



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe Request
Complainants:	Anup Morar
Complaint Number:	7185
Code Version:	7.0
Advertising Rules Version:	N/A

Complaint

This complaint is the escalation of unsubscribe request.

The Complainant wrote:

“I was billed for a subscription service activated on my mobile on 22/5/2009. The service allows for download content. I was billed for the service allowing me to download (“unlimited access to download”). I was informed by sms about subscription service, but I did not give them consent to activate a subscription, someone must have typed my cell number into a web site pop up somewhere and the next thing I know i got a sms with a pin, I immediately deleted that sms. I did not use the pin anyhow nor give consent to activate the subscription services, only found out later when my bill was sky high charging me R10 a day. MTN is my service provider, and they said they get many complaints like this and they cannot block it, and I have to take it up with the content company “buongiorno”. I called them up and logged a complaint, stating that how can they charge me for something that I did not initiate in the first place and secondly did not give consent. Just by receiving a sms with pin and message does not give them the right to add me in a subscription service. I deleted those sms thinking it was spam. Please help!!!”

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

“I was billed for a subscription service activated on my mobile on 22/5/2009. The service allows for download content. I was billed for the service allowing me to download (“unlimited access to download”). I was informed by sms about subscription service, but I did not give them consent to activate a

subscription, someone must have typed my cell number into a web site pop up somewhere and the next thing I know i got a sms with a pin, I immediately deleted that sms. I did not use the pin anyhow nor give consent to activate the subscription services, only found out later when my bill was sky high charging me R10 a day. MTN is my service provider, and they said they get many complaints like this and they cannot block it, and I have to take it up with the content company "buongiorno". I called them up and logged a complaint, stating that how can they charge me for something that I did not initiate in the first place and secondly did not give consent. Just by receiving a sms with pin and message does not give them the right to add me in a subscription service. I deleted those sms thinking it was spam. Please help!!!"

The Complainant provided the following feedback:

"Thanks!!! I hope to get some response from these content provider thieves. Swindling a few hundred Rand from thousands of innocent subscribers, for subscriptions they did not activate, thinking its SPAM."

After the SP had responded the Complainant wrote:

"Where is the attachments , this is not resolved, the content provider just called saying they looking at the matter, but that does not mean I have been credited with all the money they have taken already, and I did not give any consent to start a subscription and they cannot prove I did a subscription to their services.

My complaint against Buongiorno UK for content charges on my mobile phone, they say I have entered the pin code into the web site, which activated the subscription.

My argument with them till today is that I never entered any PIN into any website, I did receive a PIN number, as a sms thinking it was SPAM, and immediately deleted that SMS, so no one, not even myself could have taken the PIN , go back to the website and enter the PIN in there.

Also they have records of when the SMS was sent and when the subscription was activated, the 2 times differ and not immediate. So how could I have gone back to the website at a later date and time and enter the PIN.

- 1) First of all, if the web page would have been a pop up, it would have to be bookmarked to go back there,
- 2) Can they prove that the PIN was entered into there webpage?
- 3) Thinking this was SPAM I did not bother terminating the subscription, (there was no welcome to the subscription, so I did not know I so how subscribed to some sort of subscription that was taking R10 of my contract account every day.
- 4) I only got to know that I have subscription when my bill statement reflected R10 a day for something I did not give consent to activate.
- 5) No content was ever requested.

This is daylight robbery, and they target many accounts to get free money. Just because they sent me a sms does not necessary mean I took the PIN in that SMS and entered it in the webpage.

If they can prove that to me, then I am the guilty party. I know how these sharks operate and therefore would have never subscribed or entered anything into any webpage.

Surely they can prove which computer/service providers/ISP I come from, if they drill deeper they could also see where and what IP and Mac address I come from, proving which computer the PIN was entered from.”

Finally the Complainant wrote:

“This has still not been resolved, they took my money!!!! For no reason.”

Service provider's response

The SP stated the following:

“Please be advised that the user had subscribed via the Fun Club Web advertisement, as indicated in the Detail Options window below.

The media key fca_tek521_3762 is link to our fun club web advertisement and used for tracking as to what user access and interact with.

One the day the user interacted with the Fun Club Web advert, the user was sent and sms with a 4 digit pin code, which in this instance was 6627, which the user did in fact enter in the web advertised pages. If the user had not entered the pin code correctly or not at all the mobile content user subscription would not and could not have been initiated. Messages sent to the user inform the user of the mobile subscription and instruction on how to terminate the mobile content service. We also informed the user of the 24/7 support number in the event that the user had encountered problems with the Fun Club Service.

The pages accessed by the complainant display the Terms and Conditions and inform the user that he or she would need to have the bill payer's permission should he or she wish to continue with the Subscription into the Fun Club. These instructions are made clear to the user before the subscription is initiated.

The complainant indicated that another mobile user, could have inserted his mobile number, as this could not have been the case, as the Fun Club not started by entering the cell phone number but, only when the user inserts the 4 digit pin sent to his or her cell phone number, which would mean that if only the cell phone holder would have access to the pin 6627, which was sent to the users cell phone. If the user had not entered the pin or should he or she had inserted the pin incorrectly, then the Fun Club subscription would not have been started. Our investigation shows the user had inserted the pin number, as this is the only way the Fun Club subscription was initiated in this way of subscribing to the Buongiorno Fun Club.

Please be advised that a refund is not forthcoming in this regard, as messages sent to the user, as can be seen in the Mobile traffic report

windows informs the user that he or she, had subscribed to the Fun Club as is the result of his or her interaction with the Fun Club Service...

Further below, is the entire process the user would have needed to follow in order for the Fun Club subscription to be initiated.

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

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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.
