



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Subscription service
Complainants:	Gasam Sulaiman
Complaint Number:	6865
Code Version:	7.0
Advertising Rules Version:	N/A

Complaint

The Complainant wrote:

"I never accessed the internet to register for "FUN CLUB". I wouldn't even if it was free. I unfortunately ignored the emails, thinking that it was just another marketing strategy. Only when I received my first bill did I realise that I was charged for WASP."

The complainant indicated that they were not satisfied with the SP's response and provided the following reason for escalation:

"1. Below is the sms correspondence I received and ignored, thinking that it was some marketing gimmick.

"Welcome to ...to end" received at 8 Jan 2009 11:01:19 from 0820048351
"Hi & welcometo end" received 8 Jan 2009 11:01:19 from 0820048351
"Your PIN 0719" received 8 Jan 2009 11:00:56 from 0820048350

2. I did not receive an sms before receiving the "PIN" sms (assuming I did not delete it). So my first question is: did I receive an sms before the PIN sms was sent and if not, how did I get to know which website "FUN Club" to go to.

3. I would like iTouch to provide evidence of me entering my mobile number on their website and to provide me with the web address, as I:
-have no recollection of going to this website
-have no recollection of entering my mobile number
-would never subscribe to such a service even if it was free

-would never/never subscribe to such a service if it costs R10 a day.

4. Even if I was a willing subscriber - I never downloaded anything. Do they not have records of this?

"Something is definitely rotten in the state of Denmark". I would therefore proceed to the fullest extent possible, not only to get a refund, but also to expose any wrong doing of the parties involved.

6. Having said all of the above - iTouch should rather call people confirming their subscription instead of sms'ing them.

7. Auto page should notify their subscribers of the possibility of being charged without receiving permission.

8. To conclude - I suspect some fraudulent activity on the part of one or more parties."

In its final response the Complainant wrote:

"I am still not satisfied with the response regarding my complaint.

- I would not do something as stupid as "calculate my brain age"

- No one else has access to my mobile to do this.

- I did not go to any of the websites mentioned below

- I was in the UK from the 24 January - 1 March 2008 and only realised on the 5 March 2009, after checking my statement that it could not be my sms'ing (sms roaming) from UK to SA that would result in a huge increase in my bill.

- Why would I spend R10 a day on a service and then not use the service?

- I repeat, I suspect some fraudulent activity on the part of Buongiorno ZA

I would like to stress to Buongiorno ZA, that I am not claiming to have not seen the T&C relating to the payment of R10 a day, I am claiming to have never entered the website and filled in the information that would allow me to subscribe."

Service provider's response

The SP wrote the following:

"Please be advised that the user was subscribed via the Fun club Subscription service R10/pday via website advertisement at. The pages visited show the user that he or she was interacting with a mobile subscription service. The messages sent to the user instructs the user on how to unsubscribe from the service, as well as informs the user of the mobile content subscription service that he or she had joined.

The reporting information window shows the date and time the Fun Club subscription was started. In the detail options window the media key fca_tek521_3762, can be viewed. This media key is our internal tracking process of which website user has interacted with within our company. We also make the fun club's terms and conditions visible on the pages visited informing the user that he or she would need to get the bill payer's permission

before continuing with the subscription and the price associated with the subscription.

The mobile traffic report windows show that messages have been sent to the user informing him or her of the Fun club Subscription Service, as well as our call centre contact number and instruction on how to end the service, which the user did utilize in order to end the subscription on the 2009-03-05 09:35:59 as shown in the mobile traffic report window.

The user's subscription was started when he or she entered the 4 digit pin number, which he or she had received on the mobile cell phone number 27828956242. The pin was entered correctly on the website, as this is the only way in which the user would have been subscribed to the Fun Club Service. If the user had entered the incorrect pin, then the subscription would not have been initiated, which in this users case he or she had in fact entered the correct pin he or she received on his or her cell phone.

Below is the entire breakdown of the Fun Club subscription process the user would have needed to follow to have been subscribed to the Fun Club subscription service at R10/pday.

In light of this, please note that the user did in fact receive the ms's sent to him or her as, they did in fact send in the stop command, which was sent to him or her in the message communication.

In this regard, we do not deem a refund forthcoming, as the user had received the monthly reminder, the unsubscribe instruction and our call centre contact number should he or she have experienced any problems with the reactivation of the service.

The pin number 0719 sent to the user, would need to have been verified via the Fun club web advertised pages, when the user received the pin number 0719, as it would have to be verified for the subscription to have been initialized. The pin 0719 the user was sent is specifically assigned to the user's mobile number on the day the subscription was started. As shown in the breakdown below it clearly shows that by not entering the pin the user would not have been subscribed to the fun club.

Please note that the mobile number is no longer subscribed to any of the Buongiorno Mobile Content Subscription Services."

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. 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", "Brain-age" or other fun club services, 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 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 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.

It is also ordered that the SP provides the Complainant with a formal excuse in writing.

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.
