



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Buongiorno UK
Information Provider (IP) (if any)	
Service Type	Subscription
Source of Complaints	A M Heyns
Complaint Number	9150
Date received	29 March 2010
Code of Conduct version	8.0

Complaint

The complainant logged an unsubscribe request on the WASPA unsubscribe system on 23 March 2010. The complainant was not satisfied with the SP's response and the request has been escalated as a formal complaint.

The complainant was advised by her network service provider that she was receiving content charges on her cellphone account of R10.00 per day. The complainant contacted the SP and queried the charges. She was advised that she had been sent a message with an access code, which she was alleged to have used to subscribe to the service. She was also advised that she had downloaded numerous content items to her phone.

The complainant denies that she subscribed to the service and that she downloaded content from the SP. She advises that she is 61 years of age and would definitely not waste her money on such things.

It appears that the subscription ran from February to August 2009, at which stage the complainant alerted the SP to terminate her subscription.

The complainant states that she did not query the accounts sooner as she had left Durban and her daughter forwarded the accounts to her periodically.

It appears that the subscription service was promoted by some form of IQ (brain) test.

SP's response

The SP confirmed that the complainant was unsubscribed from the service and uploaded logs purporting to be proof of subscription. No refund was offered by the SP.

The SP attached messages sent to the complainant from the date of service initiation in January 2009 until August 2009, when the subscription was cancelled.

The SP states that the complainant would have activated the subscription by responding to an SMS sent to her mobile device with a 4 digit pin code. The complainant would then have entered the code on the SP's Fun Club Website advertisement correctly in order for the service to have been initiated.

In the Detail Options window provided, the SP referred to the subscription media key linked to the website advertisement (fca_tek521_3762), which corresponds with the media key linked to the Fun Club web advert, and which was used by the complainant.

The SP denies that its web advert was misleading in any way. On all its web pages, the SP included the text "subscription service R10/day" and the full terms and conditions. In the terms on conditions it instructs the user how to unsubscribe from the service.

The user enters their age and the number of hours that they sleep on the banner advert. Another banner notifies them that the result is on their mobile.

The user is not subscribed at this stage and is sent to the SP's WAP splash page.

On the splash page, the terms and conditions for the subscription service are stated. Some users, depending on their screen size, may have to scroll down to see the full terms and conditions.

The user is then prompted to enter their phone number and is sent a pin number to their phone. On this screen, the game can be seen in the corner and then comes to the front of the page and is enlarged. The user has to enter the pin number that is sent before they can be subscribed to the service.

The user is given their brain age results and notified that with the brain trainer they can calculate their own brain age. The SP states that this page is being modified to say "WELCOME TO FUN CLUB. At this point, the user is subscribed and will receive their welcome message, the brain age game and the link to the WAP site.

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 WAP link to download content where it states in the terms and conditions and frequently asked questions on the WAP 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: 021 417 8001 (R10/day subscription service. Sms STOP FUN to 31194 to end)"

The SP does not believe a refund is due as all pages display that that this is a subscription based service.

Sections of the Code consideredSection 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.

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.

Section 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.

Section 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.

Section 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.

Section 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].

Section 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

I have noted the SP's description of the subscription process and by its own admission it has contravened section 11.1.2 of the WASPA Code of Conduct by

promoting its subscription service using the “brain age test” that is initially offered to a user.

The complainant is a 61 year old woman that uses her cellphone to send SMS's and communicate with her family. She has denied ever having requested this service.

On the evidence presented, even if the complainant had entered the brain age test, she did so without having a specific intention of subscribing to the SP's subscription service.

The complaint is accordingly upheld.

Sanction

There have been numerous complaints lodged against the SP's Fun Club subscription service, most of which have been upheld (e.g. 7688, 7631, 7452, 6112, 6039, 5921).

It has been noted that the SP has been suspended from WASPA pursuant to the sanction handed down by the adjudicator in complaint 7452, and that a number of fines handed down in other adjudications remain unpaid.

In light of the foregoing, I am left with no choice but to recommend the termination of the SP's membership of WASPA.