



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	SA Funclub (TMG)
Information Provider (IP) (if any)	
Service Type	Content subscription service
Source of Complaints	Mr G Van Niekerk
Complaint Number	8172
Date received	26 November 2009
Code of Conduct version	8.0

Complaint

The complainant logged an unsubscribe request on the WASPA unsubscribe system on 13 November 2009. The SP did not respond to the request and the matter has been escalated as a formal complaint.

The complainant states that during April 2009 his wife started receiving 2 to 3 SMS's every 2 days on her cell phone. The messages were deemed as junk seeing that they were promoting competitions.

The complainant's wife intended to send a "stop" instruction but discovered that she would be charged R10 and so she refrained from doing so and simply continued to delete the messages.

The complainant states further that after struggling to get an itemized billing from his service provider, he eventually got an itemised account on 6 November 2009. It was only then that he saw that charges for content services had been billed to his account.

He was advised by his network service provider to contact Sybase as they were responsible for the debits to his account. He phoned Sybase on 9 November 2009 and was advised that the debits could have been charged from any one of 15 service providers that link up to them. They undertook to investigate and give further details to the complainant.

After further reminders, the complainant was advised that he should contact TMG or GMG Cash Competition. The complainant contacted the SP on 11 November 2009, and initially thought he had called a private residence due to the manner in which the call was answered.

The lady who answered the call apologized and said that it was indeed "Wixawin" but their call centre only operates from 08h00. She undertook to relay the complainant's query and he would be further contacted by one of their agents.

After a number of follow up calls, the complainant was advised that the number had been used to subscribe when it was entered into an online IQ test. The complainant was then charged R8.77 for every SMS received.

The complainant denied that he or his wife had ever responded to or visited any of the websites promoted by their messages. However the SP stated that it had proof of registration and that no refund would be given.

The complainant states that the following amounts have been debited to his account:

30/04/09 - R149.97
31/05/09 - R209.95
30/06/09 - R259.94
31/07/09 - R239.95
31/08/09 - R259.94
30/09/09 - R249.95
31/10/09 - R239.95
30/11/09 - R259.94

Total - R1868.79

The complainant has requested a full refund.

SP's response

The SP provided subscription logs for the relevant MSISDN number for the complainant.

The log shows that on 13 March 2009, at 6:30 am, the owner of the mobile phone (or someone that has access to the mobile phone) entered their number and their network operator on the SP's web page at <http://www.wixawin.com/za/ads/ig.aspx>

This is a service where users can participate in an online IQ test and subscribe for an IQ score, tips that can improve one's IQ and mobile content. The URL has been offline since 21 June 2009.

The SP states that the terms and conditions were stated on the relevant web page and could be viewed and printed by the subscriber.

After entering the mobile number and the operator, a free pin message was sent to the user's mobile phone. After the user had entered this pin code at 6:31 am on the web page, they were subscribed to the service. The SP also stated that it had the details of the computer that was used to enter the aforementioned information. However, due to privacy regulations it is not allowed to provide such information to third parties.

The subscription was confirmed by the following free message:

"You joined the Wixawin download club for the coolest content 4 ur phone! R10/msg, 6 msg/week. Reply Stop to 31939 to unsubscribe.Info: 0214043808"

The user then received 2 premium messages charged at R10 per message 3 times per week. Each message was accompanied with disclaimer information containing contact information, pricing of the service and stop instructions.

The user was also sent monthly reminder messages for the subscription as follows:

“Your subscribed to the Wixawin Content Club. Cost is R10/SMS, 24 SMS/month. SMS STOP to 31939 to unsubscribe. Help? Call 0214043808 or wixawin.com/za”.

In total, the user has received 8 reminders pointing out to the user that he was subscribed to the service.

The SP confirmed that unsubscribing from the service is not charged at a premium cost. Whenever a user unsubscribes, they send a free MO message and the SP sends a free MT message confirming that the user has been unsubscribed.

In order for people that prefer not to unsubscribe via sms, the SP also offers the possibility to unsubscribe via its helpdesk or by email, which address is stated on the web site.

The SP confirmed that the complainant had been unsubscribed on 10 November 2009. They have been in contact with the user regarding his complaint, but are of the opinion that the user is not entitled to a refund as all disclaimer information has been supplied frequently.

Sections of the Code considered

Section 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.

Section 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. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

Decision

In the current complaint, the SP alleges that the complainant, or someone using his phone, entered an online IQ test being promoted at the following URL: <http://www.wixawin.com/za/ads/iq.aspx>. By entering their information, the user was then subscribed to the SP's "wixawin" subscription service.

The complainant has denied that he or his wife, who uses the relevant cellphone, ever visited such a site or entered any online IQ test as alleged by the SP. The SP has provided logs of all messages sent to the complainant's number but has not provided proof of subscription, despite it stating that it was in a position to do so.

Based on the evidence before me, I am not satisfied that the SP has provided proof that the complainant has opted-in to validly subscribe to this service. The SP has therefore contravened section 11.1.5 of the WASPA Code.

There have been numerous complaints made to WASPA regarding entrants to online quizzes and IQ tests being automatically subscribed to content services. The volume of complaints resulted in the amendment of the WASPA Code of Conduct to strictly forbid bundling quiz and competition promotions with content subscription services.

Based on the SP's own explanation of how this service was promoted, it appears that the SP has bundled an IQ test with the "wixawin" content service. The web site promoting the IQ test and content service was taken down in June 2009. Therefore I was not able to access the relevant web pages for the purposes of this adjudication. However, based on the complainant's statements that neither he nor his wife ever intended to subscribe to this content service, even if it could be shown by the SP that they had entered the online IQ test (which is also denied), they clearly did not intend to be subscribed to the content service offered by the SP.

I therefore find that the SP has also contravened section 11.1.2 of the Code.

The complaint is accordingly upheld.

Sanction

I have already referred to the volume of complaints lodged with WASPA regarding the bundling of online quizzes and IQ tests with content services. Contraventions of section 11.1.2 are viewed in a serious light.

The SP's failure to provide proper proof of subscription has also been taken into account.

I have noted that there has been a previous complaint upheld against the SP (see 4599) also relating to subscription services, although not to these particular sections of the Code.

Taking these factors into account, the following sanction is given:

1. The SP is ordered to refund all amounts debited to the complainant's account and must provide proof to the WASPA Secretariat that it has done so within 7 (seven) days of receipt of this report.
2. The SP is fined R 75 000.00.