



REPORT OF THE ADJUDICATOR

WASPA Member (SP) Buongiorno UK / Mobimex GmbH

Information Provider (IP)
(if any)

Service Type Content subscription services

Source of Complaints Ms M Buys

Complaint Number 7314

Date received 12 August 2009

Code of Conduct version 7.4

Complaint

The complainant logged an unsubscribe request via the WASPA unsubscribe system on 6 August 2009. The request was processed for three different SPs. One matter was resolved to the satisfaction of the complainant. The remaining two were not and they have been escalated for formal adjudication in the form of the current complaint.

The complainant states that at the end of April 2009, she noticed that her cell phone account was rather high. During May, she monitored the number of calls she made but still found that her account was high again at the end of the month.

In June, the complainant set up a limit on her account with her network service provider. She was advised that the charged being levied to her account were for adult content charges. The complainant denies accessing such content and also states that no other member of her family could have accessed these services.

She also has been informed by a consultant from her network operator that WAP functionality had not been activated on her handset. The complainant alleges that it was therefore impossible for her to have subscribed to the services in question.

The complainant has requested a refund for charges totalling R973.31 which were levied to her account over a period of 4 months.

SP's response

The two SP's involved in this complaint, Buongiorno UK and Mobimex GmbH have unsubscribed the complainant from their respective services. They have also provided printouts which they have presented as proof of subscription. Both have refused to refund any monies to the complainant as they both allege that the complainant's number was used to validly subscribe to, and use the services in question.

The two SP's responded in greater detail to the complaint as follows:

Buongiorno UK

The SP provided technical data to support its allegation that the complainant's number was used to validly subscribe to the service via WAP. The SP alleges that the complainant clicked on a link on a banner advert for a "Double Dragon" game item. This banner was linked to a media key which allowed the SP to track user activity thereafter.

After clicking on the "Double Dragon" banner, the user was directed to the SP's Fun Club WAP page. This page informs the user that if he or she clicks the "Join Now Link" highlighted in blue, he or she agrees to being subscribed to the Fun Club Mobile Content Service. The page also informs the user of the Call Centre help line if he or she experiences any problems when subscribing.

A further page then introduces and offers the user various content items within the Fun Club Service, including the Double Dragon Game in the games menu. This page was accessed via an internet mobile WAP browser. The terms and conditions are

made available to the user and at no stage during this process is the user misled into subscribing to the Fun Club Service.

The SP indicates that the complainant did not interact with its adult content services, only its Fun Club service. The SP advises that the complainant should refer the matter to her network operator for further investigation in this regard.

The SP confirmed that the complainant's number was used to opt-in to the subscription service on 23 April 2009. Multiple downloads were made on the same date with different content. Subscription was terminated via "Stop" SMS sent on 19 June 2009. The SP provided a download log confirming what content was downloaded, what handset was used and from which IP the user accessed the service.

The SP does not accept that WAP functionality on the complainant's cellphone was not activated as its logs prove that multiple downloads were made from this phone for the month of April.

The SP also states that a confirmation message was sent to the complainant's number on the date of subscription which displayed a welcome message to the Fun Club and a WAP link to access the site. These messages also provided pricing information and what billing was to occur.

The SP also provided proof of the monthly reminder messages that were sent to the complainant's number.

Mobimex GmbH

The SP states that the complainant's number was used to opt-in to the subscription service on 23 April 2009. Multiple downloads were made on the same date with different content. The SP has provided proof of subscription and downloads.

Subscription was terminated via "Stop" SMS sent on 19 June 2009. From the download log, it is clearly seen when and what was downloaded, what handset was used and from which IP the user came to us.

The SP states that for subscription to take place and to enable content to be downloaded, the WAP functionality on the complainant's cell phone was set and the SP cannot accept the complainant's allegations in this regard as downloading would not be possible and it has proof of multiple downloads showing for the month of April.

The SP also confirmed that multiple free notifications were sent to the complainant advising her of the subscription. Examples include:

*Welcome 2 African Gsm.VC!Content on its way!Click on it 2download!Probs?
help@gsm.vc or Call:0791444615.Txt STOP to 39215 unsub.(weekly Sub.Cost:R30
Age:16+)*

*Free SMS: Thank you for using our service!This is R200 spending notification.
Replay STOP to unsubscribe.*

*You r subscribed to NEW Content Updated!
(R15/3days+R10/tone,wallpaper,animation) from gsm.vc.To stop service,SMS
STOP to 39215 (R1).Help?Call 0791444615(VAS)*

Complainant's reply

The complainant maintains that her network operator can prove from her itemised billing that no WAP transactions have been utilised on her account, and that her cell phone was not WAP enabled.

With reference to both complaints, the complainant asks for an explanation on what security checks were done to verify her details. No further response was given by either of the SPs.

Sections of the Code considered

11. Subscription services

11.1. Manner of subscription

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

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 and may not be an entry into a competition or quiz.

11.1.3. An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed.

11.1.4. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.5. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.1.6. 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.

11.1.7. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

11.1.8. 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.

11.1.9. Once a customer has subscribed to a subscription service, neither the amount and frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

11.1.10. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing].

11.1.11. If a subscription service can be initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation must be obtained from that customer's mobile handset before any billing may take place for that service.

11.2. Reminder messages

11.2.1. A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter.

11.2.2. The reminder messages specified in 11.2.1 must adhere exactly to the following format, flow, wording and spacing:

U r subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

or

U r subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help call [call centre number + “(VAS)” if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

11.2.3. The entire reminder message must be sent in a single SMS, may not contain any line breaks or carriage returns and may not include any additional characters other than those specified in 11.2.2.

11.2.4. The content/service description must be text describing the content, promotion or service (e.g. “tones” or “poems”). This text must not be worded in a way that attempts to deceive or mislead the customer from the purpose of the reminder which is to inform the user that they are subscribed to a service.

11.2.5. The cost of service and frequency of billing must use the format “RX/day”, “RX/week” or “RX/ month” (or RX.XX if the price includes cents). No abbreviations of “day”, “week” or “month” may be used.

11.2.6. The text “(VAS)” must be included after any VAS-rated phone number. It does not need to be included after phone numbers which are not VAS-rated.

11.2.7. Members must test reminder messages on a range of phones to ensure that all characters and lines are displayed identically.

11.6. Subscription service directory and logs

11.6.2. When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:

- (a) proof that the customer has opted in to a service or services;
- (b) proof that all required reminder messages have been sent to that customer;
- (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and
- (d) any record of successful or unsuccessful unsubscribe requests.

Decision

In the current complaint, there appears to be a dispute of fact as to whether the complainant or, at least, her cell phone, was used to validly subscribe to the services offered by both SP's.

I will deal first with the complaint against Buongiorno UK. The SP has provided a detailed explanation of how a user is subscribed to its service. They allege that the first step taken was that the complainant's handset was used to click on WAP link on a banner advert.

The advert promoted the SP's Double Dragon mobile game, which is an example of content available for download from the SP's "Fun Club". There is no indication from the SP that further examples of available content were given in this advert as required by section 11.1.3 of the Code.

After clicking on the "Double Dragon" banner, the user was directed to the SP's Fun Club WAP page. The user then clicks on the "Join Now" link and opts-in to the Fun Club subscription service. The user is then redirected to a further WAP page where additional content can be downloaded by subscribers.

Buongiorno UK have provided logs which provide *prima facie* proof that the complainant's handset was used to access the WAP page and to click on the "Join Now" link to activate the subscription. The complainant, in turn, has denied that she accessed the WAP site and offered to provide proof from her network operator that her handset was not WAP enabled. She also intimated that she could present her itemised cell phone accounts to show that no WAP transactions took place on her number. However, such proof was not presented by the complainant prior to the complaint being referred to adjudication.

The complainant is invited to furnish the necessary proof and this issue can then be properly adjudicated. In the meantime, I must accept the evidence presented by the SP that the complainant's handset was used to subscribe to the service.

The SP has also alleged that confirmation messages were sent, as well as the monthly reminders and billing notifications where amounts in excess of R200 were spent.

The confirmation and reminder messages sent by the SP do not adhere exactly to the required format, flow, wording and spacing required by section 11.1.10 of the Code.

The logs provided contain a detailed transaction history but there is no indication of the charges levied and the service or content item applicable for each charge. The logs therefore do not comply with section 11.6.2 of the Code.

Based on the evidence presented, the SP has contravened sections 11.1.3; 11.1.10 and 11.6.2 of the Code.

The complaint is accordingly upheld against Buongiorno UK.

Regarding the complaint against Mobimex, the SP has provided a less detailed and candid explanation of how the complainant was subscribed to its service. Based on a number of recent complaints that have been brought to my attention, it appears that this is the general attitude of the SP to these complaints.

However, as stated previously, in the absence of any evidence from the complainant showing that her handset was not WAP enabled or that no WAP transactions were processed by her network operator, I cannot make a definitive ruling on this issue.

I can, however, make a finding on the evidence presented that this SP has also not complied with sections 11.1.10 and 11.6.2 of the WASPA Code.

The complaint is accordingly upheld against Mobimex GmbH.

Sanction

It has been correctly pointed out in a number of other adjudication reports against both these SPs that contraventions of the provisions of section 11 of the Code must be viewed in a serious light. It appears that this sentiment has fallen on deaf ears.

I have examined the sanctions passed down in previous adjudications against both SPs and it appears that the severity of such sanctions have not been enough to prevent further contraventions of the Code from taking place.

In light of the foregoing, the following sanctions are given against both SPs:

1. The SPs are directed to:
 - 1.1 Provide the WASPA Secretariat with proper logs that comply with section 11.6.2 of the Code within 5 (five) days of receiving notice of this adjudication report;
 - 1.2 Refund all charges levied to the complainant's account within 5 (five) days of receiving notice of this adjudication report.
2. The SPs' membership of WASPA is suspended for a period of 180 (one hundred and eighty) days from the date of this report.
3. All network operators and/or other WASPA members who provide billing or other services to the SPs are requested to suspend such services for a period of 180 (one hundred and eighty) days.