



REPORT OF THE ADJUDICATOR

WASPA Member	Buongiorno UK
Information Provider (IP) (if any)	n/a
Service Type	Subscription
Source of Complaints	Public
Complaint Number	5682
Date lodged	30 January 2009
Code of Conduct version	6.2

**NOTE THAT THIS ADJUDICATION CONTAINS ADULT MATERIAL AND MAY ONLY BE
READ BY PERSONS OVER THE AGE OF 18**

Complaint

This complaint is an escalation of an unsubscribe request relating to the Sexy Cherry service provided by the WASPA member.

The complainant disputed having subscribed to the service and requested a refund for charges dating back to May 2008.

The member unsubscribed the complainant's MSISDN and confirmed this to the complainant but refused the request for a refund on the basis that logs provided indicated that the complainant had subscribed to the service.

After viewing the logs provided the complainant acknowledged that it "seemed" like he had subscribed but raised a further issue in terms of the billing he had received for content services. The query in this regard was that, notwithstanding that the subscription service offered by the member was billed at R30 per 5 days, the complainant had been billed R131.60 for November 2008; R184.23 for December 2008 and R52.64 for January 2009 (copies of the relevant MTN accounts were provided).

Member Response

The member provided:

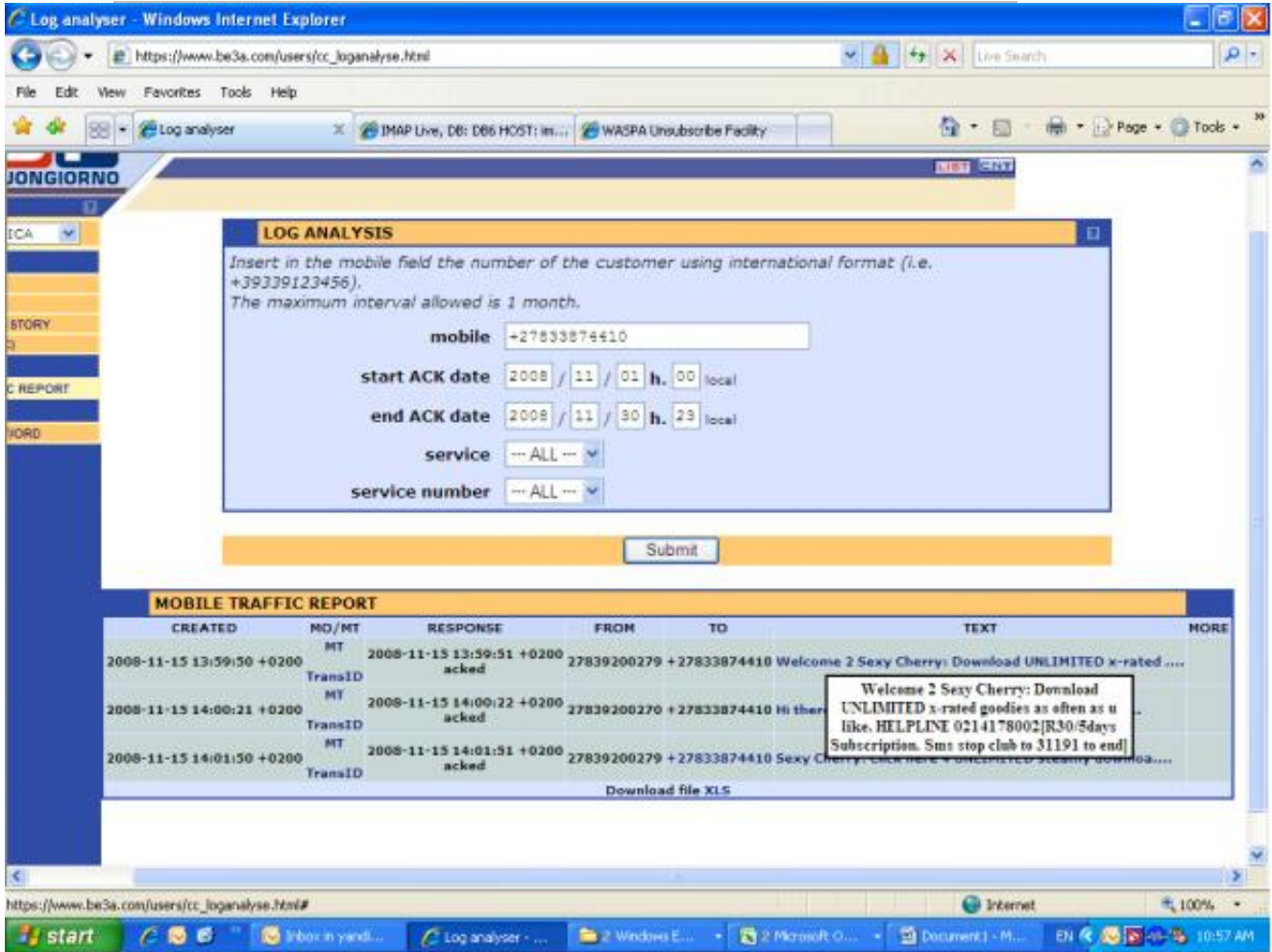
- Confirmation that the complainant subscribed to the service on 15 November 2008 (Screenshot 1)
- Messages sent to the user upon subscription to the Sexy Cherry service (Table 1)
- Confirmation that the complainant was unsubscribed as of 26 January 2009
- A screenprint of the wap page used by the complainant to access the service.

The member noted that the wap page in question “clearly states that this service is a subscription service @ R30 / 5days. By clicking on the link, [the user] is stating that they are over 18 and joining a subscription service”.

The member did not deem a refund justifiable as “this user was well aware of the conditions of this service upon subscription (joining), as seen on the page which he or she accessed via our mobile wapsite”.

key	value
billed	true
credits	20060
creditsBilled	60
d.WAPP.count	1
d.WAPP	2009-01-15 09:15:00
d.WAPP - TimeToLive	20090415
d.WASPA.count	2
d.WASPA	2009-01-15 08:15:00
d.WASPA - TimeToLive	20090415
dateBill	2009-01-21 10:58:47
dateBillAttempt	2009-01-21
dateBillSucc	2009-01-21 10:58:47
daysFT	0
mk	spa_buz577_3818
operator	mtn
rebills	90
source	wap

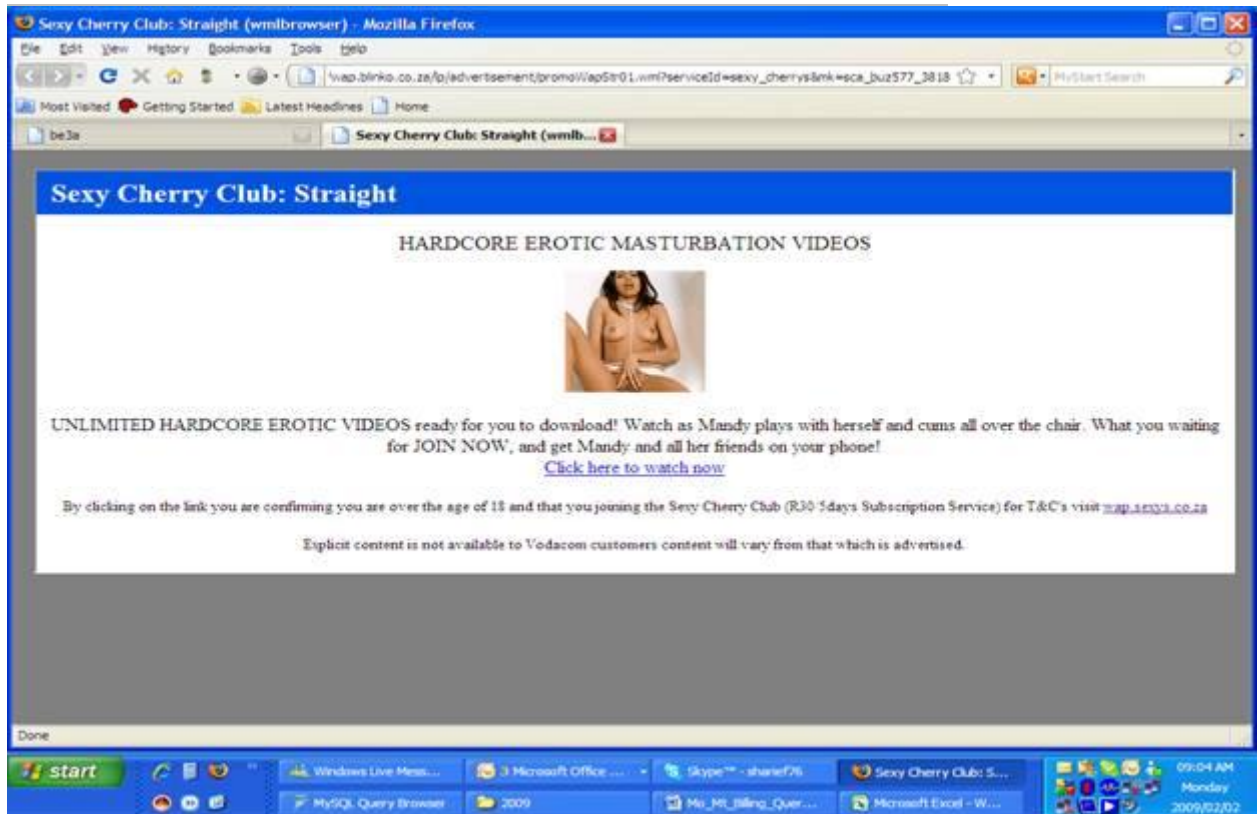
Screenshot 1



Screenshot 2

11/15/2008 12:59	Welcome 2 Sexy Cherry: Download UNLIMITED x-rated goodies as often as u like. HELPLINE 0214178002[R30/5days Subscription. Sms stop club to 31191 to end]
11/15/2008 13:00	Hi there! Join Club Movilisto for UNLIMITED fun & games! FREE ringtones, videos, games & CHAT with ur friends! Join now: sms MOVE to 36060 [R10/5days]
11/15/2008 13:01	Sexy Cherry: Click here 4 UNLIMITED steamy downloads!
12/15/2008 8:15	Reminder:ur a SexyCherry VIP member@just R30/5day u have UNLIMITED HARDCORE ACCESS.2 end sms stops to 31191.Y would u want 2? My wet friends r cuming.0214178002

Table 1: Messages sent to the complainant



Screenshot 3: WAP sign-up page

Sections of the Code considered

The following sections of the WASPA Code of Conduct were 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.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”.

Decision

The Adjudicator accepts the proof of subscription provided by the WASPA member but is not satisfied that the subscription mechanism utilised by the member was compliant with the Code of Conduct.

In the Adjudication report for complaint 5564 - see <http://www.waspa.org.za/code/download/5564.pdf> - which dealt with a very similar online advert for the Sexy Cherry subscription service, the following was stated:

“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.”

1. It does not follow, however, that a user would necessarily be aware that by clicking on the link they will be subscribed to the member’s Sexy Cherry subscription service or that they would, after clicking on the link, be charged immediately.
2. An examination of the advert shown above indicates that the member has not complied with the requirements of section 9.2 of the Advertising Rules with regard to the manner in which the cost of access text and the terms and conditions have been set out.
3. The member has not clearly conveyed to customers and potential customers the pricing information for its subscription service in that it has not made such pricing sufficiently prominent in the context of the advert and in relation to the positioning of the “Click here” text.
4. The member is found to have breached section 4.1.1 of the Code read with section 9.2. of the Advertising Rules.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”.

5. It is immediately clear from a study of the advert set out above that:
 - 5.1. the “call to action” is the “click here link”, i.e. this is the subscription mechanism;
 - 5.2. the words “subscription service” are towards the bottom of the advert, below the competition details and other promotional items;
 - 5.3. the words “subscription service” can not objectively be said to be prominently displayed not can it be said that the advert prominently and explicitly identifies the service provided by the member as a subscription service.
6. The use of the word “Club” does not save the WASPA member in this regard – WASPA and the industry has invested a great deal of time and effort in shoring up consumer confidence in subscription services and they must be explicitly labelled as such.
7. The member is therefore found to have breached section 11.1.1 of the Code read with section 9.3.15 of the Advertising Rules.
8. The Adjudicator views this breach as being serious in that there is a strong likelihood of harm to consumers who will not expect to be subscribed to a service (and immediately billed) through one click on a link.”

The Adjudicator in this matter is satisfied, after reviewing all the material provided, that the logic set out above applies in equal measures to this matter. It follows that the member is found to have breached sections 4.1.1 of the Code read with section 9.2 of the Advertising Rules as well as section 11.1.1 of the Code read with section 9.3.15 of the Advertising Rules. It follows further that the complainant cannot be said to have validly subscribed to the service.

As regards the sanction to be applied the Adjudicator has considered the following:

- the lack of any evidence showing that the complainant actually used the service
- the fact that this complaint was lodged in close proximity to complaint 5564 and prior to the release of the finding in the latter matter, and
- the fact that the WASPA member has appealed the sanctions imposed in respect of the breaches of sections 4.1.1 and 11.1.1.

In the circumstances the following order is made:

- the member is ordered to refund the complainant in respect of all amounts deducted from him as a result of his "subscription" to the Sexy Cherry service from date of subscription to date of unsubscription; and
 - further sanctions in respect of this complaint are to be subsumed in those ordered under complaint 5564, i.e. the sanctions imposed in respect of the breaches of sections 4.1.1 and 11.1.1 of the Code under complaint 5564 are held to apply also to this matter.
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