



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe Request
Complainants:	Lessing
Complaint Number:	7001
Code Version:	7.0
Advertising Rules Version:	N/A

Complaint

This complaint is the escalation of unsubscribe request. The Complainant was not satisfied with the SP's response and provided the following reason for escalation:

"Please note that I have been called by Donovan. Thanks for the call but as discussed over the phone I have not subscribed to this service. Looking at the proof that you supplied it can be seen that I have allegedly subscribed to this service on the 27th of April 2009. Note that I have gone through my statements for the month of April and noted that the 27th of April was a public holiday in SA. According to my statements supplied to me by my service provider Auto page, I did not send any SMS on the 27th of April at all. I have also checked my statements and I never sent a SMS to ANY 3xxxx number ever.

Thus, the only other way that I could have been created on your subscription list is on a website. Please note that anyone could have used my number on a website as you have no evidence that I confirmed the alleged subscription as I never replied to any of your SMS. I have gone through my accounts as of the 27th of April and found that you need to refund me the following:

April: R 23.69 (Funny, all of these are before the alleged subscription date of the 27th of April)

May: R43.86

June: R219.17

Please let me know how you will be refunding me ASAP."

After the SP had replied to the formal complaint the Complainant wrote the following:

"Please note that I am not satisfied that this issue has been resolved as I am 100% sure that I did not subscribe to this service.

This is what I understand from your email:

1. I allegedly logged on the following web-address:
[http://wap.blinko.co.za/lp/advertisement/FunWapPage66.wml?
servic=Id=funclub&mk=fca_buz984_4800](http://wap.blinko.co.za/lp/advertisement/FunWapPage66.wml?servic=Id=funclub&mk=fca_buz984_4800)
2. Then I allegedly clicked on the "JOIN NOW" link.

Can you please supply me with the data that I have to supply to join? During this process, is it possible to confirm / change your mobile number?

Can you also tell me what I subscribed to?

I understand from the WASPA website that if you subscribe via WAP the service subscribed to has to send a double opt-in SMS where I have to reply "Yes" for the subscription to become active.

Can you please send proof of this SMS sent from me to you because I am 100% sure I did not subscribe to this service?"

The complainant raised the following questions:

"I do not want to sound like a little dog that does not want to let go from a bone but I am 100% sure that I did not subscribe to this service. Can the proof be sent to me that I:

1. Clicked on the link.
2. Clicked on the follow up confirmation as my provider (MTN) requires a second YES to be clicked on to complete the transaction."

Finally the Complainant wrote:

"I am not satisfied that this has been resolved because I know I did not subscribe to this service. So in my mind it is theft and I can not prove that I am innocent as I do not have any "Server logs" or items like that. I must say that is a very fraudulent industry. Can I ask that my number be flagged to not allow ANY of these kinds of services going forward?"

Service provider's response

The SP stated the following:

"Our investigation shows that the user did not send in an sms but did in fact click on the JOIN NOW link on our Leona Lewis wap advertised page. The page tells the user that he or she is interacting with a subscription service as R10 / every day and by clicking the JOIN NOW link he or she is agreeing to the subscribed to the Fun Club. The pages also inform the user of our call centre contact number, should he or she experience any problems with the service. The web page also informs the user that he or she can view our full

terms and conditions regarding the fun club and the link to this page is provided as well.

The web page accessed via mobile cell phone by the user was http://wap.blinko.co.za/lp/adve=tisement/FunWapPage66.wml?serviceld=fun_club&mk=fca_buz984_4800, which as shown in the detail options window this link has the media key assigned to it, which is our in house wap advertised tracking reference number.

Messages sent to the user can be viewed in the mobile traffic report windows and indicates that the user did receive the sms's sent to the mobile number, making it know to the user that he or she was interacting with a mobile subscription service. In this case it was in fact the Fun Club and billing at R10 / every day.

In this regard, we do not deem a refund possible, as messages sent to the user of the mobile subscription service and wap pages showing the user the intensions of the service as well as the unsubscribing instructions and call centre contact number, should the user wish to have the subscription cancelled should any problems have occurred.

Please note that the user is no longer subscribed to any of the Buongionro mobile content subscription services and that billing has been stopped on the 9th July 2009 at 08:13:02."

The SP provided an additional response:

"We've sent through all system generated proof of the user's Subscription to the Fun Club at R10/pday.

User:

Please note that I am not satisfied that this issue has been resolved as I am 100% sure that I did not subscribe to this service.

B!

We are certain that the mobile content subscription Service to the Fun Club was started by the mobile number ...33214567, as this is the number that interacted with the wap advertisement. The T&C on the page informs whoever chooses to subscribe that he or she should gain the bill payers permission should he or she wish to subscribe to the fun club at R10/pday. Gprs or 3G usage at the time of the subscription can be verified by the user's network carrier. Messages sent to the user on the day the subscription was started informed the user of the mobile subscription in this regard.

User:

Can you please supply me with the data that I have to supply to join? During this process, is it possible to confirm / change your mobile number?

B!

1. Please note that the subscription was started by selecting and clicking the join now link on the wap advertised page provided.

2. The mobile number could not have been captured incorrectly, as the subscription was initiated via wap browser on your mobile cell phone thus not

making it possible to change or alter the mobile number when the subscription was started.

The subscription was an independent transaction between the users and the Fun Club. The page displays the subscription amount as well as the terms and conditions.

Please note that the user's subscription has been cancelled and all billing has been stopped on the users account from within Buongiorno ZA. Proof has been sent in previous correspondence."

Finally the SP responded:

"All information on our systems has been supplied in this regard, and no further information is forthcoming in this matter. We hope that this matter was handled to your satisfaction and thank you for making this matter known to us. Our investigation shows that user had subscribed via the proof given in this matter."

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.
