



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Cellfind (Pty) Ltd Cell C
Telephone Network(s)	MTN Vodacom
Information Provider (IP) (if applicable)	Lucky Mobile (Pty) Ltd under its Freshmobile brand
Service Type	Subscription Service
Source of Complaints	Competitor
Complaint Number	#0032

Complaint

A complaint was received from a competitor of the SP in respect of two television advertisements for subscription services offered by the IP, using the SP as a content aggregator. The complainant has not furnished copies of the advertisements in question, however the Secretariat had previously received a copy of the “rude” subscription advertisement and was provided with a copy of the “ring tone” advertisement from the IP.

The Complainant alleged that the IP “are currently airing TV ads for their subscription service where their price of the subscription and how often it will be charged is not clear. They are also bundling their subscriptions and subscribe you upon request for product. The ads were for 2 products, the first was RUDE where you get a daily rude picture and the second was for MONO or POLY where you get a daily Monotone or Polyphonic ringtone”.

The Secretariat conducted an investigation into the service offered by the IP, using the services of the SP.

The following breaches of the WASPA Code of Conduct were raised:

4.1. Provision of information to customers

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.

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.

11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.

In addition, the following Clauses of the WASPA Code of Conduct were considered:

11. Subscription services

11.1. Manner of subscription

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

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.

11.1.7. Once a customer has subscribed to subscription service, a notification message must be sent to the customer containing the following information:

- (a) The cost of the subscription service and the frequency of the charges;
- (b) Clear and concise instructions for unsubscribing from the service;
- (c) The member’s contact information.

Investigation

The Secretariat received a response from the IP, through the SP, indicating:

- The advertisements in question are:
 - an advertisement for a subscription for weekly “rude” wallpapers (the “rude advertisement”); and
 - an advertisement for a subscription for weekly monophonic and polyphonic ring tones the “ring tone advertisement”).
- The term “subscription service” is prominently displayed near the middle top section of the rude advertisement and the top right section of the ring tone advertisement for the entire duration of the advertisement. In the case of the ring tone advertisement this is black font in a text box with a green background, which also contains the price.
- The voice over specifically states “sms rude to 31188 and get the rudest pictures sent to your mobile phone weekly”, in the case of the rude advertisement and “sms mono or poly to 31188 and get the hottest tones sent to your mobile weekly”, in the case of the ring tone advertisement.
- The ring tone advertisement displays the text “get a hot ringtone sent to your phone every week” prominently in the middle right of the advertisement for part of the duration of the advertisement.
- The wording “Subscription Service” appears at the bottom of the terms and conditions of the ring tones advertisement situated in the bottom right portion thereof for part of the duration of the ring tone advertisement.
- The price is prominently displayed as “R4.95 per week” in the case of both advertisements.

- The only keywords that can be used are “rude” in the case of the rude advertisement and “mono” and “poly” in the case of the ring tone advertisement. In the later case, the reason for the two keywords is to distinguish between the capabilities of the telephone device and the appropriate format. The keyword does not relate to the content but rather the format thereof.
- A customer cannot buy any of the individual pictures or ring tones advertised but can only subscribe to receive a weekly rude picture or ring tone, as advertised. If the purchase of a specific content item were possible, the advertisement would contain specific keywords, such as “rude1”, “rude2”, “rude3” etc or “poly1”, “poly 2” etc or even *song title1*, *songtitle2* etc, which is not the case.
- No song titles are given in the ring tone advertisement, however photographs of popular musical performers are shown in rotation during the advertisement.

Based on the reasons given above, the IP, through the SP, submitted that the advertisement is in full compliance with Clauses 4.1.1, 4.1.2 and 11.1.2 of the WASPA Code of Conduct, in that it is sufficiently clear that the service is a weekly subscription service, as well as the pricing thereof.

In addition, the IP sends a customer the following SMS message through the SP, upon subscribing to the rude wallpaper service:

;-) U will get a weekly rude wallpaper. ";-)" means its from us. To get more fun on your phone reply MENU. Optout = STOP or mail help@luckymobile.co.za. R4.95/wk

in accordance with Clause 11.1.7 of the WASPA Code of Conduct. A similar message is also sent in the case of the ring tone subscription service.

Decision

The Adjudicator did not uphold the complaint.

The Adjudicator considered the IP’s submission regarding pricing, the specific description of the service as a subscription service and the absence of content specific keywords, as well as considering the objective clarity and frequency of the information displayed in the advertisement and contained in the “voice over”, in coming to this decision.

The test in Clause 11.1.1 of the WASPA Code of Conduct is whether the service is “prominently and explicitly” identified as a subscription service. The Adjudicator was of the view that the rude and ring tone advertisements met the requirements of this test. The Adjudicator noted that the WASPA Advertising Guidelines will, in due course, specify in greater detail the requirements of advertising for subscription services (such as font sizes and text colours) so as to provide a greater degree of objectivity in determining the prominence and clarity of the identification of the service as a subscription service.

The Adjudicator considered the use of content items to advertise a subscription service and whether this practice constitutes a breach of the WASPA Code of Conduct:

- The purpose of Clause 11.1 of the WASPA Code of Conduct is to protect customers and potential customers from confusing or misleading subscription services. Clause 11.1 of the WASPA Code of Conduct requires providers of subscription services to ensure that customers and potential customers are fully informed of the nature of the service. Clause 11.1 of the WASPA Code of Conduct specifically requires an independent transaction for subscribing and prohibits the practice of automatically subscribing a customer who has requested a non-subscription content item or service.
- It is reasonable and appropriate for providers of subscription services to give customers and potential customers of their subscription service an indication of the type of content or service to be delivered. However, use of one or more specific items of content as an indication or example of content to be provided in terms of a subscription service, has the possibility of confusing a customer or potential customer so that they believe they are acquiring a specific content item or service rather than subscribing to a subscription service. This is prohibited in Clause 4.1.1 of the WASPA Code of Conduct requiring honest and fair dealings with customers and Clause 4.1.2 of the WASPA Code of Conduct requiring members to “not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission”. Advertising of this nature is also likely to be in breach of Clause 11.1 of the WASPA Code of Conduct.
- However, the WASPA Code of Conduct does not specifically prohibit the use of a content item or items in advertising for a subscription service; provided that the content item or items is clearly and only being used as an indication or example of the type of content to be provided in terms of the subscription service. This is of course subject to the further proviso that such use does not breach Clauses 4.1.1, 4.1.2 and 11.1.1 of the WASPA Code of Conduct and that the business processes involved do not breach Clauses 11.1.2 and 11.1.4 of the WASPA Code of Conduct (as these Clauses or other Clauses of the WASPA Code of Conduct may be amplified or further explained by advisories issued by WASPA from time to time, in this case the WASPA Advisory on Subscription Services).
- Assessing whether a content item or items is clearly and only being used as an indication or example, or whether it is likely to mislead (intentionally or unintentionally) can only be done in the context of the specific advertisement. There are a number of factors to be considered, both individually and in relation to each other inter alia and by way of example only, including:
 - The use of keywords. Specific content is more likely to be an example only if a single, generic keyword used for the subscription request, while the use of one or more content specific or content related keywords is likely to cause confusion.
 - The indication that the service being advertised is a subscription service and the prominence and clarity of such indication (visual, auditory or otherwise); particularly in comparison with the indication (visual, auditory or otherwise) of the content example/s.

- The indication that there will be a continual billing process and the billing frequency as well as an indication of the amount to be billed and the prominence and clarity of such indication.
- The indication that there will be ongoing, continual and regular delivery of content and the frequency of such delivery, having regard to the prominence and clarity of such indication.
- Whether there is a mix of content items and a subscription service being advertised or only a subscription service.
- Whether the same short code or access number is used for both content items and a subscription service.
- Whether similar key words are used for content items and a subscription service.
- The clear differentiation between the content examples or indicators and the subscription service itself.