

WASPA APPEALS PANEL DECISION IN RESPECT OF COMPLAINT NO. 637.

GOZOMO (PTY) LTD

Appellant

3 September 2007

DECISION

Background

This complaint stems from the display of two short code numbers (40994 & 31996) on the website www.gozomo.co.za without any accompanying pricing information being displayed either immediately below, above or adjacent to the aforementioned numbers. The particular web page in question is headed "Subscription services for your mobile phone". Also displayed on the same page was information and links to different categories of wallpapers, information services, ring tones, games and animations and a link called "*Subscribe Now to Wallpapers – 50 Feathers*".

A complaint was lodged that the above web page constituted an infringement of section 6.2.2 of the WASPA Code of Conduct (Version 4.6) and section 9.2.2.2 of the WASPA Advertising Rules (Version 1.6). Section 6.2.2 of the Code stipulates that "all advertisements for services must include the full retail price of that service". Section 9.2.2.2 of the Advertising Rules provides that "for each unique access number, the full and final cost of the access must be displayed immediately below, or above, or adjacent to the unique number or content access code in a non-serif font".

The Appellant replied to the complaint by denying that the web page constituted an “advertisement” as contemplated by the above sections. This submission was grounded in the fact that the website itself offered no transactional features and did not display any keywords that would need to be used by a consumer in order to activate any of the subscription services described on the website. The Appellant stated that the purpose of the website was to provide information on its services, including the terms and conditions relating to use of its services. The Appellant appeared to state further that none of the service activation links that appeared on its website were actually operational.

The Adjudicator’s Ruling

The Adjudicator held that the obligation to display pricing information whenever a short code service is advertised did not only arise where the customer is able to find all information needed to access the service (including keywords). The Adjudicator held that the Code and Advertising Rules were clear that whenever a short code is advertised the relevant pricing information must be displayed and imposed a fine of R4 000 on the Appellant. The Adjudicator also directed the Appellant to remove all links to short codes or access channels on its website until such time as the service to which those short codes or access channels related actually became available to consumers.

The Appellant has now appealed against the Adjudicator’s ruling on the grounds set out hereunder.

Grounds of Appeal

The Appellant has advanced two grounds of appeal. Firstly, the Appellant contends that the Adjudicator erred in her interpretation of the Code and argues that the Code is silent on crucial definitions which form the basis of the ruling,

that it is unclear what interpretative guidelines were employed by the Adjudicator in reaching her decision and that the ruling was not made with due consideration of the spirit of the Code and the fact that it was designed to protect the general public. Secondly, the Appellant submits that the ruling is inconsistent with previous rulings of similar infractions and therefore indicates that the Adjudicator was biased against the Appellant.

The Appellant advanced further arguments in support of the above grounds of appeal, all of which have been considered by the Appeals Panel in coming to its decision.

The Appeals Panel deems it convenient to deal firstly with the allegation of bias made on the grounds that the Adjudicator's ruling appears inconsistent with previous rulings of similar infractions. The Appellant refers specifically to complaints 306 and 307 wherein no fine was imposed on a member who had displayed short codes in a promotional booklet without pricing information accompanying each instance of display of the short codes in the booklet. The facts of complaints 306 and 307 were, briefly, that pricing information for a particular short code appeared on the cover of the promotional booklet in question as well as on pages 2, 5, 6, 9, 11, 13, 15 and 17 thereof but pricing information was omitted from pages 19 and 20. The Adjudicator in that matter accepted the member's response that the omission was an oversight that would be corrected and the Adjudicator did not impose any fine on the member.

Even if the facts of complaints 306 and 307 were assumed for all purposes to be indistinguishable from the present matter, that mere fact that another Adjudicator had reached a different decision in complaints 306 and 307 would not, in itself, be conclusive of bias in the present matter. In its decision in respect of complaint no 2 (in which the present Appellant was the party alleging bias) the Appeals Panel stated that for bias to be established, the Appellant would need to show that the Adjudicator had dealt with the issues in an unfair manner. Having looked at the

manner in which the Adjudicator considered the relevant sections of the Code and the manner in which they were applied in this matter, we find no basis for upholding this appeal on the grounds of bias.

We turn now to deal with the main ground of appeal, i.e. that the Adjudicator erred in her interpretation of the Code. In this regard, the Appellant's arguments can be summarized as follows: the Code does not define what an "advertisement" or "advertising" is and the Appellant submits that its website ought not to be regarded as an advertisement; the display of the short codes on the Appellant's website was within the context of an informative display and not an advertisement and that it is therefore not required to display pricing information in that a context. The Appellant argues, in support of its interpretation of the phrases "advertisement" and "advertising" that the terms ought not to be interpreted too broadly in light of the spirit and purport of the Code. The Appellant submits further that no consumers were negatively affected by the displays and that the display of the numbers on the website was not in breach of the spirit of the Code.

The Appellant states in its appeal that the merits of its appeal "would be settled, by establishing what amounts to an advertisement or to a service in terms of the Code. Unfortunately the Code does not define these terms explicitly".

With respect to the Appellant, the Appeals Panel deems it unnecessary to consider an interpretation of the word "service" in order to settle the appeal. The web page in question displays information relating to "*subscription services for your mobile phone*" and there is no doubt that where the word "service" as used in section 6.2.2 of the Code and section 9.2.2.2 of the Advertising Guidelines includes subscription services.

Furthermore, the Appellant's suggested definition of "advertisement" (taken from Dictionary.com version 1.1) as meaning "a paid announcement, as of goods for

sale, in newspapers or magazines, on radio or television, etc.” is unnecessarily narrow. The Compact Oxford English Dictionary defines “advertising” as a verb meaning “to present or describe (a product, service, or event) in a public medium so as to promote sales” and “advertisement” as a noun meaning “a notice or display advertising something”. The words “advertisement” and “advertising” must be given their ordinary meaning within the context in which they have been used in the Code. The crisp question which falls to be determined in this Appeal is whether the web page in question ought to be regarded as a notice or display presenting or describing a service in a public medium so as to promote sales.

In this regard, we agree with the Adjudicator that it is not necessary for all service information (including key words needed to activate a particular subscription service) to be displayed in order for a notice or display to be regarded as an advertisement. We also agree that it is immaterial whether page links that appear on the web site such as “Subscribe now to Wallpapers – 50 Feathers” are active or dormant links. The overriding question remains whether the display presents or describes a service in a public medium so as to promote sales. Having regard for the public accessibility of a website and the overall content of the web page in question we regard it as being promotional of a service and therefore an advertisement.

The Appeals Panel therefore dismisses the Appellant’s appeal that the Adjudicator erred in her interpretation of the Code.

The Adjudicator noted the fact that the page links enabling a consumer to activate the services were not active links and regarded this as a relevant factor for the purposes of determining the severity of the sanction to be imposed on the Appellant. The Appeals Panel has noted further in this regard that the Adjudicator specifically took into account the fact that no customers had complained of using the service in ignorance of the charges before imposing a fine of R4 000. The Appeals Panel has also noted that the Appellant’s breach of

section 9.2.2.2 of the Advertising Rules also entails a necessary breach of other more detailed requirements regarding the display of full and accurate pricing information that is required on website advertisements. The Appeals Panel regards the sanction of R4 000 imposed by the Adjudicator to have been a reasonable sanction in the circumstances.

Decision

The appeal is dismissed and the decision and sanction of the Adjudicator is confirmed. In the circumstances, the Appellant forfeits the appeals fee.

The Appeals Panel

3 September 2007.