



REPORT OF THE ADJUDICATOR

WASPA Member	Buongiorno UK
Information Provider (IP) (if any)	
Service Type	Subscription
Source of Complaints	WASPA Media Monitor
Complaint Number	7631
Date lodged	17 September 2009
Code of Conduct version	7.4

Complaint

The WASPA Media Monitor raised alleged breaches of sections 3.3.1, 4.1.2, 6.1.1, 6.2.8, 11.1.8 and 11.1.10 of version 7.4 of the WASPA Code of Conduct as well as section 9.2.2.1 of the Advertising Rules in respect of a web campaign promoting a service that was not available for download. The Monitor further noted that pricing information and the terms and conditions of the service were not properly set out and that the welcome and PIN confirmation messages were not in the correct format.

The full report compiled by the Monitor is set out as an annexure to this adjudication.

The member responded by acknowledging that the site was “clearly non-compliant” with the Code of Conduct and they had advised their third party advertiser to remove the site immediately. After a further enquiry from the Monitor the member advised that the site had been removed on 22 September 2009.

The Monitor was not satisfied with this response, particularly as regards incorrect pricing information being utilised by the member.

“[The member has] informed us that they have removed the website in question. However, there were other breaches in my complaint that have simply been overlooked. In my opinion, removing a website quickly does not constitute fixing a problem.

This particular breach 4.1.2, where I commented on the advertised price differing from what is actually charged, is still very much a problem.

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.

I thought that this complaint would alert [the member] to testing any other of their services they may be running, but instead they opted to just remove the site in question.

We therefore did some further testing on [the member's] services.

FUNCLUB SERVICES ADVERTISED AT R10 A DAY BUT ACTUAL DAILY DEDUCTIONS CHARGED AT R6:

PHONE NUMBER KEY WORD SHORT CODE

0715847772 LIFE 31194

0715847746 / 0715847757 GAS 31194

**0715847751 PLAY 31194

0712291256 POP 31194

0715847765 / 0785865179 STAR 31194

All above reminder messages received said: (I have been subscribed to all these services)
FUN CLUB Reminder:U have unlimited games,music & more 2 d/load PLUS the chance to win a Wii! Help:021 4178001(R10/day Subscription. Sms stop fun to 31194 to end)

After sending the subscription cancellation message I received this sms:

Fun Club: Ur membership has been cancelled. U've put an end to the fun & UNLIMITED downloads. Remember, to join again, sms MORE to 31194. [R6/day service]

**the pricing on the cancellation msg of this number was shown as [R10/day] not R6 like the others.

Since this testing was done, we received a further complaint from a subscriber today on 2 October 2009:

i-Touch flighted an ad on etv yesterday at about 9pm: Sms KO to 31194 to get the game Fight Night Round 4 - visuals looked great so I tested! The ad depicted the price at R6/day but when I joined, the welcome message I received read R10/day

Complaint: Price on ad is not the same as actual price billed = misleading advertising.

It is therefore clear that some stringent testing should happen on the SP's side.”

The Monitor requested that the matter proceed to adjudication.

Sections of the Code considered

The following sections of version 7.4 of the WASPA Code of Conduct were considered:

3.3.1. Members will not offer or promise services that they are unable to provide.

4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

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.

6.1.1. In addition to the provisions listed below all members are bound by the WASPA Advertising Rules, published as a separate document.

6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.

6.2.8. Pricing on any promotional material must use one of the following generally accepted formats for prices in Rands: “Rx” or “Rx.xx”.

6.2.9. During any calendar month, if the total cost of any service exceeds R200 for that month:

(a) Where the WASP is in control of the billing (e.g. an OBS), an additional communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.

(b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they have reached this limit.

11.1.8. 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.

11.1.10. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing].

11.2.2. The reminder messages specified in 11.2.1 must adhere exactly to the following format, flow, wording and spacing:

U r subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

or

U r subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

11.5.6. When a customer has requested that they be unsubscribed from a service, an unsubscribe notification must be sent to that customer, and must use the following text format, flow and wording:

You've been unsubscribed from [service name].

or

You've been unsubscribed from [service name]. To resubscribe [service activation instructions]. U'll then b resubscribed @ [cost of service and frequency of billing].

The following sections of version 2.3 of the WASPA Advertising Rules were considered:

9.2.2 T&C DISPLAY RULES

9.2.2.1 Formatting & Font Criteria For T&C Text

• **The T&C text must be in 12 point font size**, or 50% of the largest access number on a Web page, whichever is the greater. The T&C must be in a non-serif font.

[Chapter 12](#)

Decision

1. There is an abundance of precedent to the effect that a WASPA member cannot escape responsibility for compliance with the Code of Conduct by raising a defence that the non-compliant conduct was undertaken by a third party with which the member had contracted for the provision of marketing and other services. This position is normally expressed with regard to the relationship between WASPs as aggregators and information providers – see [Appeal 4580](#) @ paragraph 6.1.8 and [Appeal 0985](#) @ paragraph 6.3.4 – and this Adjudicator cannot see any cogent reason as to why this principle should not be extended to apply to the relationships between WASPA members and affiliate marketing entities. The following excerpt from the findings of the WASPA Alternative Appeals Panel in Appeal 4580 is particularly apposite:

“It is imperative that the parties have proper agreements in place to manage their contractual relationships and to define their roles and responsibilities under the Code and generally in relation to consumers.”

2. It is accordingly found that the member bears direct responsibility for any breaches of the Code of Conduct related to the promotional site and sign-up procedure as tested by the Monitor.
3. The Adjudicator, noting the admission by the member that the site was non-compliant, has evaluated the breaches alleged by the Media Monitor and is satisfied that the promotional material and the sign-up process are non-compliant with sections 3.3.1, 4.1.2, 6.2.8 and 11.1.10 of the Code of Conduct and section 9.2.2.1 of the Advertising Rules.
4. The Adjudicator is unable to find a breach of section 11.1.8 of the Code of Conduct and cannot agree with the Media Monitor that this section prescribes that the information in the message sets out a “chronological order” which must be followed.
5. Turning to the issues raised by the Monitor with regard to misrepresented pricing, it is clear that the member has a difficulty in this regard and that it is in breach of section

6.2.4 of the Code of Conduct which requires that pricing contained in an advertisement not be misleading as well as section 4.1.1 (the Monitor has referenced 4.1.2 but 4.1.1 is more appropriate with respect to misleading pricing). This is notwithstanding the fact that the misrepresentation in general stands to the benefit of the consumer. As can be seen below the benefit of the consumer is not what has motivated the member in making this misrepresentation.

6. The Adjudicator agrees with the Monitor that this appears to have been done to avoid the requirement of section 6.2.9 (a) of the Code which states that a further confirmation must be obtained from a subscriber where billing exceeds R200 in any one calendar month. A charge of R6 per day is the lowest daily charge which can be levied so as to avoid reaching this threshold. As can be seen from the testing done by the Monitor this is being done across a number of subscription services offered by the member. The further complaint noted by the Monitor indicates that the member has got itself into somewhat of a muddle through its efforts to avoid compliance with section 6.2.9.
7. Although not raised in the complaint it is evident that the unsubscribe message received by the Monitor in respect of the Fun Club service ("Fun Club: Ur membership has been cancelled. U've put an end to the fun & UNLIMITED downloads. Remember, to join again, sms MORE to 31194. [R6/day service]") is not compliant with section 11.5.6 of the Code.
8. Furthermore the reminder message sent ("FUN CLUB Reminder:U have unlimited games, music & more 2 d/load PLUS the chance to win a Wii! Help:021 4178001 (R10/day Subscription. Sms stop fun to 31194 to end)"), is clearly not compliant with the specific requirements of section 11.2.2 of the Code and Chapter 12 of the Advertising Rules.
9. The member is accordingly found to have breached sections 3.3.1, 4.1.1, 6.2.4, 6.2.8, 11.1.10, 11.2.2 and 11.5.6 of the Code of Conduct as well as section 9.2.2.1 and Chapter 12 of the Advertising Rules.

Sanction

10. The Adjudicator notes the remedial action taken by the member in recognising that the site was non-compliant and taking it down. While in no way excusing the multiple breaches of the Code, this is regarded as a mitigating factor in that no further harm was thereafter occasioned to the public interest.
11. Nevertheless, breaches of the Code relating to subscription services are to be regarded in a serious light, and it is apparent that the member has experienced a great deal of difficulty in this regard. In this matter a number of serious breaches have been found and

the fact that the member, notwithstanding all prior scrutiny of its subscription services, is still non-compliant to this degree constitutes a factor in aggravation in that the public interest continues to be prejudiced.

12. The following findings, relevant to this matter, had been made against the member prior to 15 September 2009, the date on which the Monitor undertook the testing of the service:
 - 12.1. In [Complaint 5980](#), [Complaint 5985](#), [Complaint 6105](#) and [Complaint 6112](#) the member was found to be in breach of, *inter alia*, section 4.1.2 of the Code in respect of its Fun Club service and ordered to refund the complainant;
 - 12.2. In [Complaint 6057](#) the member was fined R20 000 in respect of a breach of section 4.1.1. In this matter the member did not file any response so the finding was a default finding.
 - 12.3. In [Complaint 5921](#) and [Complaint 6039](#) the member was fined R20 000 in respect of a breach of section 4.1.2 relating to a promotional website for the Fun Club service. The member was also found to have breached section 11.1.10 of the Code and section 9.2 of the Advertising Rules.
13. Most of these complaints relate to two specific promotions for the Fun Club service and, while they do indicate a recent history of non-compliant subscription services offered by the member, the Adjudicator is of the view that they are not directly on point.
14. In [Adjudication 5641](#) the member was found to be in breach of, *inter alia*, section 11.1.8 of version 6.2 of the Code, which set out the monthly reminder requirement as it then existed. The section of that Adjudication relevant to the imposition of a sanction reads as follows:

“In considering the sanction in this matter Adjudicator has considered:

 - the recent introduction (1 November 2008) of the provisions in respect of which the breach lies (although this must be balanced against the period given for preparation)
 - the fact that the member appears to have made an effort to comply
 - the consideration that it would be reasonable to have expected the member to test the reminder messages before attempting to send them to their subscribers
 - the consideration that, when introducing a new requirement of the Code of Conduct and Advertising Rules, a member would reasonably be expected to monitor such introduction to ensure that it was functioning as required
 - the consideration that all services provided by the member and which were tested by the Monitor were found to be non-compliant steps taken to remedy the issue once notified of it by WASPA

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- the need to ensure that consumers are properly and adequately protected in respect of subscription services and that they are given an informed choice with regard to services they wish to receive or continue to receive
 - the recent record of the WASPA member.

In the circumstances the following order is made:

- The complaint is upheld and the WASPA member is found to have breached section 11.2.8¹ of the Code of Conduct, read with section 12.1 of the Advertising Rules.
- The member is ordered to ensure, at its own cost, that all subscribers to its subscription services are sent a reminder message in the correct format and in the prescribed manner as soon as possible after the member is notified of this Adjudication. This is to be confirmed with the Secretariat.
- The member is placed on notice that its services will be monitored by the WASPA media monitor on an ongoing basis and that any failure to comply with the provisions breached as per this Adjudication in the future will be severely dealt with.
- The member is fined an amount of R120 000, of which R50 000 is payable within five days of date of notification of this Adjudication. Payment of the balance is suspended for a period of one year on condition that the member is not found to be in breach of section 11.2.8 of the Code of Conduct or section 12 of the Advertising Rules during that period.”

15. In this matter the following sanction is imposed:

- 15.1. In respect of the breach of section 3.3.1 of the Code and taking into consideration the removal of the site and the acknowledgement of non-compliance from the member, the member is fined the sum of R5 000.
- 15.2. In respect of the breaches of sections 4.1.1 and 6.2.4 of the Code the Adjudicator took into consideration the lack of pecuniary prejudice to consumers resulting from the non-compliance by the member.
- 15.3. In respect of the breach of section 6.2.8 the Adjudicator regards the non-compliance as being of a minor nature given that the communication of pricing is not materially compromised in the format used. No sanction is imposed in respect of this breach.
- 15.4. In respect of the breach of section 11.1.10 of the Code the member is fined R50 000, payment of R40 000 of which is suspended for a period of 12 months subject to the member not being found to be in breach of this section or its successor in future versions of the Code during this time.
- 15.5. In respect of the breach of section 11.2.2 of the Code read with Chapter 12 of the Advertising Rules, the Adjudicator regards the suspended sanction to be imposed as

¹ This appears to be an incorrect reference to section 11.1.8 of the Code as it then existed.

set out in paragraph 15.8 below as sufficient and no further sanction is imposed in respect of this complaint.

15.6. In respect of the breach of section 11.5.6 of the Code the member is fined R50 000, payment of R40 000 of which is suspended for a period of 12 months subject to the member not being found to be in breach of this section or its successor in future versions of the Code during this time.

15.7. In respect of the breach of section 9.2.2.1 the member is fined the sum of R5 000.

15.8. The member has been found to have breached chapter / section 12 of the Advertising Rules within the period of suspension imposed under Adjudication 5641 as set out above (which would have expired on 1 June 2010). The condition of suspension of the balance of the fine imposed has been breached and this amount accordingly falls due for payment. The member is accordingly ordered to make payment of the amount of R70 000.

15.9. All fines / amounts payable and not suspended are payable within five (5) days of date of receipt of relevant invoice from the WASPA Adjudicator.

16. The Adjudicator wishes to make it clear to the member that any attempt to increase pricing from the current R6 per day level in respect of subscribers to any service affected by the misleading pricing in contravention of section 11.1.9 of the Code will attract an extremely harsh sanction.

ANNEXURE: WASPA MEDIA MONITOR'S REPORT

DATE: 15 SEPTEMBER

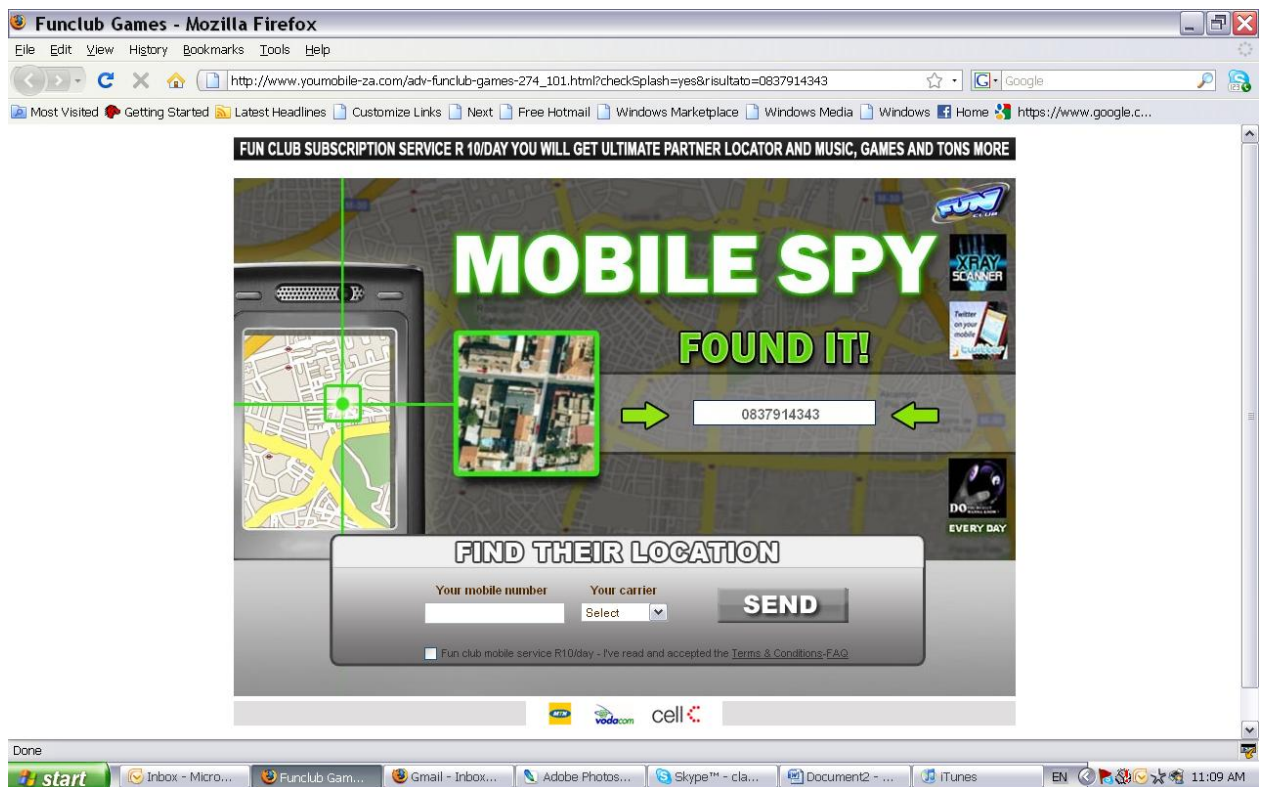
PHONE NUMBER: 0785865179

STARTING BALANCE: R100.66

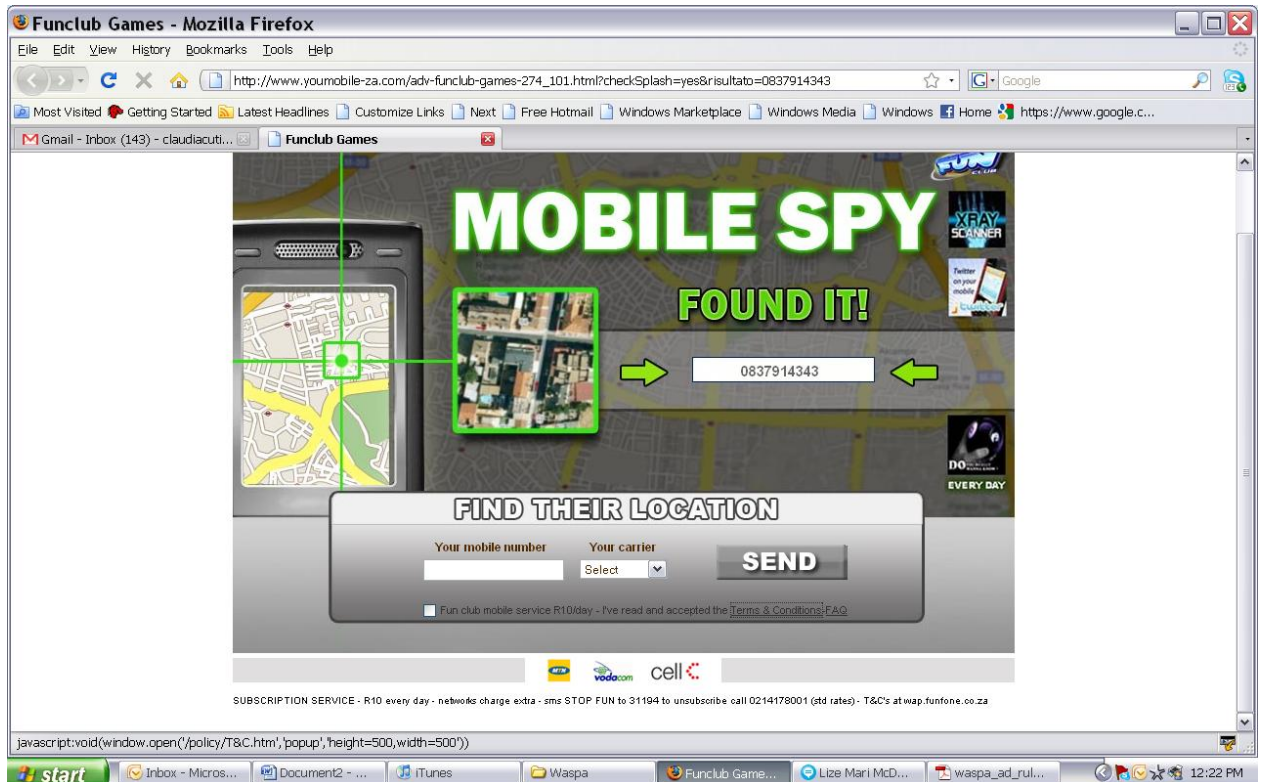
SERVICE PROVIDER: iTouch / Buongiorno

WEB SITE: http://www.youmobile-za.com/adv-funclub-games-274_101.html?checkSplash=yes&risultato=0837914343

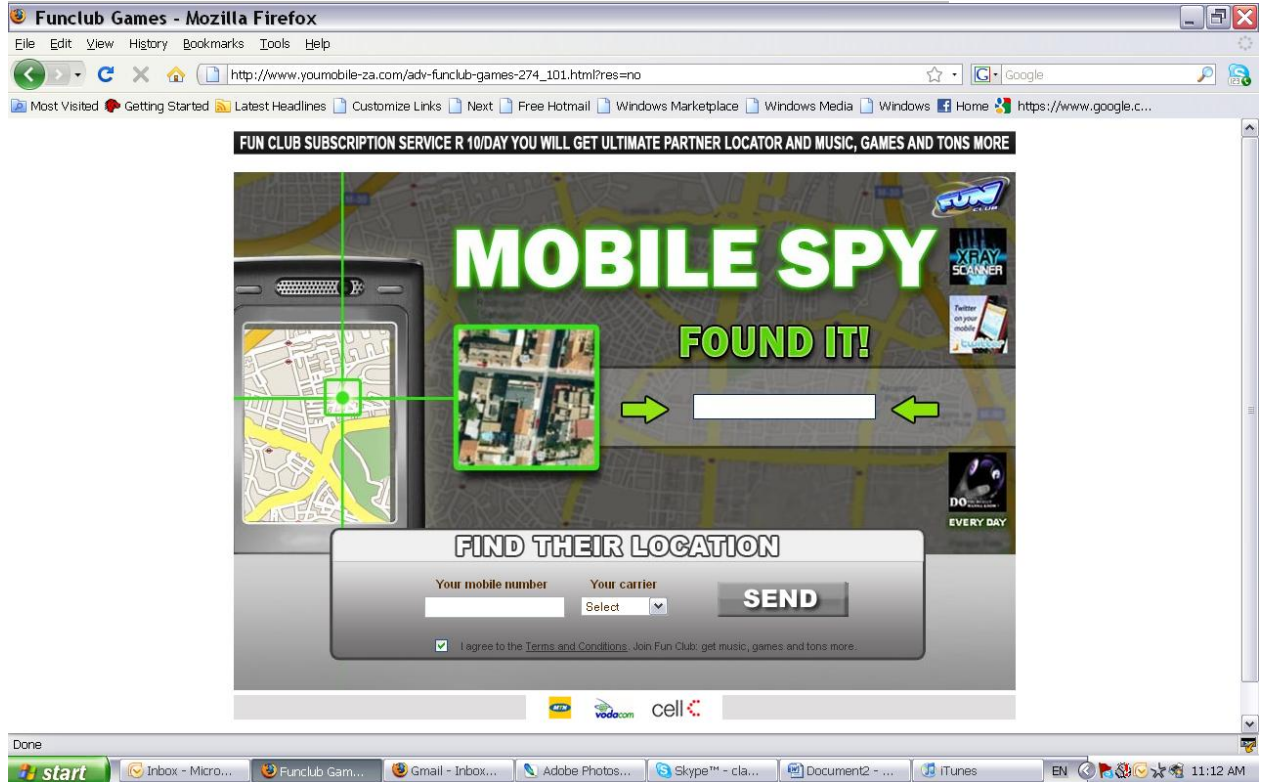
I went to the above website:



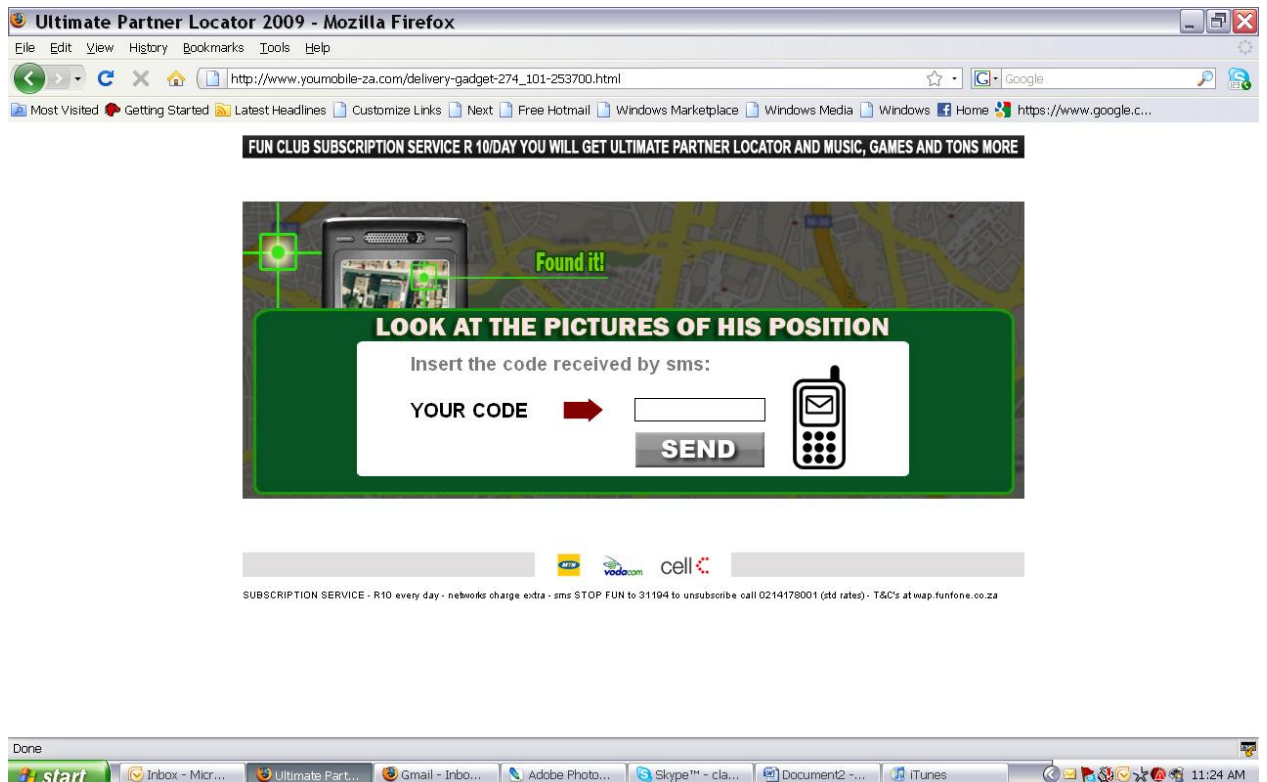
When scrolling down to see the T&Cs:



I entered my mobile number and clicked on **SEND**. I then noticed that the screen changed and all of a sudden the T&Cs box was ticked without me ticking it. See below:



I then entered my cell phone number and carrier again and clicked on **SEND**:



Then I received a sms:

Ur pin is 1799. Come join in the TONS of fun.Ur games & tones r waiting.By entering the pin number, ull be subscribed to Fun Club (R10/day subscription)

I then entered the code and clicked on **SEND**.



Then I received a sms:

Welcome 2 FUN CLUB. Click on the link we sent for unlimited access to games, tones and more!Help: 0214178001. Sms stop fun to 31194 to end. Subscription R10/day

My new balance was R94.66 so R6 had been deducted.

I then received a wap link for the fun club service which I went to.

The screen then said:

Sorry you are not subscribed to the Fun Club Service.

To subscribe click on the below link.

Subscribe Link

I then clicked on the subscribe link so that I could get the advertised content.

The screen changed to:

Welcome to Fun Club

Where you get access to unlimited

Content! Start

Downloading now.

I searched the whole Funclub site and was unable to find the advertised "Mobile Spy" which was the reason I joined the service in the first place.

Conclusion:

The customer is completely drawn to the advertised "**Mobile Spy**" "**Find their location**" which shows you by entering a person's number you will be able to find their location. The customer then proceeds to join the service to be able to get this amazing download that will let you be able to find anyone you're looking for . The pricing information in the top of the screen is in the wrong format: **R 10/DAY** with a space between the R and the numbers and should be **R10/DAY**. Also the T&C box becomes ticked if you haven't ticket it yourself. The T&C information at the bottom of the page is definitely not the 12 font size its suppose to be. Also when going to the funclub wap link you are given, there is no Mobile Spy application at all.

Therefore content is being advertised and users are being charged, but users are not getting what they've paid for.

NOTE: this service is being advertised at R10/day, but is charging R6/day. This change was made by Buongiorno when three Reminder messages complaints were issued by myself. It is suspected that the R6/day service is being utilized as no Reminder messages will be required in the calendar month. (Their Reminder message backend is clearly not repaired yet). It is suggested that the correct advertised price, R6/day should be displayed in all marketing. This is still false advertising, even though the user is benefiting. We are mindful of the fact that this service may not be increased at any time once a consumer has subscribed, even though the advertising is displaying R10/day. This would be a new breach of Code should that route be taken.

Breaches of the Code:

3.3.1. Members will not offer or promise services that they are unable to provide.

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.

6.1.1. In addition to the provisions listed below all members are bound by the WASPA Advertising Rules, published as a separate document.

6.2.8. Pricing on any promotional material must use one of the following generally accepted formats for prices in Rands: "Rx" or "Rx.xx".

11.1.8. 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:

- e. The name of the subscription service;
- f. The cost of the subscription service and the frequency of the charges;
- g. Clear and concise instructions for unsubscribing from the service;
- h. The service provider's telephone number.

11.1.10. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing].

Breaches of the Advertising Rules:

9.2.2 T&C DISPLAY RULES

9.2.2.1 Formatting & Font Criteria For T&C Text

- **The T&C text must be in 12 point font size**, or 50% of the largest access number on a Web page, whichever is the greater. The T&C must be in a non-serif font.

On 16 September 2009, I requested our tester checks the service again and requested she finds the Spy locator.

These are her findings.

Here is a list of the different sub categories on the wap site. I checked every possible category they could be in as you can see:

Applications

EA Games-**content not found for this category**

Full Mp3 downloads

Games

Screensavers

Truetones

Videos

Wallpapers

Applications:

Mystic Megs Palm Reader

Alcoholimeter

Cartoon Yourself

Expense Tracker

Baby Name Guide

Cloes 8 Ball

When I tried clicking on page 2 (cause there were 2 pages of applications) it said there was nothing else.

Then I went back and clicked on applications again and it said "Content not found for this category"

I would think the content should be in applications as the Applications category already has an Alcoholimeter and Expense Tracker. It does seem to fit in this category.

Games:

Action games

Adventure games

Classic games

New games **content not found for this category**

Puzzle games **content not found for this category**

Racing games

Sport games

Those are the only two games categories I checked cause I doubt the spy thing would be in any of the others

Screensavers:

Celeb Screensavers

Fun Screensavers

Local screensavers

Love screensavers

Movie screensavers

Music screensavers

I only checked fun screensavers cause I doubted it would be in any of the others

Videos:

Extreme sport videos

Fun videos

Movie trailers

Music videos

I only clicked on fun videos as it's the only possiblye category the spy thing or xray scanner would be in, and they were nowhere.

Requirements:

1. This service must be repaired immediately
2. The website must be de-activated until such time as a service can be delivered to a user.
3. The format of the Welcome message must be revised to adhere to the chronological order as set out in the Code of conduct.

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4. The pin SMS message must be revised to adhere to the chronological order as set out in the Code of conduct.
 5. All changes as requested above to be sent to WASPA .