



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK/iTouch
Information Provider (IP):	Not applicable
Service Type:	The usage of word "Free"
Complainants:	Monitor
Complaint Number:	8780
Code Version:	7.0
Advertising Rules Version:	N/A

Complaint

The complaint was lodged by the WASPA Media Monitor.

The Monitor wrote:

"Buongiorno is promoting web ads that make use of a competition to get users subscribed into a subscription service. This is clearly in breach of 11.1.2. The service is promoted as FREE content, yet R6/day is charged. This is misleading advertising. The pages are not explicitly identified as a subscription service. Buongiorno were given an opportunity to remove these web-ads on 29 January, but felt that their service was complaint and did not respond despite various reminders."

The Monitor provided the following feedbacks:

"Can it also be noted that two competitors also complained about this Buongiorno website ads. They wish to remain anonymous."

"Please proceed to adjudication.

The Code states that entering a sub service must be an independent transaction, and not via a competition or quiz. These web ads (now web ads) continue to be in breach of code 11.1.2.

I am thankful that the word "Free" has been removed, however these ads are still not properly and adequately identified as a subscription service. The fine print they have used to display "subscription service" at the bottom of each block is quite simply not "explicitly identified as a subscription service" as required by the Code. And the headline that appears on the final page is an out-of-focus (softened type) blue on blue type – definitely not explicit.

An average user making use of this service will have no idea that they are entering into a subscription service.”

“There was one point I forgot to comment on:

Buougiorno wrote:

If this is the case, please state clearly what the prize would be, if this is as claimed a competition into a subscription service.

Following the questions answered on the web/web pages, the next screen reads: “Congratulations! Free music and game for you”. This line most definitely implies a winning.”

The complaint was assigned to the Emergency Panel Hearing.

The Emergency Panel provided the following Ruling:

“Complaint 8780 relates to marketing material for Buongiorno UK's Fun Club subscription service. This complaint was lodged by the WASPA Media Monitor. The SP had provided a response to the formal complaint prior to the invocation of the emergency panel process, and this response was made available to the panellists. Although it was noted that WASPA has received several other complaints relating to this service, these complaints were not reviewed by the panel, which limited its review to complaint 8780.

When reviewing this matter, the panel noted some difficulty in determining exactly which version of the advertisements presented in the complaint and in the SP's response to the complaint are currently active. However, this did not have a material impact on the panel's conclusions. The panel did not make any determination on the alleged breaches of clauses 4.1.1 and 4.1.2 of the WASPA Code of Conduct, and left these aspects of the complaint for the adjudicator to review.

Reviewing the alleged breach of clause 6.5.1, the panel noted that the SP has made some changes in response to the original complaint to remove the word "free" from various marketing materials.

However, while the breach of 6.5.1. appears to have been substantially remedied, there remain occurrences of the word "free" in both revised version of the advert presented in the SP's response (despite the SP's claim that they "have removed the Free word in the advertisement") and on some of the online marketing examined by the panel.

To the extent that the word "free" remains in the marketing, the panel is of the view that this represents a prima facie breach of clause 6.5.1.

Reviewing the alleged breach of clause 11.1.1, the panel was of the view that the advertisements for the Fun Club service are generally not clear, and seem to be designed to be misleading. In particular, the prominence, positioning and colouring of the words "subscription service" in almost all of the marketing material represents a prima facie breach of clause 11.1.1 and of the section 9.3.15 of the Advertising Rules.

The panel also noted that the terms and conditions linked to from the promotional material do not seem to specify that the service is a subscription service.

During the emergency panel hearing, one of the adjudicators tested the

service by following the subscription instructions. The following additional problem was noted during this process. The message sent to a prospective subscriber in response to entering a mobile number on the web site does not follow the prescribed format set out in 11.1.10.

The panel views this as a serious breach of the WASPA Code. Examining the remaining alleged breach, that of clause 11.1.2, the panel noted that the overall impression created of the marketing of the service is that it is an entry into a competition, rather than a request to join a subscription service. Noting the findings of the appeals panel in complaint 5558, the panel agreed that if all of the related requirements of the Code had been correctly implemented, this might well be sufficient to alleviate concerns regarding clause 11.1.2.

However, given that the panel had identified evidence of breaches of clause 11.1.1 and 11.1.10, this cast significant doubt on the SP's compliance with clause 11.1.2. Nonetheless, the panel decided to reserve judgement on the alleged breach of 11.1.2 for the formal complaints process.

Having determined that the SP's marketing and service offering is in breach of at least clauses 6.5.1, 11.1.1 and 11.1.10, the emergency panel orders that:

1. Buongiorno UK must immediately suspend all new subscriptions to the Fun Club service until the service is fully compliant with clause 11.1.10 of the Code.
2. Buongiorno UK is ordered to rectify the breaches of 11.1.1 and 6.5.1 of the Code. Buongiorno UK must also ensure that all marketing for the Fun Club service is fully compliant with the requirements of the Advertising Rules.
3. The remedy specified in 2, above must be completed to the satisfaction of the WASPA Media Monitor within 48 hours of the publication of this ruling, failing which all marketing for the Fun Club service must be withdrawn until such time as it has been amended to the satisfaction of the WASPA Media Monitor."

Service provider's response

The SP stated the following:

"We are not promoting a competition and or luring the public into a subscription service. If this is the case, please state clearly what the prize would be, if this is as claimed a competition into a subscription service.

Since notification of the webpage by the media monitor, we have undertaken to amend the web pages in question and have removed the Free word in the advertisement.

The advertisement states the cost as well as the Terms and Conditions for the user to assess before deciding to subscribe to the Fun Club.

Below is the current page as it stands currently:

Nowhere on the creative is the word free found.

Answering of the questions does not lead to the subscription, hence the questions answered or not will not initiate a subscription into the Fun Club.

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

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...

We trust that this is to the satisfaction of the secretariat."

The SP provided the following response to the Emergency Panel Ruling:

"Please be advised that all pages will be stopped in the interim.

Once these have been amended accordingly, we will thus inform the media monitor to commence testing of the pages in question.

Additional information as per the Emergency Panel's recommendations:

We are not promoting a competition and or luring the public into a subscription service.

If this is the case, please state clearly what the prize would be, if this is as claimed a competition into a subscription service.

Since notification of the webpage by the media monitor, we have undertaken to amend the web pages in question and have removed the Free word in the advertisement.

The advertisement states the cost as well as the Terms and Conditions for the user to assess before deciding to subscribe to the Fun Club.

Below are the current pages as it stands currently:

Nowhere on the creative is the word free found.

Answering of the questions does not lead to the subscription, hence the questions answered or not will not initiate a subscription into the fun club.

On the pages directly below it is shown that it is a subscription service and billing that would occur, should the user subscribe to the Fun Club Service.

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

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. One the user enters his or her mobile number, the user is sent a pin number, which needs to be entered on the inert pin number page.

Insert Pin Page. Only after entering the pin does the user get subscribed to the Fun Club.

Just to advise once again, changes are underway and will on be completed by COB on Wednesday 3rd March 2010.

Once the amendments have been done, we shall notify the media monitor commence testing.

We trust that this is to the satisfaction of the secretariat.”

Sections of the Code considered

2.14. A **“keyword”** is any word used in an SMS or MMS sent by a customer to request a service.

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.

6.5.1. The keyword “free” or words with the same or similar meaning (in any language) may not be used for any service unless that service has no associated charges whatsoever, excluding network bearer charges.

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.

It has come to the attention of the Adjudicator that the website referred to is still up and running, displaying the exact issues that were raised by the complainant, albeit the undertaking by the SP to disable the said site.

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 or reading difficulties.

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 Adjudicator is however not convinced that the display of free items is in contradiction of section 6.5.1 of the Code read together with section 2.14.

The text “free” is prohibited when used as a **keyword**. This is not the case in this matter. However, 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 misleading, further justifying the earlier 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 and subsequent failure to rectify.

The sanctions in Adjudication 8411 refer.
