



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe Request
Complainants:	Vivienne Anne Harris
Complaint Number:	7175
Code Version:	6.2
Advertising Rules Version:	N/A

Complaint

This complaint is the escalation of unsubscribe request.

The Complainant wrote:

“On about 1 January 2009 I received an email from a friend and on the bottom of the email, there was an offer for a free ring tone. I clicked on this offer and entered my cell phone number. I then noticed there were charges, and being annoyed that the offer was specifically for a free ring tone, I closed the web page. At no time did I agree to downloads of any sort. I did receive SMS's regarding downloads but I ignored them completely. I don't receive itemised billing but did notice that my Vodacom account was higher than normal each month and I tried to reduce my usage. When I received my statement on the 8 May 2009, I phoned Vodacom and enquired the entry "Content Services". I was told it was Itouch and must phone 0822327400. The electronic voice gave me the option of cancelling my subscription, which I did, and received a SMS confirming this. I again phoned Vodacom and asked for Itouch's phone number or email address but the agent gave me an incorrect phone number 082232328 and could not give me an emails address. I did manage to get both a phone number and email address on the second attempt. My email sent to tanya@itouch has been totally ignored. A total amount of R1256.56 was deducted from my Vodacom account without my permission. Itouch's advert smacks of misrepresentation and extortion.”

The Complainant added the following:

“Thank you for passing on my complaint to iTouch. I did receive a call from Donovan. I would have phoned him back directly but once again he gave me

the number 021 417 8001 which is an electronic voice with no option to speak to a human being. He states that as I cannot give him the original email I received with the free ring tone offer, he can only refund me for one month as I did not receive their SMS one particular month. As iTouch's records show that I not only put in my cell number but also a PIN number (on 31 December 2008), I would like to have that proof from iTocuh.”

The Complainant was not satisfied with the SP's response and provided the following reason for escalation:

“I am asking for proof that I not only put in my cell number (as I remember doing) but also a PIN number which I distinctly do not remember doing.

As previously stated I saw a offer for a FREE RINGTONE. I clicked on this offer. I then noticed charges for downloads. Being annoyed that the offer was specifically for a FREE RINGTONE, I CLOSED THE WEB PAGE. I did not agree to the offer. I NEED THE PROOF THAT I AGREED TO THE OFFER.”

Service provider's response

The SP states the following:

“Our investigation into the user's subscription into the Fun Club shows that the user was subscribed via the Fun Clubs web advertisement on the 31st December 2009 at 07:33:51. Pages accessed by the user informed the user that it is a mobile content Subscription Service and that Billing would be R10/pday.

The user inserted his or her cell phone number and was sent a 4 digit pin number, which the user had to have entered correctly before the Fun Club Subscription could have been initiated and that billing on the mobile number would commence. Should the user not have received the pin number or inserted the pin number correctly the mobile content subscription service would not have been started, indicating that the user did in fact receive the pin on the day the subscription was started and inserted the correct pin number on the web advertised pages. Attached you will find messages sent to the mobile user informing the user of the Subscription and 4 digit pin number sent to the user.

As per the users response given, we Buongiorno do not advertise via email media in this regard and that we have requested the user send on the email she had received but, unfortunately the user has indicated that the email is no longer in her possession for review by Buongiorno ZA.

In the details options window you can view the media Key fca_tek521_3762 accessed by the user on the day of the Fun Club Subscription. This media is

link to our Fun Club Website advertisement. This can also be verified by viewing the source option in the details window.

We have agreed to a partial refund due to the monthly reminder message not being delivered to user due to technical systems problems during the Month for 2009.

Below you will find the entire advertised process the user would have needed to have followed in order to have been subscribed to the fun club.

The pages indicate to the user that he or she is In fact interacting with a mobile content subscription service, as well as inform the user of the Terms and Conditions, which clearly states that the user would need to obtain the bill payers permission in order to continue with pages leading up to the mobile subscription.

Please note that this user is no longer part of any Buongiorno Mobile Content Subscription Brand Services.

Based on the above mention we do not feel that we are in breach of any clauses of the code of conduct. We have no intention on misleading the public in any way and therefore give the customer all necessary details on the subscription, including a website where full terms and conditions are available (as seen in the terms and conditions outlined below). Full terms and conditions are available on both the website and website with the call center number is if he | she wishes to unsubscribe or find out more information.

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 insures 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, vids & 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.

4.1.7. Any telephonic support must be provided via a South African telephone number and must function effectively. Should the member be unable to provide immediate support, a customer should be provided with the ability to leave a message. Support numbers may not forward to full voice mailboxes.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

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, 4.1.7, 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.

The SP is fined R 20 000 for its breach of section 4.1.7 of the Code.

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.
