



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe Request
Complainants:	Andrew Genade
Complaint Number:	7283
Code Version:	6.2
Advertising Rules Version:	N/A

Complaint

This complaint is the escalation of unsubscribe request.

The Complainant wrote:

“I have been charged for MMS usage since April 2009, although I only have a modem on this line and can't use it to make calls or anything else. The number of my MTN Extended Data 1GB is ... 526 8359. I have not subscribed to ANYTHING! According to Auto page I'm subscribed to World Play, Miracom Networks. I have not signed anything or agreed to anything and wish to have all these charges reversed and credited to my account immediately.”

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

“Thank you, for what you have done so far. I am happy with the out come of the Zed Moblie, the “unsubscribed me and have refunded me”. The print out from Rate and date, is of someone I have never seen before and none of the details are mine, which does not surprise me as I have never heard of rate and date.

I am not satisfied with the out come from rate and date or from Burongiomo, as I maintain that I have never sent or read an sms from my data card and that no one has ever had the opportunity to put it in a phone.

Having not subscribed or down loaded any content from them I feel that I am been robbed to pay for something I never asked for or used!! There is still no clarity as to how I got subscribed to these in the first place. If I want to find

out exactly what each company charged me, can you tell me or do I need to try find out from Auto page, who really does battle with service. Finally, do you suggest that I change my data card to prevent this happening again? It seems these all happened in April, before April and after April seems to have been fine, I have had the card since October, but could it happen again?"

The Complainant provided the following feedback:

"I looked at the stuff you sent me from Buongiorno, I don't understand a lot of it, but are still very unhappy as I have never had my sim card out of the modem!!!! I have never clicked on anything and don't even own a nokia 6610i. Also I am the only one with access to the modem so no one has had access to my card. There must be another explanation. I am still no happy to accept the idea of paying for something I did not want did not ask for and did not receive!

They need to look further to find out what actually happened, because this could be a case of fraud."

Service provider's response

The SP states the following:

"After investigating the matter it is clear that the user had subscribed to the Fun Club Mobile Content Service via web (cell phone) Internet Browser, as can be seen In the Detail Options insert on the page below. The media Key fca_buz983_4799 is linked to the web page and indicates to us the web advert clicked on i.e. "Selected".

In the attached file you will find a list of content items the user did in fact download. The date stamp shows mere minutes after the Fun Club subscription was started did the user start to download content. The cell phone used to retrieve the content was a Nokia 6610i, as can be seen in the attachment. Billing logs are attached as per the user's request.

In the Log analysis widows and Mobile traffic reports you will find messages sent to the mobile user for the various months informing him or her of the subscription into the Fun Club and that the cost would be R10 /p day. As per the mobile carrier, these messages were delivered to the user and are confirmed in the Mobile Traffic reporting Windows. These Mobile traffic reports shows messages sent to the user since the subscription was started on the 16th April 2009 leading up when the user requested the service be terminated, which was on the 28th July 2009 as seen in the Reporting Information window above.

Furthermore the user had clicked on the Beyonce Banner, which says "click her 4 Beyonce".

This banner was accessed via wap browser by the user

After the user clicked the Banner he or she was redirected to the Fun Club Landing Page below, showing the Beyonce Pictures.

The page also informed the user that he or she is in fact interacting with the Fun Club Mobile Subscription Service and by clicking on the JOIN NOW link, he or she agrees to being subscribed to the Fun Club. We make our 24x7 call centre contact number available to the user as well should the user have experienced any problems during the in both the messages sent to the user and the wap accessed pages. The link to the Terms and Conditions are displayed for the user, should he or she had wished to review it at wap.funfone.co.za.

And finally after clicking the JOIN NOW Link the user was directed to the Fun Club Wap page, where all content is available including the Beyonce mobile content. The page shows once again links to the Terms and Conditions of the Fun Club Service and gives the user a variety of items to choose from by selecting the various links provided e.g. Games, screensavers, true tones, videos etc.

In this regard, we do not deem a refund justified, as the user had interacted with a mobile content subscription service and informed via sms, as well as shown that he or she was in fact interacting with a Mobile content subscription service as shown on the Fun Club landing page accessed by the complainant. Content downloads shows that he or she was well aware of their actions in this regard.

Please be advised that the user is no longer subscribed to any of Buongiorno ZA's mobile content services and that billing has been stopped on 28th July 2009 at 16:45.

We are committed giving our clients the best mobile content service interaction experience.”

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.

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.

It has also come to the attention of the Adjudicator that this is not the first instance where the SP has alleged that a certain phone was used and that it then turns out that the user is indeed making use of a different model.

Either the SP is committing administrative errors on its own behalf pertaining to its customers or its system providing it with the information is flawed or the SP is intending to mislead its customers and the Adjudicator in this matter.

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 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.