



ADJUDICATOR'S REPORT

WASPA Member (SP):	Buongiorno SA
Information Provider (IP):	Not applicable
Service Type:	Subscription
Complainant:	Public
Complaint Number:	11040
Code Version:	10.0
Advertising Rules Version:	2.3

Complaint

This complaint concerns the SP's Fun Club subscription service ("the service"). The Complainant, the account holder whose mobile phone was used to subscribe to the service, has taken issue with this subscription. The Complainant's minor daughter has been using this particular mobile phone and, as it appears from the Complainant's submissions, she likely and inadvertently subscribed to the service when requesting a song download from the SP through the service. The reasons given for this complaint's escalation to a formal complaint are as follows:

I was subscribed to the Fun club since January 2009 without my knowledge or consent and cancelled it immediately when I was informed of this by CellC. I received the e-mail below on the 26th of October 2010 from the Fun club to confirm that I was subscribed. CellC paid them an amount of R5 per day for 1 year and 10 months on my behalf. Regardless the so-called confirmation from Fun club I never subscribed to this service nor was I aware that I was subscribed to this service. As far as I understand the law there must be consensus between two parties to constitute such an (continuous) agreement. As cell phone users we receive many such messages stating that: You are subscribed to .., to unsubscribe SMS the word .. to We receive these from various companies without ever subscribing to any of these services and do not reply to such SMSs because of the possible charges involved.

This part of the complaint doesn't disclose much detail but further detail was provided in response to the SP's feedback which I have set out or referred to below.

Service provider's response

The SP's response is a fairly standard response describing the service and how a person becomes a subscriber. A copy of this explanation, together with an email conversation thread detailing the initial complaint is annexed to this report, marked "A". I have redacted the Complainant's personal information. The SP explained that the service is a subscription service activated by sending a keyword to an sms shortcode. In this case the service would have been activated by sending the keyword "hot" to 31194.

According to the SP's logs (annexed and marked "B"), the Complainant's phone was subscribed on 2009-01-07. The logs do not detail the messages sent from that time until 2010-07-02 when a reminder message was sent to the phone stating the following:

You are subscribed to Fun Club from Buongiorno. You get unlimited downloads. Cost R6/day. For help call 0214178001. To unsubscribe sms STOP FUN to 36060.

The logs detail further reminder messages dated 2010-08-02 and 2010-08-30 with the same content.

The SP's feedback to WASPA includes a screenshot of the TV advertisement which prompted the subscription. It lists a number of songs and highlights a Katy Perry song, "Hot & Cold", and has relatively large text inviting viewers to "sms HOT 31194" with the implication being that doing so would deliver the song to the viewer. The advertisement has a block of black text against a white background immediately below these activation instructions which states the following:

SUBSCRIPTION SERVICE. R10 per day. Network charges extra. Sms STOP FUN to 31194. Company Buongiorno. Help 021 417 8001 (VAN rates apply). Full T&C's at www.36060.co.za.

There is a further block at the top right of the screen, similarly black text against a white background, stating the cost being "R10 per day".

The difficulty with services like this one is that the dominant impression is often that the service is a single item, non-subscription content download service as opposed to a subscription service. This particular complaint is a clear illustration of how such an impression can lead to a subscription where the subscriber lacked the intention to subscribe in the first place.

The Complainant expressed dissatisfaction with the SP's feedback to WASPA and when he was advised that the complaint lacked sufficient detail for an adjudicator to meaningfully consider the matter, the Complainant responded to the WASPA Secretariat with the following:

Thank you for this opportunity to present my case.

Although the contract is in my name, the cell phone number has always been used by my young daughter. She cannot remember the exact incident but I assume that it is quite possible that she sent an SMS with the word "HOT" to the service provider. The point is that she had no idea that she was entering into a continuous and long-term agreement. She was under the impression that she could download a song for R5.00 and that was it. She also didn't use this service again, further implying that she was unaware that she was in fact 'subscribed'.

The television advertisement that she apparently reacted to was in English, which is not her mother tongue so I can understand that she only read the words that she could in fact comprehend. The only word in the television advertisement that implies a continuous agreement is 'subscribe' and she obviously did not understand this.

I was also unaware of the subscription since I never received monthly bills from CellC, until a month ago when I requested this. According to my daughter, she did from time to time, receive messages stating that she was subscribed to 'The fun club' but thought nothing of it as she didn't understand the message. As cell phone users we receive many such messages stating that: 'You are subscribed to, to unsubscribe SMS the word to' We receive these from various companies without ever subscribing to any of these services and I for one, do not reply to such SMS's because of the possible charges involved.

I am certainly no legal expert, but I cannot see how this company's behavior could be ethical or legal. As far as I'm concerned, they entered into an agreement with a minor who did not know what she was doing. As legal guardian and account holder, I could also not ratify the agreement as I was completely unaware of the situation, until a month ago, when I immediately cancelled the subscription.

I imagine that the company could argue that as account holder, I should have been aware of the subscription. In normal circumstances this may be true but it became quite clear to me that my daughter was not the only one to be caught out by these misleading advertisements. When I phoned CellC to inquire about the so-called 'content services' charged on my bill, the call centre had a list of telephone numbers of companies conducting business in the same way, readily available. I wonder how many subscribers phone CellC on a monthly basis to query these amounts that are being charged – completely unaware of what they apparently subscribed to. Furthermore, if you phone this company, they have an 'unsubscribe' option on their telephone menu, further implicating that it's not something that happens on an irregular basis.

I read the Consumer Protection Act (2008) and came up with the following sections that may

support my case.

- 1. Not only contracting parties are covered by The Act, but also users, recipients and beneficiaries of goods or services.*
- 2. There is a distinct focus throughout the Act on clear and understandable language and ensuring that the consumer is not misled by suppliers.*
- 3. Section 31 effectively outlaws negative option marketing where an agreement comes into existence automatically unless the consumer declines (such as when you don't decline, you receive a subscription and an invoice).*
- 4. "Unsolicited goods" provisions determine that a consumer is under no obligation to pay a supplier for unsolicited (uncalled-for) goods/services.*
- 5. The Act has extensive provisions regarding direct marketing, the use of language and prohibitions against misrepresentations to and deception of consumers, especially the most vulnerable who are challenged either by literacy, language, age, or health.*

I believe that there are many others out there who have encountered the same kind of problems and I thank you for your time to address our concerns.

Sections of the Code considered

The following sections of the Code are particularly relevant to the complaint:

- 11.2.1. 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.*
- 11.2.2. 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.*
- 11.2.4. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian to do so.*

Sections of the Advertising Rules considered [if applicable]

I did not consider the Advertising Rules for the purposes of this complaint.

Decision

Leaving aside the Complainant's interpretation of the Consumer Protection Act, the Complainant raises a number of important concerns about the service and how it is presented to prospective subscribers. The Complainant's daughter is apparently a minor and does not speak English as her primary home language. She apparently perceived the service as a single item and non-subscription content download service and sent the requisite keyword to the shortcode with the intention of downloading the Katy Perry song. She did not appreciate the import of the subscription notifications or the subsequent messages she presumably received from time to time. In the meantime the Complainant incurred charges for the subscription over an extended period of time. The Complainant's prejudice was aggravated by an apparent lack of statements from Cell C, the relevant network provider.

While the SP took steps to advise prospective subscribers that the service was, in fact, a subscription service, the manner in which it was presented to viewers likely created some confusion as to the service's nature (single item download service or subscription service?) and may have induced some viewers to subscribe without a specific intention of doing so. For this reason these sorts of advertisements have been problematic for some time and remain so.

In this particular case, the service has infringed sections 11.2.1 and 11.2.2 of the Code in that -

- The Complainant's daughter accessed the service under an apparent perception of the service as a single item and non-subscription content download service, with the apparent intention to download a song, rather than to subscribe to a content service. She further misunderstood the nature of the service and lacked a specific intention to subscribe to it. The service therefore violates section 11.2.2 of the Code.
- The service ostensibly linked requests to download single content items with a subscription service with the result that a person requesting a content item download will become a subscriber as a result of that request. This subscription mechanism falls foul of section 11.2.1 of the Code.

In addition to the above grounds, the SP does not appear to have taken steps to ensure that

the Complainant's daughter has consent from her father, the Complainant, to subscribe to the service. Given the nature of the content on offer and its likely intended market, the SP should have taken further steps to address this issue as well as the likelihood of non-English speaking viewers looking to access the service based on their overall impression of that service. In this case, that overall impression was not of the service as a subscription service.

Sanctions

The service is in violation of the Code and the Advertising Rules and the SP is ordered to immediately cease all instances of the service as well as variations of the service ***which entice prospective subscribers through offers of single content items which are not clearly and explicitly identified as being part of a subscription service.*** It is not sufficient to mention that a subscription service exists without explicitly linking the subscription nature of the service to the items on offer through the service. Prospective subscribers must be reasonably aware that, furnishing their phone number and requesting the item on offer, they are opting into a subscription service.

The SP is required to withdraw the Web pages intended to promote the service from public view until such time as they are compliant with the Code's requirements as stated above.

In respect of the Complainant and his complaint, the SP is ordered to -

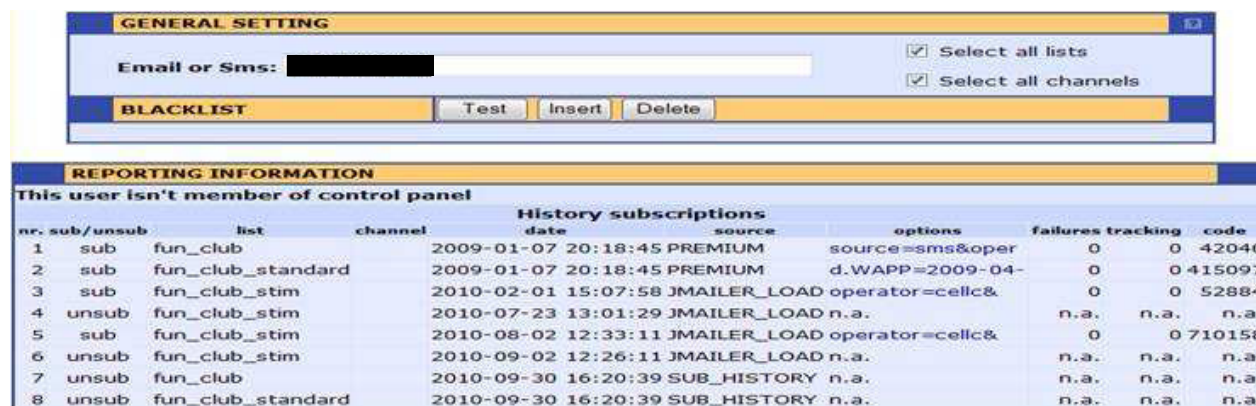
- send a reminder message to all current subscribers of the service that forms the subject matter of this complaint in the format specified in section 11.6 of the current version of the Code no later than 48 hours after being notified of my findings;
- refund all charges levied against the Complainant's account for the period of her subscription to the extent such an order is feasible in the WASPA Secretariat's opinion.

Subject: Re: [WASPA.complaints] [formal] Complaint Ref:#11040 Escalation of unsubscribe #673966
From: "Sharief Holt" <sharief.holt@buongiorno.com>
Date: Tue, 9 Nov 2010 15:40:41 +0200
To: <complaints@waspa.org.za>, "'Rosalinda van Rooyen'" <rosalinda.vanrooyen@buongiorno.com>, "'Hans Mol'" <hans.mol@buongiorno.com>

Dear Waspa,

Further investigation into the complainants mobile content subscription within the fun club service was initiated by the complainant via sms.

The complainant had sent in the keyword HOT to 31194 2009-01-07 20:18:45, as shown in the message received log attached and the screenshot directly below.



This was in response to the television commercial, where the viewer was required to send in the keyword hot to 31194. Once having done so the service sent the following two welcome message to the user.

1. Hi & welcome to FUN CLUB! The fun NEVER stops with UNLIMITED downloads 4 ur phone. Helpdesk: 0214178001. [R10/day
2. Hi!U're a member of the FUN club!Click now 4 tones,pics & more!

The messages sent to the user was informative of the subscription service, stop command and 24x7 contact details, should the user exp period.

On a monthly bases the user was sent reminder messages also informative of the subscription, billing frequency and 24x7 contact deta The user had received monthly reminders during the subscription period, as shown in the attached document.

In the advertisement viewed by the user it was informative of the subscription service wording and T&C's displayed placed in the viewers plain site.

Other content items were shown to the user as well during the airing of the advertisement.

From the time of first viewing all information was clearly visible to the complainant during the television advertisement.



In light of these finding we are not in favor of a user refund, as all information was given to the user in order to have made an informative decision before initiating the subscription process. Please be advised that the service is no longer active on the users mobile msisdn.

Best Regards
Buongiorno SA

-----Original Message-----

From: WASPA Complaints (Lorraine Hartzer) [mailto:complaints@waspa.org.za]
Sent: 05 November 2010 04:57 PM
To: Sharief Holt; 'Rosalinda van Rooyen'; Hans Mol
Subject: [formal] Complaint Ref:#11040 Escalation of unsubscribe #673966

Dear WASPA member,

The appended unsubscribe request was logged on the WASPA unsubscribe system on 2010-11-05, but the complainant has indicated that they are not satisfied with your response.

Therefore, the WASPA Secretariat has no choice but to escalate this query to a formal complaint against Buongiorno.

Accordingly:

- You have five working days to respond to the complaint, and to provide the WASPA secretariat with any information you deem to be relevant to this complaint.
- After five working days have passed, this complaint, together with your response (if any) will be assigned to an adjudicator for review, and if upheld, determination of appropriate sanctions.
- You do not have an obligation to respond to this complaint. Should the WASPA secretariat not receive any response from you within this time period, it will be assumed that you do not wish to respond.
- Your response, and any other correspondence relating to this complaint, must be sent to <complaints@waspa.org.za>. Correspondence sent to any other address may not be deemed to constitute a formal response.
- The WASPA Secretariat will confirm receipt of your response.

It is recommended that your response should include as much as possible of the following information that is relevant to this complaint:

- Logs as stipulated in clause 11.9.2. of the Code of Conduct
- Information on how this service was or is advertised e.g.: TV, WAP, Internet, SMS, radio
- A copy of the advertisement/marketing material
- In the case of a TV advert please provide flight times and codes
- Statistics on the number of entries/users of this service

If you have any questions regarding the Code of Conduct or the complaints procedure, please address your queries to <complaints@waspa.org.za>.

Please confirm your receipt of this message.

Warm regards,
WASPA Secretariat

--- A copy of the unsubscribe request follows below ---

The user who escalated this request has provided the following reason for escalation: Complainant writes: I was subscribed to the Fun club since January 2009 without my knowledge or consent and cancelled it immediately when I was informed of this by CellC. I received the e-mail below on the 26th of October 2010 from the Fun club to confirm that I was subscribed. CellC paid them an amount of R5 per day for 1 year and 10 months on my behalf. Regardless the so-called confirmation from Fun club I never subscribed to this service nor was I aware that I was subscribed to this service. As far as I understand the law there must be consensus between two parties to constitute such an (continuous) agreement. As cell phone users we receive many such messages stating that: You are subscribed to .., to unsubscribe SMS the word .. to We receive these from various companies without ever subscribing to any of these services and do not reply to such SMSs because of the possible charges involved.

I would be grateful if the matter could be taken further.

WASP members

Buongiorno

Details of the complaint

Mobile number: [REDACTED]

Customer email: [REDACTED]

Mildré Olivier

Actions requested:

- SP requested to unsubscribe customer
- SP requested to send an SMS confirming this unsubscribe
- SP requested to provide proof of subscription
- SP requested to contact customer regarding a refund

WASPA member response: Buongiorno

Response to unsubscribe request: Unsubscribed

Confirmation SMS sent to the customer: Sent

SP has been in contact with the customer: Yes

Response to the request for a refund: No refund offered

Upload proof of subscription: Uploaded by WASP

Proof of subscription available from

<http://secure.ff.co.za/unsubscribe/proof.php?action=view&id=673966&wasp=9>

Comments

Buongiorno on 2010-11-05 09:47:05 said:
please see the attached logs. no refund is offered. we'll notify the customer hereof - thanks

Buongiorno on 2010-11-05 10:03:27 said:
please see the attached logs. no refund is offered. we'll notify the customer hereof - thanks

+27848687047 Message send in log from user.xlsx	Content-Type: application/vnd.openxmlformats-officedocument.spreadsheetml.sheet Content-Encoding: base64
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+27848687047 Messages sent to the complainant.xlsx

+27848687047 Messages sent to the complainant.xlsx	Content-Type: application/vnd.openxmlformats-officedocument.spreadsheetml.sheet Content-Encoding: base64
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Request number: #673966

Mobile number: [REDACTED]

GENERAL SETTING ?

Email or Sms: [REDACTED] Select all lists
 Select all channels

BLACKLIST

REPORTING INFORMATION

This user isn't member of control panel

History subscriptions										
nr.	sub/unsub	list	channel	date	source	options	failures	tracking	code	
1	sub	fun_club		2009-01-07 20:18:45	PREMIUM	source=sms&oper	0	0	42040	
2	sub	fun_club_standard		2009-01-07 20:18:45	PREMIUM	d.WAPP=2009-04-	0	0	415097	
3	sub	fun_club_stim		2010-02-01 15:07:58	JMAILER_LOAD	operator=cellc&	0	0	52884	
4	unsub	fun_club_stim		2010-07-23 13:01:29	JMAILER_LOAD	n.a.	n.a.	n.a.	n.a.	
5	sub	fun_club_stim		2010-08-02 12:33:11	JMAILER_LOAD	operator=cellc&	0	0	710158	
6	unsub	fun_club_stim		2010-09-02 12:26:11	JMAILER_LOAD	n.a.	n.a.	n.a.	n.a.	
7	unsub	fun_club		2010-09-30 16:20:39	SUB_HISTORY	n.a.	n.a.	n.a.	n.a.	
8	unsub	fun_club_standard		2010-09-30 16:20:39	SUB_HISTORY	n.a.	n.a.	n.a.	n.a.	

MOBILE TRAFFIC REPORT

CREATED	MO/MT	RESPONSE	FROM	TO	TEXT	MORE
2010-07-02 17:10:00 +0200	MT TransID	2010-07-02 17:11:31 +0200 acked	27840031194	[REDACTED]	You are subscribed to Fun Club from Buongiorno. Yo....	template

[Download file XLS](#)

You are subscribed to Fun Club from Buongiorno. You get unlimited downloads. Cost R6/day. For help call 0214178001. To unsubscribe sms STOP FUN to 36060.

MOBILE TRAFFIC REPORT

CREATED	MO/MT	RESPONSE	FROM	TO	TEXT	MORE
2010-08-02 17:15:00 +0200	MT TransID	2010-08-02 17:17:06 +0200 acked	27840031194	[REDACTED]	You are subscribed to Fun Club from Buongiorno. Yo....	template
2010-08-30 17:15:00 +0200	MT TransID	2010-08-30 17:20:04 +0200 acked	27840031194	[REDACTED]	You are subscribed to Fun Club from Buongiorno. Yo....	template

[Download file XLS](#)

You are subscribed to Fun Club from Buongiorno. You get unlimited downloads. Cost R6/day. For help call 0214178001. To unsubscribe sms STOP FUN to 36060.