



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe request
Complainants:	Ian Ruthven
Complaint Number:	7841
Code Version:	6.2
Advertising Rules Version:	2.3

Complaint

The Complainant stated the following:

“iTTouch or its affiliates are billing my account without my consent and without me having subscribed to any of their services. They are not contactable via telephone or e-mail. As I did not subscribe to their service I did not want to send a STOP or any other request to them. Dates of messages: (Sexy Cherry VIP) 16/04/2009 16/05/2009 16/06/2009 16/07/2009 16/08/2009 16/09/2009 Also from unknown senders: (Links in messages) 16/04/2009 18/04/2009 09/05/2009 26/06/2009 10/07/2009 16/07/2009 30/07/2009 06/08/2009 17/09/2009 07/10/2009.”

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

“I have now apparently been unsubscribed but what recourse do I have to recover the amounts that were billed to my account without my permission/consent/subscription?”

The Complainant provided the following response to the SP’s reply:

“As per my previous Mail I did not have any data activity on my account for the time provided. As a result I could not have been using the WAP service on my Mobile. I believe that I was fraudulently subscribed to the service. As I did not subscribe to the service I was not about to send a cancellation message to any number provided.(with associated costs....) There is no way for me to know that it is in fact a valid unsubscribe number rather than a data mining exercise. I only got any form of response once I had logged a complaint with

WASPA.

I have now apparently been unsubscribed but the issue has yet to be resolved to my satisfaction.”

Service provider's response

In its initial response to the informal complaint the SP wrote:

“Member has been unsubscribed on 01/10/2009 and confirmation sms sent. Thanks. Please find attached proof of subscription please note that no refund is due. The customer will be informed hereof.”

The SP provided the following response to the formal complaint:

“Our investigation shows that the user had subscribed to the Sexy Cherry Lesbian Service on the 16th April 2009 at 10:30:02.

The banner directly below the user clicked on clearly states that by clicking the click now button that he or she is agreeing that he or she is in fact over 18 and agreeing to be subscribed to the sexy cherry service. The banner also shows the user, that he or she is in fact interacting with a subscription based service and will be billed R6 every day.

Attached you will find the welcome message the user had received on the 16th April 2009 due to his or her mobile interaction with the sexy cherry subscription service.

In the **DETAIL OPTIONS** window you will find the media key sca_AMD536_3665, which is link directly to the banner the user had clicked on and our way of tracking our web site advertised banners. The media can be seen in the banner screenshot in the address bar to verify the advertisement.

Further below you will find messages sent to the user on a monthly basis informing him or her of the sexy cherry subscription service he or she had joined. These message include the unsubscribe keyword, as well as the call centre contact number should the user had experienced any problems with the Sexy Cherry Service.

Welcome message: Sent to user on the 16th April 2009 at 10:30:02

In the reporting information window above you will find proof of the user unsubscribe request, as given to our call centre agents to follow through.

In this regard, we do not deem a refund possible as we had given then user full disclosure of the intentions of the sexy cherry subscription service.”

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.

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 such as the Sexy Cherry service in this case, stating that they 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.

In addition, the sanctions provided in Adjudication 5921 refer.