

REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno
Information Provider (IP): (if applicable)	N/A
Service Type:	Subscription
Complainant:	Competitor
Complaint Number:	10479 & 10489
Code version:	Code v 9.0 and Ad Rules v 2.3
Date of Report:	28 October 2010

1. Complaints 10479 & 10489 are both in respect of the same Member, and relate to similar facts; it is thus appropriate to deal with them together.

Complaint 10479

Complaint and Response

2. This adjudication stems from a complaint lodged on the 8th of September 2010 via the WASPA website at www.waspa.org.za by a competitor of the Member, which wishes to remain anonymous.
3. The complaint is short enough to reproduce verbatim:

The font colour - grey on black is not clear. This service does therefore not clearly indicate the price and the service is not clearly identified as a subscription service. The purposeful ambiguity is to lure subscribers into a subscription service whilst being unaware of the cost of these service. One content item is used to mislead subscribers to subscribe to this service. The content is displayed before a user is subscribed - but this content is not clear - also a grey on black font. There are also random pieces of content displayed on some of the pages - at times one item and sometimes more. This has nothing to do with the actual meaning of your name service and just confuses further. This service misleads subscribers to think that they get the meaning of their names but they are subscribed to a ring tone service? This service is clearly a clever bundling-plot which is aimed at confusing subscribers.

4. The Complainant also listed the sections of the WASPA Code of Conduct that it deemed the Member to have been infringed, being sections 4.1.1, 4.1.2, 11.1.1, 11.2.1 and 11.2.2.
5. There is no mention of the medium in which the advertisement in question appeared, but the Adjudicator established that the service was advertised on a website. No indication was given of the URL of the website.

6. The Member made response to the complaint per email on the 15th of September, and addressed each allegedly infringed section *seriatim*. It also provided screenshots of the website in question, which are attached as Annexure “A”. The Member’s responses will be included in the Adjudicator’s decision below.
7. On the 16th of September the Complainant advised the WASPA Secretariat per email that it was not satisfied with the Member’s response and wished the matter to proceed to adjudication.
8. It appears there are three elements to this complaint:
 - 8.1. That the notification that the advertisement is for a subscription service is intentionally obscured by means of formatting and font colour so as to mislead consumers;
 - 8.2. The price of the service is obscured in the same way;
 - 8.3. One content item (in this case a service that requests a consumer’s name and then responds with its meaning) is used to lure consumers into subscribing to a service that provides ringtones.

Portion of the Code Considered

9. The following sections of the WASPA Code of Conduct are alleged to have been breached:
 - 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.
 - 11.1.1 Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.
 - 11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.
 - 11.2.2. 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 a request for a specific content item and may not be an entry into a competition or quiz.
10. Section 9.2.1.1 of the WASPA Advertising Rules (incorporated by reference by section 6.1 of the Code of Conduct) is also relevant to this complaint:

- Access cost text must be of a size that is at least 80% of the largest access number on the page, or 15 point font size, whichever is the greater. The access cost text must be in a nonserif font
- The pricing text must be clearly shown being independent of any other text or image, and not be placed or formatted in a manner where it may be obscured by other text information, graphics or marks that may be displayed around it.
- The cost text must not be part of a colour scheme or design that could obscure (objective) easy reading of complete details of the price.
- All access cost information must be placed horizontally

Decision

11. The Adjudicator drew the following from the screenshots provided by the Member, coupled with its response to the complaint:

- 11.1. It is not clear how consumers linked to the web page. It would have been useful to know whether this was done via print advertising, SMS advertising or merely by the Member relying on search engines to publicise the site for it, as the method used could itself have involved an infringement of the Code of Conduct
- 11.2. On loading the Member's web site into a browser window, the consumer would be presented with a large banner heading stating "What is the meaning of your name?" Below the heading was a box containing fields for the consumer to enter mobile number and carrier, as well as a button to allow for submission of this information. Presumably the consumer had to consent to the terms and conditions of the website before being allowed to submit.
- 11.3. Apart from the above, this page also included the words "SUBSCRIPTION SERVICE R3/DAY" in a bar at the top of the screen. In the screenshots provided by the Member, these words appear in **black** text on a **grey** background, rather than in **grey** text on a **black** background. Unfortunately, as the Complainant did not furnish its own screenshot of the web site, the Adjudicator is forced to rely on those provided by the Member. Certainly the words appear perfectly readable on the version provided by the Member. At the bottom of the screen there is another bar which includes the logos of the three major cellular service providers as well as "T&Cs" and "FAQ" hyperlinks. The bars described in this paragraph appear on both screenshots provided by the Member.
- 11.4. Squeezed into the right hand side of the screen, the Member has inserted four small block graphics under the title "Top of the Week" in light blue script against a light blue background. Next to each block is a radio button, presumably allowing the consumer to select one of these four blocks. No further information is given as to what these graphics may relate to.

- 11.5. The second screenshot appears to contain the meaning of a name at the top of the screen, in a small, very faint font that is barely intelligible. The Member only provided two screenshots, and so the Adjudicator has assumed that they follow on from one another. The Adjudicator is not entirely clear at what stage the consumer fills in his or her name in order to get information on its meaning. As the consumer would apparently not have given this information by the time the web page reflected in the second screenshot appears, no other construction makes sense in the context other than that the “meaning” given here is intended to be an example of what results the “service” will provide.
 - 11.6. Below this “meaning” the words “THE MEANING OF YOUR NAME” appears in large yellow letters with an arrow pointing down towards the words “GET IT NOW” in even larger white letters. Below THAT the consumer is enjoined to fill in a pin number and to send it to the Member by clicking on a “Confirm” button. In a very small script the following words are displayed “By clicking confirm, I agree to subscribe to 35050 Vip subscription service R3/day. For Help dial 0214178001”.
 - 11.7. Squeezed into the left of the screen in the second screenshot are three of the graphic blocks mentioned earlier, this time without any title or radio buttons associated with them.
12. Consequent to the above, the Adjudicator considers the following to be an adequate summary of the facts:
- 12.1. A consumer landing on the Member’s first web page would fill in his or her mobile number and carrier, accept the terms and conditions by clicking the checkbox, and then proceed to the next page. The Adjudicator was given no information what effect, if any, selecting one of the radio buttons would have.
 - 12.2. On submitting the required information from the first page, the consumer would be sent an SMS to the number provided on the first page. This SMS would contain a pin code which the consumer would enter and submit on the second page. This act would have the effect of subscribing the consumer to a certain subscription service. The Complainant seems to think that this subscription service is in respect of ring tone downloads; the Adjudicator has no idea, having seen both the screenshots and the Member’s submission – and therein lies the trouble.

Unclear notification of a subscription service and unclear pricing information

13. The Member submitted that the website had not contravened these sections, and the Adjudicator agrees. As explained above, the screenshots provided to the Adjudicator by the Member were perfectly readable, and consequently the Member cannot be found to have breached sections 4.1.1 (insofar as it relates to this head), 6.1 (read with section 9.2.1.1. of the Advertising Rules) or 11.1.1 in this regard.
14. Complainants are urged to submit full support for their complaints to the WASPA Secretariat.

Provision of false information; breach of subscription service provisions

15. As this Adjudicator has said before, merely using the words "Subscription Service" and otherwise complying with the formal requirements of the Code of Conduct does not allow Member free reign to engage in conduct that is misleading in substance.
16. The screenshots provided by the Member certainly do state that a subscription service is in the offing. However the main call to action on the Member's website is not the subscription service, but what we can call the "name" service. The actual subscription service apparently being advertised is subordinated to the "name" service to the extent that the Adjudicator does not know what that subscription service was. By responding to an offer to use the "name" service, consumers are actually subscribed to the subscription service. The Member in its response contends that giving a clear indication that the service in question is a subscription service allows it to do this; clearly however such conduct is misleading, and the disproportionate nature thereof leads the Adjudicator to the conclusion that it was intentionally so. Consequently, the Member has infringed section 4.1.2 of the Code of Conduct.
17. The Member's submission on sections 11.2.1 and 11.2.2 was that the service is clearly labelled as a subscription service, and as the consumer is required to enter a cell number and confirm with a pin, no confusion can result and that hence no infringement of the section had taken place; clearly the Member has missed the point here.
18. Section 11.2.1 states that subscription to a subscription service cannot take place as a result of a request for a non-subscription service. The Member has set up a mechanism which does precisely that, and placing notices on the website to the effect that the service is a subscription service are of no assistance to the Member if the service being requested is in fact NOT a subscription service. Consequently the Member has infringed section 11.2.1 of the Code of Conduct.
19. Section 11.2.2 forbids what used to be called "bundling" in previous versions of the Code of Conduct. When a consumer subscribes to a subscription service, the act of doing so must be an independent transaction in respect of that service only.
20. Even if the subscription to the "name" service was the main "call to action" and the consumer got the "name" service as a free extra, the Member would still be in breach of this section as the request for subscription would not be an independent transaction. Consequently the Adjudicator finds that the Member has breached section 11.2.2 of the Code of Conduct.
21. Finally, while the Member did not infringe section 4.1.1 in the sense of providing misleading pricing information, its conduct as described above infringed the requirement that it be honest and fair in its dealings with consumers, and it has consequently also infringed section 4.1.1.
22. The Adjudicator's reasoning in this regard is corroborated by the report of the appeal panel in complaint number 5479.

Complaint 10489

Complaint and Response

23. This complaint also originates from a competitor of the Member which wishes to remain anonymous. On the 10th of September 2010 the Complainant lodged the following complaint via the WASPA website:

This service is misleading. It is not clear what a subscriber will be getting. It is confusing and not clear – the content items at the sides have nothing to do with an IQ quiz.

24. The Complainant further provided a URL for the website in question and alleged that the Member had infringed sections 4.1.1, 4.1.2, 11.1.1 and 11.2.2 of the WASPA Code of Conduct.
25. The Member responded to the complaint on the 16th of September, providing a written response to each of the sections alleged to have been infringed and attaching a screenshot of the landing page of the website in question.
26. On the 17th of September the complainant rejected the Member's response and requested that the matter be referred to adjudication.

Decision

27. The relevant sections of the Code of Conduct have been reproduced in paragraphs 23-26. The following sections of the WASPA Code of Conduct are alleged to have been breached: and Section 9.2.1.1 of the WASPA Advertising Rules (incorporated by reference by section 6.1 of the Code of Conduct) is also relevant to this complaint: above. The Member is accused of breaching sections 4.1.1, 4.1.2, 11.1.1 and 11.2.2 of the Code of Conduct.
28. The Adjudicator used the URL provided by the Complainant to visit the website that is the subject of this complaint, and generated screenshots that are attached hereto as Annexure "B".
29. On first sight, the website is very similar to that in complaint 10479, and so the most efficient method to proceed is by comparison. An examination of the screenshots shows the following material differences between the screenshots in this complaint and those in complaint number 10479:
- 29.1. The call to action is now a service that is described as an "IQ Booster" but merely receives certain information from the consumer and then informs the consumer of his or her IQ as well as the average IQ score in the country. The second page however exhorts the consumer: "IQ Booster: get it now". The Member's response confirms that the IQ booster is in fact an application that can be downloaded. However from the website it is not clear that this is one of many available content items for download rather than the game being the main call to action of the web site. Moreover, the facility that works out the consumer's IQ on the website itself is apparently NOT the IQ Booster itself,

which is one of the downloads. Accordingly, the main call to action of the website is NOT one of the applications that are available for download.

- 29.2. The required information for the “IQ Booster” is actually submitted in the first page, as opposed to the “name” service in complaint 10479 where the information does not seem to be obtained before the consumer has confirmed subscription to the subscription service. Thus in the instant complaint the consumer is not subscribed to the Member’s service when he or she completes use of the “service” used as the centrepiece of the advertisement.
- 29.3. Fuller terms and conditions are furnished at the bottom of both pages, with a link provided for the full terms and conditions, as opposed to the mere links given on the website in complaint 10479. However, as was stated in paragraph As this Adjudicator has said before, merely using the words “Subscription Service” and otherwise complying with the formal requirements of the Code of Conduct does not allow Member free reign to engage in conduct that is misleading in substance., form does not override substance, and a statement in small print in the terms and conditions to the effect that the consumer acknowledges that he is entering into a subscriber service does not assist the Member if the content of the site is itself misleading.
- 29.4. Block graphics on the left hand side of the screen in screen one are carried through on the same side on screen two, but other graphics on the right hand side are not. Those on the left appear (by process of deduction due to the fact that their nature is not labelled) to be “mind games” similar to the “IQ Booster”. Those on the right appear to be “arcade-style” games. With the Member’s explanation, the Adjudicator was able to work out that the IQ booster is probably similar to the other games on the right, but a consumer without the benefit of such input would not know this. The distinction is in any event irrelevant, as the IQ Booster was not actually being demonstrated as the main call to action, but rather an IQ Test was being used.

Unclear notification of a subscription service

30. The Adjudicator is satisfied that the Member has followed the formal requirements set out in this section. Consequently no infringement of section 4.1.1 insofar as pricing is concerned, or of section 11.1.1.

Provision of false information; breach of subscription service provisions

31. The Member made a fuller submission in response to this complaint that to the complaint 10479:
 - 31.1. On the infringement of section 4.1.2 the Member submitted that as multiple content items were displayed, this was indicative of a subscription service and hence not misleading; however this point does not get around the fact that the subscription service was not the main call to action – the “IQ Booster” was, which had the tendency to mislead the consumer into thinking that he or she was getting one content item, rather than being subscribed to a subscription service.

- 31.2. On the infringement of clause 11.2.2 the Member was of the view that the pitch was regarding the “IQ” application which was available for download once the consumer had subscribed, and that no quiz or competition was involved. This argument would indeed exclude application of the second sentence of the section, but not the first, as the information disseminated was false and/or deceptive, as established elsewhere.
32. The Adjudicator is of the view that Member’s conduct in respect of this complaint is materially the same as that in complaint 10479. The conduct is however somewhat less reprehensible for these reasons:
- 32.1. The consumer is not subscribed to the Member’s service by using the IQ test application, as opposed to the case in complaint 10479; and
- 32.2. The call to action has at least something to do with the subscription service.
33. Notwithstanding, the Adjudicator finds that the Member has infringed sections 4.1.1, 4.1.2, 11.2.1 and 11.2.2 of the WASPA Code of Conduct.

Sanction (Complaints 10479 & 10489)

34. Both of these complaints arose from the same set of facts; while the advertisements and services advertised were distinct from each other, they followed from the same advertising / subscription method used by the Member.
35. The Adjudicator notes that the Member was recently been the subject of several complaints that were upheld against it. The following complaints are relevant to this matter; descriptions of infringed sections not pertinent to these complaints are omitted:

Number	Date	Sections Infringed	Sanction	Status
7452	27/8/2009	13.3.16	Suspension	
9150	20/7/2010	11.1.2	Termination	
9334	20/7/2010	11.2 inter alia	R250 000 fine	
9502	20/7/2010	11.2.2	R200 000 fine; terminate the service and any similar “Fan Club” service	
9508	20/7/2010	11.2.2	R50 000 fine; terminate the service and any similar “Fan Club” service	

36. The reports in the four most recent complaints are dated 20 July 2010, and according to the WASPA Secretariat were sent to the Member on that day. The Adjudicator has perused the reports in complaints 9334, 9502 and 9508 and finds

that the conduct which occasioned the findings of infringements of section 11.2.2 is materially the same as that complained of in the instant complaints. On the 27th of September 2010 the Adjudicator successfully subscribed to the Member's service described in complaint 10489 using the web portal described in that complaint.

37. It is thus clear that the Member was made aware of the infringing nature of its conduct in this regard almost two months prior to the date that the instant complaints were lodged, but that it made no effort to make changes to the advertisements concerned.
38. It is apparent from the WASPA record that the Member has little regard for fines imposed upon it (also see the report in complaint 9150 in this regard). Consequently the Member is suspended from membership of WASPA for a period of 20 working days from the date that the WASPA Secretariat presents it with a copy of this report, and thereafter until such time as the WASPA Secretariat notifies the Member that it is satisfied that its advertisements and subscription systems comply with the provisions of the WASPA Code of Conduct. Such suspension shall be concomitant with a request to the network operators to suspend all of the Member's services for this period.
39. The above sanction is suspended pending the outcome of the Member's appeals against the adjudicators' findings in complaints 9150, 9334, 9502 and 9508.

-----oooOooo-----

Annexure A

Annexure B