



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Integrat, Funmobile, iTouch
Information Provider (IP):	Not applicable
Service Type:	Subscription service
Complainants:	COLLIN WILLIAM HYMAN
Complaint Number:	7004
Code Version:	7.0
Advertising Rules Version:	N/A

Complaint

The Complainant wrote:

"In Dec I was searching in Google, when a menu popped up asking if I want to test my I.Q. Did the test, it asked for my cell number and now I sit with a bill of R1.559.65. At the request of VODACOM I am contacting you."

The Complainant was not satisfied with the SP's response and provided the following reason for escalation:

"I would like to know where I agreed to accept services from Buongiorno and iTOUCH.

I was never informed that I was being charged for such services. Can you please inform me what I received from these services."

The Complainant provided an additional feedback:

"I can recall in December that my wife was showing me how to use GOOGLE. While I was searching on Google an ICON appeared something to the effect 'Test your I.Q.' I was curious and clicked on the icon. When I answered a few questions, it asked for my cell number, thinking that the result of I.Q. will be sent to my cell phone (as no result appeared on screen), I entered my cell number. I can't recall receiving a pin number. There definitely wasn't anything on computer to say that I would be charged R8.77 daily. If that was the case, I would have immediately discontinued service.

I have never received any info to my cell phone or downloaded or used whatever service they claim to me.

From 27 December 2008 I was charged R8.77 daily for BUONGIORNO.
 On 27 January 2009 BUONGIORNO changed name to iTOUCH.
 On 1 April 2009 iTOUCH changed name to NOTHING.
 I am waiting for 3.7.2009 statement to see what June 2009 charges are.

To date I still haven't received result to my I.Q. which was originally what the ICON offered.

STATEMENT		ACCESS POINT DESCRIPTION
		BUONGIORNO
3.12.2008	R =.00	
3.1.2009	R =9.99	
3.2.2009	R =09.93	ACCESS POINT DESCRIPTION CHANGED FROM BUONGIORNO TO iTOUCH ON 27 January 2009
3.3.2009	R =69.94	
3.4.2009	R =19.93	
3.5.2009	R =99.93	ACCESS POINT DESCRIPTION CHANGED FROM iTOUCH to NO DESCRIPTION on 1 April 2009
3.6.2009	R =09.93	
	R 1,559.65	

I would appreciate WASPA investigating the above.”

Finally the Complainant wrote the following:

“I have just received Tax Invoice for 3 July 2009. Content Services for June is R279.94. Which brings total to R1.839.59. I would appreciate WASPA investigating the above. I haven't had any feedback on my e-mail below.”

Service provider's response

The SP stated the following:

“Please note that the user was subscribed via web advertisement as shown in the Reporting Information Window under the Source Column.

Messages sent to the user as well as the user having to confirm a pin sent to the user is how the user was subscribed to the Fun Club at R10 / per day.

All messages sent to the user as shown in the mobile traffic report windows below, informs the user of the subscription service as well as how to terminate the subscription.

The pin 0495 sent to the users mobile device would have needed to be entered on the web advertised fun club web page. This entire process can be viewed further below.

Only after the user enters the pin correctly does the subscription start. All pages accessed by the user inform the user that he or she is in fact interacting with a mobile subscription service.

In this regard we do not deem a refund forthcoming as the user was informed via sms of the subscription service and the billing that would occur at R10/pday. The terms and conditions inform the user that he or she would need to gain the bill payers permission before proceeding with the subscription to the Fun Club.

We also informed the user via sms of the number to our 24x7 support team should he or she have experienced and difficulties with the service.

Please note that the user of 082 412 5405 is no longer subscribed to any of the Buongiorno mobile subscription services and that billing was stopped on the mobile number.

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 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, ids & more! Download 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", "Brain-age" or other fun club services, 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 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 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.

It is also ordered that the SP provides the Complainant with a formal excuse in writing.

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 unsubscribe 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.
