



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Worldplay
Telephone Network(s)	All
Service Type	Ring Tone downloads
Source of Complaints	Competitor
Complaint Numbers	#0040 & #0041

Complaint

A complaint was received from a competitor of the SP concerning two advertisements for certain ring tone downloads shown on E-TV on the weekend of 7 and 8 October 2005, the first advertisement highlighting the “we belong together” ring tone and the second highlighting the “lonely” ring tone.

The complainant alleged the following breach of the WASPA Code of Conduct:

- “The price of the service is only mentioned in the fine print of the ad right at the end. The pricing is small and hidden within the terms and conditions” and “It is also very small so that it cannot be easily seen.” (Clause 6.2.5).

The following Clause of the WASPA Code of Conduct was considered:

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price should appear with all instances of the premium number display.

Investigation

The Secretariat conducted an investigation into the service offered by the SP.

The Secretariat received a response from the SP indicating that:

- “the ... advertisement has been revised since 7/8 October 2005, not as a result of this complaint, but in light of the WASPA advertising guidelines which are to be implemented imminently.
- Notwithstanding the above, it is our opinion that the complaint lodged ... is vexatious and prima facie without merit for the following reason:
 - with regards to pricing requirements, as set out in section 6.2.5 of the WASPA Code of Conduct, as these are not media specific, the

requirement that "the price for a Premium Rated Service must be clearly and easily visible in all advertisements" is purely subjective, and it is our view that such prices, were easily and clearly visible on the ... advertisement."

Decision

Concerning Clause 6.2.5 of the WASPA Code of Conduct, the Adjudicator was concerned over the use of the word "must" in the first sentence of such Clause while the word "should" is used in the second sentence of such Clause. On the assumption that the drafters of the WASPA Code of Conduct used the different terms "must" and "should" intentionally to convey different meanings or different nuances of meaning, the Adjudicator had to consider the difference in meaning between such terms.

The Oxford English Dictionary defines the term "should" as:

"modal verb (3rd sing. **should**) **1** used to indicate obligation, duty, or correctness. **2** used to indicate what is probable. **3** formal expressing the conditional mood. **4** used in a clause with 'that' after a main clause describing feelings. **5** used in a clause with 'that' expressing purpose. **6** (in the first person) expressing a polite request or acceptance. **7** (in the first person) expressing a conjecture or hope."

The term "must" is defined as:

"modal verb (past **had to** or in reported speech **must**) **1** be obliged to; should. **2** expressing insistence. **3** expressing an opinion about something that is very likely."

Having regard to Longman's Dictionary of Contemporary English, New Edition, 1991, pp 669-671, the term "should" is generally used to express desirability or probability while the term "must" is generally used to express obligation or a requirement.

The term "must" is used in indicating that it is necessary that something happens or is done, in stating formal rules and regulations, or to express strong obligation. The term "should" is generally used to state recommended or advisory procedures, a recommendation or that which is advised but not required. The term "should" does have an element of obligation, generally in the context of what is the right or correct thing to do, or the best or a good thing to do, such as the recommendations of some outside authority, to express a mild obligation or to give advice. In fact, the term "should" is regarded by some grammarians as a weak form of the term "must".

Considering the contrast between the different modal verbs "must" and "should" and concentrating on the nuances of meaning between them, the Adjudicator was of the view that both terms indicate an obligation, however the obligatory nature of the word "must" is "stronger than that of the word "should".

From the advertisements, it is clear that the SP did display the price information for the service, albeit for a limited duration (approximately five seconds of an advertisement approximately fifteen seconds in length), in a font size that is smaller than is desirable and separated with the identical price in respect of each of the three mobile networks being displayed on a terms and conditions screen.

The pricing information in both advertisements reads:

“Ringtone pricing:
Vodacom R5
Per request,
MTN R5,
Cell C R5”.

The Adjudicator did not agree with the SP that the test of ease and clarity of visibility is purely subjective and is of the view that attempting to determine if the size and duration of such display meets the requirements of Clause 6.2.5 is a combination of objective and subjective elements. This test has been comprehensively and objectively superseded by the WASPA Advertising Guidelines, however as the advertisement in question pre-dates the introduction of the Advertising Guidelines, such exercise must be undertaken.

Clause 6.2.5 of the WASPA Code of Conduct contains three requirements:

1. The price for a premium rated service must be easily visible;
2. The price for a premium rated service must be clearly visible; and
3. The price should appear with all instances of the premium number display.

Requirement 1 is not capable of objective assessment and as such, a subjective test must be used, including the size of the television screen on which the advertisement is likely to be viewed. The Adjudicator regarded the advertisement as a whole and considered particularly the small font size used, the fact that the same price information is separately reflected in respect of each mobile cellular network without any reason and the relatively brief time of display. The Adjudicator was of the view that if the SP had consolidated the five lines of pricing information to read “R5 per request” or just “R5” with an equivalent amount of space allocated, this would have obviated any question as to the ease or clarity of visibility. Having regard to these factors, the Adjudicator was of the opinion that the pricing information was not easily visible in the advertisement.

The Adjudicator is of the view that requirement 2 can be objectively ascertained, however in the absence of the ability to test the advertisements on multiple screen sizes and distances from the screen, the Adjudicator made no finding in respect thereof. The Adjudicator’s *prima facie* view is that there was no contravention of requirement 2.

Requirement 3 is similarly capable of objective assessment and here the Adjudicator found that the SP has, in its advertisement, objectively failed to display pricing information “with all instances of the premium number display” as required and as such is in breach of requirement 3 of Clause 6.2.5 of the WASPA Code of Conduct.

The complaint was accordingly upheld in respect of a breach of Clause 6.2.5 of the WASPA Code of Conduct.

In determining the sanction to be imposed in respect of the breach of Clause 6.2.5 of the WASPA Code of Conduct, the Adjudicator had regard to the fact that the:

- SP has changed its advertisements to comply with the WASPA Advertising Guidelines;
- test for easy visibility in Clause 6.2.5, is a subjective test and no finding was made in respect of clarity of visibility;
- obligation regarding pricing appearing with all instances of the premium number display in the second sentence of Clause 6.2.5 of the WASPA Code of Conduct, is a weak obligation and has a common usage of an advisory rather than peremptory nature; and
- issue has been pre-empted by the WASPA Advertising Guidelines, intended to obviate issues of this nature and in effect as at the date of this adjudication but not at the date of the complaint.

The Adjudicator accordingly imposed the following sanction, following the decision in Complaint #0014 and #0015 and Complaint #0039:

- The SP is formally reprimanded for:
 - its failure to display easily visible pricing information in the advertisement for the service; and
 - its failure to display pricing information relating to the service with all instances of the premium number display in the advertisement for the service; and
- The SP is ordered to pay a fine of R3 000,00 to WASPA, being an amount of R1 500,00 in respect of each of the instant complaints.

Fines are payable to the WASPA within five (5) working days of notification of this sanction. Should an appeal be lodged, the fine will be suspended until the determination of the appeal. Should the fine be upheld (in whole or in part, or increased) the fine will be payable within five (5) working days of notification of the appeal finding.