



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Subscription Service
Complainants:	June Klimek
Complaint Number:	6334
Code Version:	6.2
Advertising Rules Version:	2.3

Complaint

In the initial complaint The Complainant stated the following:

"The first incident took place a few years back when I found myself paying for an sms bundle which I had never requested. By the time I discovered the charge, I had inadvertently been paying for several months. I requested that the bundle be cancelled, but I was never reimbursed for the costs incurred. Sometime later I discovered that once again the sms bundle had been activated, again I only picked it up after several months of paying. Again I cancelled & received no reimbursement - not even an apology. Then last year sometime I was phoned by either vodacom or autopage, wanting to discuss a new service - "Please find me". I told the person I was busy at the time & they should phone me later. I was never phoned back & suddenly several months later I discovered that I was paying for a service "Please find me" which I knew nothing about. When I enquired from the Autopage consultant what exactly the service was, I was informed that it had never worked anyway. I duly requested that the service be cancelled. No attempt was made to reimburse me for a service which I had never agreed to & which never worked anyway.

Finally: Sometime in January this year I was on the Internet when suddenly an image of a brain started spinning around and a message appeared asking me to answer a question (s) which I did. It then indicated that if I wanted to know the answer to the question (s) I should enter my cell number, which I did. No answer was ever forthcoming. Sometime later (period of time - I am not sure of) - I received a message on my cell phone saying "Welcome to the fun club". I made no connection between the questions on

the internet & simply deleted the sms. (According to Teljoy, they sent me a pin code which I needed to enter in order to activate the service). I have no recollection whatsoever of ever entering the pin code, and I am pretty sure, that if I had received the pin code, I would simply have deleted it because I would definitely have become suspicious by that time. At the end of February I noticed an entry on my cell phone account for WASP- amount of R256.70. When I queried this with Altech Autopage, they told me that I had subscribed to a service with Teljoy, of which I knew nothing about. When I asked them why they were accepting accounts from a company that I had never agreed to buy a service from, I was informed that they take no responsibility for the account because I had agreed to obtain the service with the 3rd party concerned.

My question is: if I have a contract with Altech Autopage/Vodacom, what right do they have to accept accounts on my behalf & without my permission from an external party to my agreement with Altech Autopage. All of the above events smack of a scam being operated between Vodacom, their service providers such as Altech Autopage & in some instances external companies such as Teljoy to provide their unsuspecting customers with services which the customer has not requested & in many instances do not realise they are paying for until months later when they happen to scrutinise their bill. I suspect that these companies are making a great deal of money with this clearly unethical practice, & basically taking their customers for an expensive ride. I would appreciate your speedy action to halt this criminal practice.”

The Complainant provided the following reason for the escalation of its request to a formal complaint:

“Further to my previous complaint regarding what I consider to be unethical behaviour by Buongiorno:

I was in contact with Mr F Toefy last Thursday. He apologised profusely for what had happened, admitting that they had numerous complaints from the public, so much so that their brand image had been damaged and they have decided to abandon their advertising campaign. He however, informed me that I would not be getting any refund because I was responsible for activating their services by entering the pin number which they sent through to me. They however, cannot provide me with proof that I actually entered the pin & thereby activated the services.

In addition, Mr Toefy promised to send me a copy last Friday of the advert which appeared on the internet. I need this to send through to the Advertising complaints commission. This information has not been forthcoming.

I have an issue with this decision for a number of reasons:

- Buongiorno must prove to me that I activated the services.

- They must prove to me that it was clear from the advert that I was joining a Fun Club at a fee of R10 a day.
- I cancelled the services on the 5th of March & have proof in the form of an sms from Buongiorno the same day confirming that all the services from their company had been stopped. Initially Buongiorno denied this, but have subsequently admitted that the sms came from one of their agents.
- I take exception to the fact that I have paid for a service which I never wanted, never knew I had & which I never used.
- Furthermore they continued to charge me for the service for 15 days after confirming that the services had been discontinued.
- Finally, what concerns me more than anything else is that, while Buongiorno are now quick to apologise for charging people for a service that they did not know they were getting & never wanted & even withdrew the advert (Very conveniently, so that it is not easy for their victims to prove misleading advertising), I am sure that they have unethically made a great deal of money using this scam & I am convinced that they should not be allowed to get away with this. They should pay their victims back the money which they obtained by very suspect means. If they are not made to do this they will simply do something similar. It is easy to trick people, make lots of money & then get away with it by simply apologising afterwards & then sitting back & enjoying the spoils."

Service provider's response

The SP wrote the following:

"The user was subscribed via our Web brain Age advert, in which the user was required to enter his or her Mobile number in order to calculate their brains age. Upon doing so, the user is sent a Pin, which can be viewed in the Mobile Traffic report window below, as well as sms sent to the user informing him or her of the fun Club subscription Service. Only once the pin is inserted, is the Service activated on the supplied number of the mobile user. In this regard, we do not deem a refund possible, as communication regarding the Subscription service, was made available to the user via sms. The user was subscribed on the 20th January 2009.

Below you will find the entire process that would have needed to be followed in order for the user to have been subscribed to the Fun club service. The subscription would not have been possible if the user did not insert the correct pin, which in this user's case, was inserted correctly, which the pin number was 4327. The pin was sent to the user via sms.

Please note that the service has been cancelled as of the 2009-03-20 08:48:32.

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 center 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, ids & more! Start Downloading now! Help: 0214178001 (R10/day subscription service. Sms STOP FUN to 31194 to end)."

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.

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 evidence on behalf of the Complainant proving otherwise as to what was logged by the SP, it is difficult for the Adjudicator to make a finding, based on the words of the Complainant alone.

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 the same allegations alleged by the Complainant in this matter, uttering their frustrations with the "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 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.

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 decision provided in Adjudication 00000, 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 7.4 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;

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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.