



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Subscription service
Complainants:	Marius van Rooyen
Complaint Number:	6781
Code Version:	6.2
Advertising Rules Version:	2.3

Complaint

The Complainant lodged the following complaint:

"I seem to have visited a website in January 2009 where my age was required. Due to other commitments and an overseas visit I did not check my cell account. I am now being billed for a "unknown" service rendered by iTouch that I have not authorized by way of a formal written contract. Can you please investigate?

See my mail message below returned after trying to contact iTouch. This has me really worried as I used the link on their website."

Later on the Complainant wrote:

"Thanks for prompt action. I have spoken to Buongiorno. They say no refund. I cannot see how people can bill you for items for which no paperwork or confirmation is given by e-mail or paper. I still do not understand what happened as to how I "subscribed". I feel that there actions are misleading and not open to scrutiny. I cannot remember any monies mentioned or supplied."

The Complainant provided the following reason for escalation:

"From the way that the subscription was done you can see that I was unsure about what had transpired. The wording is not "come and join the fun club" but "calculate your brain power". Lots of free fun games are available on the net and that is what I thought this was. You can also see that I never tried to download info and was thus in the dark as to what had transpired.

It is easy to say that I received a SMS every month and should have known about it. I presumed they were junk mail and deleted them. To acquire a cell phone contract means provision of all my personal data as well as written forms to act as proof of my commitment for payment of an amount of R135-00 per month. With the press of a button I must suddenly pay R300 per month and have filled in no paper work. This robs me of my right to a cooling off period. I am desperately unhappy about being duped into losing money on a deceptive scam. I therefore demand that I be reimbursed.”

The Complainant provided the following feedback to the SP's response:

“I have read their reply and am not happy with attitude. Even though I might have pressed all the correct buttons I still feel that for the amount I have been charged without filling in a form or seeing any contract in writing is blatant robbery. If they do not wish to reimburse me my next step will be to inform the written media and I hope they will gain from the negative publicity.”

Service provider's response

The SP wrote the following:

“Please be advised that the user was subscribed via our Fun Club Brain Age advertisement. The media key fca_tek521_3762 is our way of tracking the Web advertised page that the user accessed.

The user had entered his or her mobile number twice, hence he or she received 2 separate pin numbers. The pin used to successfully access the fun club was pin no. 0409, as can be seen in the reporting information window. The pin number would have needed to be entered correctly before the subscription was initiated and not before the pin was verified.

The user had also been informed monthly of his or her subscription and had been notified via sms on how to stop the Fun Club mobile Content Subscription Service.

The Web advertised pages in the banners show the user that he or she is in fact interacting with a subscription based service as R10 / per day. We also informed the user of our call centre contact number should he or she has experienced problems trying to unsubscribe from the Fun Club Service.

Further below is the entire process the user would have had to have followed in order to have been subscribed to the fun club subscription service.

Please note that the pages accessed via the web advert does show that the user is indeed interacting with a Mobile Content Subscription Service at R10/pday.

Messages sent to the user were on the onus of the user to have read them when it was sent to him or her. The terms and conditions of the mobile content subscription was made available to the user and clearly stating that the user

had to have had the bill payers permission before entering The Fun Club Subscription Service at R10/pday.

In this regard we do not award a refund to the user as he or she had been well informed of the mobile subscription and how to end the subscription at anytime convenient to him or her.

Please note that currently the user is no longer subscribed to any of the Buongiorno South Africa Subscription Service.

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 & more! Start Downloading now! Help: 0214178001 (R10/day subscription service. Sms STOP FUN to 31194 to end).”

Sections of the Code considered

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.

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

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.

11.1.3. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.1.5. Subscription services with different billing frequencies should not have a subscription mechanism likely to cause a customer to accidentally subscribe to a more frequent service.

11.1.6. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

11.1.7. 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.

11.1.8. A monthly reminder SMS must be sent to all subscription service customers containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) The service provider's telephone number.

11.1.9. The monthly reminder SMS must adhere to the following format:

- (a) The monthly reminder must begin with either "Reminder: You are a member of NAME OF SERVICE" or "You are subscribed to NAME OF SERVICE".
- (b) Any marketing for a new service must appear after the cost and frequency of the existing service and the service provider's telephone number.

11.1.10. Once a customer has subscribed to a subscription service, neither the amount nor frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

11.1.11. The format of the both the initial notification message and the monthly reminder should comply with the relevant section of the WASPA Advertising Rules.

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.

The SP has provided proof of the fact that the Complainant in this matter has indeed subscribed to its services through a website. A pin was subsequently issued and the Complainant, after allegedly entering the pin, became subscribed.

As can be seen on the logs and the SP's database, this was logged and subsequent services started.

The SP has provided proof of the fact that the Complainant in this matter has requested to stop its subscription services. Logs were also provided to indicate the sending of subsequent reminder messages. No other information was provided by the SP.

Although the Adjudicator is not implying that the Complainant in this matter is not providing facts true to the best of his knowledge and hence his subsequent recollection of events, it has to be stated that in the absence of any real evidence on behalf of the Complainant, the facts would under normal circumstances amount to mere speculation.

However, should there be some overriding factor(s) which might alter the opinion of the Adjudicator, mention thereof must be made, and this is indeed what is unfolding here.

It has come to the attention of the Adjudicator that there have been several complaints in the same period pertaining to the same services.

These were all lodged as formal complaints against the SP in this matter.

All complaints have its origins based on the same allegations alleged by the Complainant in this matter, complainants uttering their frustrations with either the "IQ test", or "Brain-age" service, stating that they either did not receive a pin, or when receiving the pin, did not enter the pin and therefore did not consent to a subscription service.

In this specific matter the Complainant felt that he was misled into subscribing to a service, completing the "IQ test" under the pretense of only gaining knowledge to his IQ.

In light of these circumstances and the occurrence of similar events, manifesting itself over the same time period, having regard to evidence supplied by the SP, the Adjudicator has to ask him / herself whether such evidence can be relied upon and whether there might be a case of bundling and an instance of the SP misleading its customers?

Without having sufficient access to the said systems generating these logs, and therefore any mechanism to guarantee the fail-save operation of the SP's operational system, the Adjudicator can also not merely imply that the SP is in breach of any section of the Code of Conduct.

The Adjudicator is however of the opinion, taking all the relevant circumstances into consideration, based on circumstantial evidence alone, that there must be an instance of malfunction on behalf of the SP, or at the very least, something to that extend.

This read together with the decisions provided in Adjudication 5921, 6039, 6112 and several others, leaves the Adjudicator with no alternative but to find the SP in breach of sections 4.1.2, 11.1.2, 11.1.4 of version 6.2 of the Code and 11.1.5 of version 7.0 of the Code.

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 is instructed to refund the Complainant in full;

In addition, the sanctions provided in Adjudication 5921 refer:

1. The SP is required to suspend the service and access to the site it is hosted on until such time as it complies with the orders set out below. The SP may not initiate any new or existing billing transactions for the service during such period of suspension; however it may process any unsubscription requests;

2. The SP shall send an sms notification to all existing subscribers of the service in the format prescribed in 11.4 of the current Code (the SP shall furnish the WASPA Secretariat with confirmation that it has notified its subscribers);

3. The SP shall ensure that welcome messages sent to the service's subscribers comply with the requirements of 11.1.10 of the current Code;

4. The SP shall clearly indicate at the first point of contact with the service and all subsequent pages and sites that the service is a subscription service and further precisely what the subscription entails. These indications must be clearly visible and unambiguous.

5. The SP shall ensure that any reference to or implication of the availability of single items is removed from the service's site such that the site only makes reference to its subscription content in clear and unequivocal terms;

6. The SP shall ensure that its terms of use are amended in accordance with Rule 9.2 of the Advertising Rules;

7. The SP is fined:

7.1. R20 000 for its breach of 4.1.2 on the basis set out above; and

7.2. R30 000 for its non-compliance with 11.1.2 and 11.1.4 in that it bundled a single item with a subscription service and its failure to adequately differentiate between single items and subscription services.

The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this.