



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Integrat
Information Provider (IP) (if any)	Timwe
Service Type	Subscription
Source of Complaints	Competitor
Complaint Number	#0590
Date received	16 October 2006
Code of Conduct version	4.6

Complaint

The Complaint relates to a television advertisement for a subscription service flighted on television during the weekend of 13 & 14 October 2006. The Complainant alleges a breach of clause 11.1.2 of the WASPA Code of Conduct which requires that a request to join a subscription service must be an independent transaction and such request "may not be bundled with a request for a specific content item".

The detailed Complaint as submitted states as follows:

"The ad shows 3 movie themes. As it shows the themes the audio says :
'Choose your favourite sound tracks for your mobile. Send M1, (pause) M2 (pause) or M3. Subscribe now to movie club. Just send M1, M2 or M3 to 31606.'

The audio is paused so that the viewer can hear the 3 sound tracks which relate to M1, M2 and M3. Therefore a user sending in M2 to receive Spiderman movie theme will automatically be subscribed to the service."

SP Response

The SP submitted the following Response:

“Our client responded to the complaint and stated that no form of bundling was done, and that the information was made clear to the costumer [sic], so that any confusion may be avoided. The complainant states that the pause that follows the presentation of each sound provided, leads the viewer to believe he is requesting a single content item. The pause was to the contrary used to ensure clear content presentation. The words ‘movie club’ are stated and nowhere is mention made of once off content purchases.

This club has 3 separate keywords for access as advertised i.e. M1, M2 or M3 but neither of the keywords give direct access to a specified content item. It merely provides access to the club access portal from where a user browses and chooses content to download after a successful subscription has been completed - in no way does any of the 3 keywords give direct access to any individual content item. The normal subscription procedure is first completed before access to any content is granted.

In summary the following issues make it difficult to accept this charge;

1. The term “subscription” appears on the top left *[actually the right – Adjudicator]* hand corner within the prescribed area, in accordance with Section 5 of WASPA’s T.V. Screen Shot Examples;
2. The voice over clearly and unambiguously announces “...subscribe now to MovieClub...”;
3. The very first sentence of the T&C at the bottom of the screen, state that “MovieClub is a subscription service”;
4. The offering is correctly described in text and verbally throughout the advert;
5. The correct subscription procedure was followed as set out by WASPA as well as the Network service providers.”

Sections of the Code & Advertising Rules considered

The following sections of Version 4.6 of the WASPA Code of Conduct were considered:

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. 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”.

11.1.2. 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 bundled with a request for a specific content item.

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.

The following sections of Version 1.6 of the WASPA Advertising Rules were consulted:

2.3.13 SUBSCRIPTION SERVICES: Show Total Subscription Charge, Frequency of Charge, any bearer charges and any additional charge/s

(i) Must Use The Words "Subscription Service"

If the Content provider is providing a continuous, subscription-like or subscription-based service, then the words "Subscription Service" must be prominently displayed at the top section of the advertisement as well as at each Content or service section in the advertisement where various subscription types are displayed.

No acronym, letter (eg "S"), number, abbreviation (eg "Subs"), icon, or any other mark may be used as an alternative to the words "Subscription Service" anywhere in the advertisement when that Content is only available at all and/or at a particular cost as part of a subscription service.

(ii) Must Indicate Charge/s:

The advertisement must indicate in the font size, position and type as indicated:

- (a) The TOTAL charge that the consumer will incur for the subscription component of their access to that subscription service.
- (b) The frequency (and the minimum frequency, if applicable) at which they will be charged for the subscription component of access to that subscription service.
- (c) Whether, in addition to the periodic subscription charges in (a) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement. [See (iii) below]

This indication must include the potential and cost of any (additional) bearer charges.

(v) Must clearly Differentiate Between Non-subscription and subscription Types if both available in the same advertisement:

Taking into account the provisions in section 11.1.2 in v3.2 of the WASPA Code Of Conduct on relating to an "independent transaction," if an advertisement has components to it that promote

(a) Content that is ordinarily made available to a consumer on payment of a once-off payment for that individual Content without the need to subscribe to that service,
AND

(b) Content that will be available at all, and/or at a particular price or even free only if the consumer subscribes to a subscription service, then this distinction between the availability of non-subscription and subscription charging must be made clear by unambiguously demarcating in separate sections (and not just wording) the non-

subscription portion from the subscription service portion or Content in the advertisement.

The words "Subscription Service" as well as the total charges and any additional access charges and charge frequency for that subscription service must be clearly indicated in the form specified.

Note: No alleged contravention of the Advertising Rules was raised in the Complaint. The above sections were consulted for guidance purposes and not for the purpose of evaluating any potential contravention thereof.

Investigation

The following appears from a viewing of the advertisement in question.

The voice-over script:

"Choose your favourite soundtracks for your mobile.

Send M1. Send M2. Send M3.

Subscribe now to Movie Club.

Just send M1, M2 or M3 to 31606."

Terms and conditions:

"Movie Club: Credits for 2 movie ringtones every week! R4.99 SMS per day (VAT Included). Vodacom and MTN only. To cancel SMS STOP ??????* to 31606. This service requires WAP. VAS rates apply. No free minutes apply. Questions? Call 082 235 0400 or e-mail supportsa@timwe.com. Java, WAP, GRPS required. Total Tim."

A red triangle appears in the top right hand corner bearing the text:

"R4,99

per day

Subscription”.

* this text is unclear

Decision

In considering the use of specific content items in the marketing of subscription services the approach adopted in the Adjudicator’s Report in respect of Compliant #0022¹ is approved and applied.

In this matter the following test was applied:

“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

¹ <http://www.waspa.org.za/code/download/0022.pdf>

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:

- o 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.

- o 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.

- o 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.

- o 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.

- o Whether there is a mix of content items and a subscription service being advertised or only a subscription service.

- o Whether the same short code or access number is used for both content items and a subscription service.

- o Whether similar key words are used for content items and a subscription service.

- o The clear differentiation between the content examples or indicators and the subscription service itself.

There accordingly must be a comparison of the indicators the IP provides to customers and potential customers to show that the service being advertised is a subscription service as against the indicators that may potentially confuse a customer or potential customer in the advertisements which are the subject of the two complaints.”

Section 11.2 of the Code of Conduct has been amended since the above Adjudication was delivered by the addition of the underlined section:

“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 bundled with a request for a specific content item.”

The amendment was effected to bring clarity to by far the most vexatious provision of the Code and I regard the addition as having been inserted to bring clarity more particularly to the preceding sentence. In any event I do not think the amendment necessitates any alteration to the adjudicative approach set out in the Adjudicator's Report in respect of Complaint #0022.

In the matter under consideration there are clearly a number of actions which the IP/SP undertook correctly in order to communicate to viewers that the advertisement related to a subscription service and that the featured content was only being used as an indication of the type of content provided under the subscription service. These include:

- The use of a red triangle in the top right hand corner for the full duration of the advertisement stating in contrasting text that the service is a subscription service and indicating the periodic charges;
- The use of the word “subscribe” in the voice-over script; and
- The fact that no individual content items are available through the advertisement.

On the negative side the use of different key words, in particular, has the potential to mislead. Using “M1”, “M2” and “M3” as distinct keywords which relate to three distinct pieces of content and which can all be used to subscribe to the service creates scope for confusion in the minds of watching consumers. The potential for confusion may be slightly aggravated by the small pause inserted in the voice-over script between the mention of the three distinct keywords. This may constitute a breach of section 4.1.1 and 4.1.2 of the Code.

Furthermore there is a *prima facie* breach of the Advertising Guidelines in the failure to use the words “subscription service” in the terms and conditions displayed. The SP's statement that “[T]he very first sentence of the T&C at the bottom of the screen, state[s] that ‘MovieClub is a subscription service’” is not borne out by a viewing of the advertisement.

No evidence was provided in either the Complaint or the Response as regards the actual subscription process and no findings can be made as to whether such process clarifies or confuses the subscription process.

Has a request to join a subscription service been bundled with a request for a specific content item? On the evidence presented and in the absence of any further information regarding the subscription process it is found that no such bundling has occurred.

Is the design of the advertisement such that there is a reasonable likelihood of a consumer being subscribed to a subscription service under the mistaken belief that he or she is requesting content on a once-off basis? Given the analysis above and in the absence of any further information regarding the subscription process it is found that such a reasonable likelihood does not exist.

Is the design of the advert likely to mislead by inaccuracy, ambiguity, exaggeration or omission, i.e. does it constitute a breach of section 4.1 of the Code? The use of different keywords certainly does promote ambiguity, but I am not convinced that this is sufficient, given other measures taken to indicate the nature of the service, to constitute a breach of section 4.1.

In the circumstances the Complaint is not upheld.

The IP and SP are, however, requested to take careful note of the potential confusion caused by:

- the use of different keywords – this could easily be avoided; and
- failure to properly adhere to the Advertising Rules.

As Complaints of this nature are handled on a case-by-case nature and within the context of each advertisement, it may be that a failure to remedy the above issues in future advertising will contribute towards a finding that sections 11.1 and 4.1 have been breached in respect of such future advertising.