



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Subscription service
Complainants:	Sagren Pillay
Complaint Number:	8530
Code Version:	7.0
Advertising Rules Version:	N/A

Complaint

The Complainant wrote:

“They offer free music downloads after you do a quiz correctly and then send a password to your phone to insert on site for free music. The sms advises that you now subscribed to FUN CLUB and it's R6 per day. Where is the free now or is this just deceitful business practice?”

The Complainant provided the following feedback:

“I have received no response from anyone since. This is the first time a have got anything on the subject. I feel they con people into getting business. Note I still do not have their free song and do not want it. I feel even if I have lost a small amount they cannot get away with this kind of fraud as it could run into the millions when combined.”

The Complainant indicated that the complaint was not resolved satisfactory:

“If you notice the color of the R6 is in the same color yet a slightly darker shade. One may not see this if the screen is dim. The block showing FREE is not with this and no where in the free block does it state charge R6. Misleading and fraud has a very fine line so if they want to get away with this then they need to be more open and not think we are all fools. I just spoke to a friend now who told me how shocked she was that her air time was finished and then realized how. Guess I cannot be the only idiot to get ripped or rather as they would put it subscribe with them. No I do not accept this explanation of theirs. Why don't they set things straight forward instead of hiding their

intentions like how they operate? Why does it not state free song on condition You subscribe to them per day. I cancelled this in minutes. Also I do not have their free song so they cannot charge me anyway.

Sorry I forgot to mention that I do not need to open my sms to see the pin code and therefore cannot read their notice. So once the pin is inserted they charge even though the notice is hidden yet again."

The Complainant wrote the following to the SP's formal complaint response:

"All I can say is it is still a rip off. To say there is no rule that shades of color or size of writing can be misleading and invisible on a users screen, is to say we will continue to rip of the public as long as we can bend the rules. It will also be that in accepting wrong doing that millions would have to be paid out so I understand why they seem to try to worm their way out. If I cannot see it that does not mean I have to brighten my screen to suit them. Nothing is for free as free means at no cost at all."

Service provider's response

The SP requested extension:

"We are unable to respond by the requested deadline and request an extension till COB 2 Feb 2010."

The SP provided the following response to the informal complaint:

"Our investigation shows that the user had subscribed on our Fun Club Mobile entertainment service.

The subscription was initiated via website advertisement on 2010-01-20 09:00:47

The website interacted with does not inform the user that the items are free but that he or she has the choice of one free content item.

Further below is the entire process the user had followed in order to be have been subscribed to the Fun Club Service.

The service does not promote a competition into the Fun Club Subscription Service, as no subscription is initiated upon answering the questions correctly or not.

Process Flow:

The user is given two questions to answer correctly before proceeding to the Music or Games Selection Page.

The questions are not linked to the subscription mechanism.

At this stage the user is not subscribed to the fun club service.

Once the user has answered the questions correctly he or she is directed to the "choose your operator" page, where he or she is required to select their cell phone mobile carrier.

The page below follows the "choose your operator" page, where it clearly states that this is a subscription service, as well as the terms and conditions of the service.

On the congratulations page the user is required to enter his or her mobile number and tick the terms and conditions in order to proceed to the next page.

On the congratulations splash page we have that it is a subscription service with terms and conditions. Still at this point the customer isn't subscribed.

After the user has entered in his phone number he is sent a pin number to his phone. Still on screen is the subscription service caption and the terms and conditions.

At this stage the user has still not been subscribed to the service.

The user has to enter the pin number that is sent to his / her phone before he / she can be subscribed to the service.

This pin number has been included in the mo / mt logs attached for reference purposes.

Under no circumstances can the subscription commence if the 4 digit pin number is entered incorrectly.

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 ensures 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 (R6/day subscription service. Sms STOP FUN to 31194 to end)

The user had in fact opted to end the service with the stop command, as given in the welcome message sent to the user's mobile number.

In the entire process followed by the user the Subscription Service is displayed.

The user is granted the opportunity to select one free content items, wish is given free to the user to download as well many more other content within the Fun Club Service.

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). 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 SP stated the following in its response to the formal complaint:

"It is our understanding that the creative is WASPA compliant.

It is not stated in the code of conduct that color is needed to be displayed in a certain way to enhance the Pricing of the Mobile Subscription Service.

The pages visited by the complainant shows the user that he or she is indeed interacting with a subscription based service.

As stated by the complainant:

Why does it not state free song on condition U subscribe to them per day?

These messages are not displayed as only one item can be selected by the user to be downloaded for free.

Once again please be advised of the entire process further below, as all pages visited display Terms and Conditions of the service.

As a full member of WASPA we do not intend to mislead the public in anyway.

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Sections of the Code considered

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

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.

6.1.1. In addition to the provisions listed below all members are bound by the WASPA Advertising Rules, published as a separate document.

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.

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.

In reviewing the said website, there were a number of issues that drew the attention of the Adjudicator.

Although the subscription service text at the top of advertisement is displayed in a font that is correct, it still does not in the opinion of the Adjudicator conform to section 9.3.15 of the WASPA Advertising Rules which requires that the terms "subscription service" must be prominently displayed.

The colour of the font being used against a backdrop of similar colour is of such a nature that it would be disadvantages to anyone with a slight visual impairment to see any prominence in display, whether such impairment can be related to colourblindness, reading difficulties or as in this case, a blurry screen.

Even in the absence of any visual impairment, the Adjudicator finds it hard to see any prominent display of the text as is required by the Advertising Rules.

This in itself relates to a breach of section 11.1.1 of the WASPA Code of Conduct where in addition to the word "prominent", the word "explicit" is also used. Nothing in the said advertisement aspires to these words.

The terms and conditions at the bottom of the page are situated at such a position that one has to scroll down, before noticing it. The website design is of such a nature that one would not necessarily think of scrolling down, therefore failing in taking note of the terms and conditions. These terms and conditions are also not fulfilling the font size 12 as is required by section 9.2.2.1 of the Advertising Rules.

The SP has failed to adhere to the Advertising Rules which would suggest a breach of section 6.1.1 of the Code of Conduct.

In its reply the SP has not denied any of the allegations made against it in the said complaint, therefore inferring acknowledgement of the alleged breaches.

The luring of consumers into subscription services by way of a quiz is a direct breach of section 11.1.2 of the Code of Conduct and further analysis of the specific content is therefore irrelevant to this matter, although also clearly a further violation of section 11.1.2.

In its breaches of the relevant sections, the Adjudicator also finds the SP in subsequent breach of sections 4.1.1 and 4.1.2.

The fact that the links on these "free" items are non functional, does not necessarily imply a breach or non-delivery of service and can merely indicate that such items would be available once subscribed. The intentions are

however not clear and the Adjudicator does find it a bit misleading, further justifying the finding of the SP in breach of section 4.1.1 above.

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's willingness to investigate but subsequent failure to rectify.

The SP is instructed to refund the Complainant in full.

The sanctions in Adjudication 8411 refer.
