



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Subscription service
Complainants:	Dr.Meyer(daughter)
Complaint Number:	6971
Code Version:	7.0
Advertising Rules Version:	2.3

Complaint

The Complainant stated that they are pensioners and did not subscribe to the service.

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

"I would appreciate it if you could review my letter of complaint I have emailed previously as well as on this occasion. The issue is not whether my parents are currently unsubscribed or not (we have already unsubscribed), but that this money was subtracted without my parents' authorisation. My parents did not enter any pin or do an IQ test. Hence we request a proper investigation."

In its final response the Complainant wrote:

"Thank you for your correspondence which I have sent to my parents. However, the service provider has NOT resolved this complaint to our satisfaction as my parents never enrolled with Blinko. Hence I request that you do not close the complaint."

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.. Our investigation shows that the user of mobile number 27833801662 had interacted with the Fun Club and subscribed via the Fun Club Brain Age Web Advertisement.

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 2009-05-21, 6:24:58 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 *****. 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 enter 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 if 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 8621 sent to the user, would need to have been verified via the Fun club web advertised pages, when the user received the pin number 8621, as it would have to verified for the subscription to have been initialized. The pin 8621 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.

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 wap link to download content where it states in the terms and conditions and frequently asked questions on the wap 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

4.1.2. 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 "Fun Club" 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 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.