



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Subscription service
Complainants:	Sarah Houghey
Complaint Number:	6820
Code Version:	6.2
Advertising Rules Version:	N/A

Complaint

The Complainant lodged the following complaint:

"I was subscribed to the service Sexy Cherry. I never subscribed to this service at any point. In addition to this I never received neither confirmation message nor any reminders until today and apparently they say I was subscribed at the beginning of January. This is Fraud."

The complainant indicated that they were not satisfied with the SP's response and the complaint was escalated to a formal one.

The Complainant provided the following reason for escalation:

"I have been unsubscribed but I never subscribed to this service is the first place. So to answer your question no this has not been resolved. I would like:

1. A copy of the "wap advert" I supposedly clicked on.
2. Logs of all SMS interaction that I supposedly would have received from them.
3. Proof linking the subscription to my number."

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

"This is not satisfactory.

1. Referring to the below clause:

11.1.8. 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.**

As can be seen by the messaging history logs their first message they sent to me is on the 6th of Feb yet the subscription was recorded on Jan 6th. This means they never sent a confirmation message as is required by your code of conduct.

As is required by your code of conduct the Service Provider is supposed to send a confirmation message confirming the subscription. It is quite evident from the message logs supplied by the provider that no such confirmation"

Service provider's response

The SP wrote:

"This user was subscribed to the Sexy Cherry straight club our wap advertisement. The media key sca_buz612_=871, which can be viewed in the detail options window below verifies the page accessed by the user. On this page the user is required to click the join now link in order to join the sexy cherry straight club. The term and condition clearly states that by clicking the link, that he or she accepts the subscription into the sexy cherry straight club at R30 every 5 / days. Messages sent to the user of mobile number +2783 438 1768 can be viewed in the mobile traffic report windows below. These messages also inform the user of the subscription and the billing that would incur on the mobile number. Interaction with the sexy cherry subscription service was solely at the user's discretion.

The only way we would have had access to the mobile number was if the user had interacted with the sexy cherry straight subscription service to commence billing, as is the findings in this investigation into the user's claims.

In this regard, we do not deem a refund justified, as the user had access to the T&C and by selecting and clicking the link to start the sexy cherry subscription at R30 / 5days, he or she had agreed to the mobile content subscription service and billing amount.

Please note that currently the user is no longer subscribed to any of the Sexy Cherry or other subscription services within Buongiorno. The subscription was ended by the user by sending in the stop s command, as sent to the user in his or her monthly sms reminders...”

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 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.

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”, “Brain-age” or other fun club services such as the Sexy Cherry service in this case, stating that they 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 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.
