to the user when the subscription was initiated, informing the user on his or her interaction with our Sexy Cherry Brand. In this regard, we do not deem a refund forthcoming, as the user was informed via sms of the Sexy Cherry subscription at R30/5day

The Wap page screenshot can be seen below, which has the wap-page accessed via the users mobile device. The page informs the user that he or she is interacting with a mobile subscription service and by clicking on the "join now" link he or she agrees that they are over the age of 18 and entering into the Sexy Cherry Subscription Service.

The user has been unsubscribed as of the 2009-04-15 4:37:49. Billing of this mobile number was stopped as well due unsubscribing from the Sexy Cherry service. Currently the user is not subscribed to any of our mobile content services."

The SP did not reply to the formal complaint.

Sections of the Code considered

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.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

11.1.2. 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.

11.1.3. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

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.

11.1.5. Subscription services with different billing frequencies should not have a subscription mechanism likely to cause a customer to accidentally subscribe to a more frequent 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.

11.1.7. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;

- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number.

11.1.8. A monthly reminder SMS must be sent to all subscription service customers containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) The service provider's telephone number.

11.1.9. The monthly reminder SMS must adhere to the following format:

- (a) The monthly reminder must begin with either "Reminder: You are a member of NAME OF SERVICE" or "You are subscribed to NAME OF SERVICE".
- (b) Any marketing for a new service must appear after the cost and frequency of the existing service and the service provider's telephone number.

11.1.10. Once a customer has subscribed to a subscription service, neither the amount nor frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

11.1.11. The format of the both the initial notification message and the monthly reminder should comply with the relevant section of the WASPA Advertising Rules.

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 SP's informal response.

However, in the absence of providing a formal response, the Adjudicator has no alternative but to assume that the SP does not wish to respond in terms of section 13.3.5 of the Code which states that if the member fails to respond within this time period, it will be assumed that the member does not wish to respond.

The Adjudicator, in the absence of a response has to concur with the Complainant and therefore has no hesitation in upholding the Complaint.

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; and
- The SP's subsequent conduct.

The SP is ordered 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.