

REPORT OF THE APPEALS PANEL

Date: February 2013
Appellant: Viamedia (SP)
Complaint Numbers: 10651
Applicable versions: 10.0

1. BACKGROUND TO THE APPEAL

- 1.1. This is an appeal against both the finding and sanction imposed on the Appellant by the adjudicator in complaint 10651.
- 1.2. The Appellant is a full member of WASPA. The complaint in question relates to conduct of the part of an information provider (IP) to the Appellant by the name of Opportune Trading 117 CC. While this fact was not raised by the adjudicator, the member is apparently accepting of its culpability for the conduct of its IPs in terms of clause 3.9.2 of the WASPA Code of Conduct (the "Code"). In its appeal the member states specifically:

We confirm that we ViaMedia ("the Service Provider/ SP ") act on behalf of Opportune Trading 117 CC ("the Information Provider/ IP")

- 1.3. In this report the panel will refer to the member for convenience, despite the fact that certain acts may in fact have been done by the IP.
- 1.4. The original complaint related to a television advertisement broadcast on behalf of the member during or about February 2010. The panel does not intend to set out the facts of the complaint, which are adequately enumerated by the adjudicator. Suffice it to say that advertisement in question was in respect of a subscription service operated by the member which allowed subscribers to that service to download games on to the subscriber's mobile phone in exchange for a daily subscription fee.
- 1.5. The complainant alleged that the member had infringed clauses 11.1.2 and / or 11.1.3 of the Code by advertising a content subscription service with one content item rather than the minimum of two required by clause 11.1.2, and that the advertisement did not admit of the member relying on the exceptions set out in clause 11.1.3.

2. THE APPLICATION OF THE CODE AND RULES

The Code, v10.0

- 2.1. The adjudicator applied version 9.0 of the Code to this complaint. The conduct complained of took place during or about February 2011, and consequently version 10.0 is applicable. Fortunately the difference between the versions is not material to this matter.

2.2. The following sections of the WASPA Code of Conduct have relevance to this appeal:

11.1.2. An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed, except as provided for in 11.1.3.

11.1.3. For a television advert, if, during the voice over:

(a) the fact that a service is a subscription service, and

(b) the price and frequency of the billing

is clearly announced in the language of the advert, then that advert may promote a single content item, provided that the key word is generic and not linked to the specific content item.

3. The Decision of the Adjudicator

3.1. The adjudicator found that the advertisement in question was “...in contravention of section 11.1.2, alternatively section 11.1.3.” His reasoning is set out as follows:

With respect to the complaint itself, there is some debate in the correspondence filed with WASPA about whether sections 11.1.2 and/or 11.1.3 apply to the ad. The SP has stated that it does not believe that section 11.1.3 applies and that the ad falls squarely within the scope of section 11.1.2. In my view the ad falls between sections 11.1.2 and 11.1.3. The ad has elements which fall within both sections' scope and yet doesn't comply fully with either. The SP has contended that the line of text “get 24, Fast & Furious, Age of Empires 3 and tons more” and the phrase “... plus loads more games ...” comply with the section 11.1.2 imperative that the ad display “at least two examples of that content clearly displayed” (emphasis added). This argument is disingenuous. The operative phrase in this rule, for the purposes of this complaint, is “clearly displayed”. This requirement implies that an ad viewer be able to see examples of the other content available on subscription. A line of text in small print naming some items is not a clear display of “at least two examples of that content”. The ad furthermore focuses on the Shrek game while the voiceover speaks about the Shrek game and makes references to the Shrek movie for the duration of the ad presented to WASPA. The ad does not comply with section 11.1.2.

On the other hand, the ad does not comply with section 11.1.3, regardless of the SP's assertions in this regard. The overwhelming impression the ad gives is that it is intended to promote a Shrek game. This, in itself, is not problematic although doing so requires the SP to comply with section 11.1.3, which it has not done. The loose references to other subscription content which I have referred to above do not, in my view, detract from a reasonable impression that the ad promotes the Shrek game, essentially as a single content item. The voiceover does not specify the subscription nature of the service and it does not make reference to the pricing and billing frequency. The ad furthermore does not use a generic keyword and instead uses the proprietary “Shrek” keyword. The ad similarly does not comply with section 11.1.3 although, given the SP's stated intentions, this is not surprising.

3.2. The adjudicator imposed the following sanctions on the appellant:

Having found the ad to be in contravention of section 11.1.2, alternatively section 11.1.3, the SP is ordered to –

- Remove the ad or similar instances of the ad from circulation and to amend the ad content to either comply fully with section 11.1.2 by including at least two clearly displayed examples of the content available through the service or with section 11.1.3 by meeting that sections requirements; and
- Refrain from flighting the ad or any similar ad that does not comply with sections 11.1.2 or 11.1.3, as the case may be.

The SP is further fined an amount of R50 000 for its failure to comply with section 11.1.2, alternatively 11.1.3. This fine is payable to the WASPA Secretariat on demand by the Secretariat.

4. Grounds of appeal

- 4.1. The member submitted an appeal in respect of both the adjudicator's findings in respect of clause 11.1.2, 11.1.3 and the sanction imposed, and raised several grounds of appeal for each. For ease of reference the panel will refer to the member's submissions in-line with its decision on each ground thereof below.

5. Findings of Appeals Panel

- 5.1. The panel will deal with each of the adjudicator's findings separately. We will reproduce the appellant's submission and comment thereon, before making a ruling on each finding under appeal.
- 5.2. Where the appellant's submissions included footnotes we will include these in the body of the text where they are relevant.

Infringement of Clause 11.1.2

- 5.3. The Appellant's first ground for appeal under this clause reads as follows:

5.1 That the argument provided by the SP was neither dishonest nor insincere as there are required references to multiple items of content in the ad. The operative phrase of "clearly displayed" has in fact not been specified in the WASPA Code of conduct and can be visual [fn: "Relating to seeing or sight" <http://oxforddictionaries.com/definition/visual>], textual or verbal, the requirement can thus not be implied as referred by the Adjudicator, to allow the ad viewer to be able to see examples of other content available on subscription. The SP has clearly made available the option of content being available by stating [textually] , at the top centre of the ad"24", "fast & furious", "age of empire 3" and tons more" and [verbally] at the 17 second point in the advert "...plus loads more games...". This then would lead the reasonable person with average literacy to note that the advert is not for a single piece of content, and in fact names actual titles that are made available as part of their club subscription.

- 5.4. Clause 11.1.2 clearly states that at least two examples of the content which is provided in terms of an advertised subscription service must be "clearly displayed". There is no doubt about the wording. The appellant contends that such a "display" can be "visual, textual or verbal" and so presumably a notification of the other content items in the advertisement voiceover would be sufficient. If this argument

were to stand the appellant would have to show that other content items were indeed referred to in the advertisement voiceover, but the only mention of other content items is contained in the words "...and lots of other games...", which is clearly not sufficient.

- 5.5. The panel agrees with the adjudicator that the display of the words "get 24, Fast & Furious, Age of Empires 3 and tons more" in, to use his words, "a line of text in small print" does not constitute "clearly displaying" other content items, which should be readily and easily discernible by the viewer.

- 5.6. The appellant goes on:

5.2 The Adjudicator then erred in finding "that a line of text in small print naming some items is not a clear display of at least two examples of that content" [fn: Page 4-5 of the report] and further shows the subjectivity on which this was decided as there is no specification in the WASPA Code.

- 5.7. This submission has already been dealt with above.

- 5.8. And further:

5.3 The adjudicator further erred in stating that the "ad furthermore focuses on the Shrek game" [fn: Page 5 of the report ; Para 1] as this game was offered incidental to all game content in fact offered upon subscription to the club.

- 5.9. The panel is of the view that whether the "Shrek" game was incidental to the totality of games offered under the service is not relevant: what IS relevant is rather the attention accorded this one content item in the advertisement itself.

- 5.10. Lastly:

5.4 The Adjudicator further erred in stating that the "game makes references to the Shrek movie for the duration of the ad" [fn: Page 5 of the report ; para1] the advert in fact makes reference to the Shrek movie in the last two seconds of the advertisement .

- 5.11. The correct quotation from the adjudication reads as set out below, and clearly states that the advertisement's voiceover referred to BOTH the "Shrek" game AND the "Shrek" movie:

The ad furthermore focuses on the Shrek game while the voiceover speaks about the Shrek game and makes references to the Shrek movie for the duration of the ad presented to WASPA.

- 5.12. The provisions of clause 11.1.2 are clear enough: the appellant should have clearly displayed at least two examples of the subscription content in the advertisement. The panel agrees with the adjudicator that it failed to do so. The appellant thus infringed clause 11.1.2 unless it can have recourse to the exception afforded by clause 11.1.3.

- 5.13. Infringement of Clause 11.1.3

- 5.14. The appellant's submissions under this head read as follows:

It is our submission that the Adjudicator erred in finding that the SP had in fact breached this section and further subjectively identified that the argument provided by the SP was “given the SP’s stated intentions this is not surprising” as and we hereby submit the following;

6.1 That there was no “loose reference” in the advertisement to the other subscription content, the reference to the other subscription content available was as previously mentioned done according to the WASPA Code. The price and frequency of the billing is clear on the face of the advert and no ambiguity was presented.

- 5.15. The panel agrees with the appellant that the adjudicator was wrong to find that the appellant had infringed clause 11.1.3 of the Code, though perhaps not for the reasons advanced by the appellant. Clause 11.1.3 qualifies clause 11.1.2. That is to say if an advertisement has not complied with clause 11.1.2, but falls under the exception allowed by clause 11.1.3 then no infringement of clause 11.1.2 has taken place. It is not possible to infringe clause 11.1.3 as such.
- 5.16. This is however of little assistance to the appellant, which must satisfy the panel that it can avail itself of the exception set out in clause 11.1.3. Unfortunately its advertisement fails to meet any of the requirements set out in the clause. The voiceover does not announce that the service advertised is a subscription service, it does not specify the price and frequency of billing, and the keyword “Shrek” is certainly not generic.
- 5.17. It is not sufficient to state, as the appellant does, that any of these elements appear from the face of the advertisement – the Code is clear that they must be contained in the voiceover.
- 5.18. Consequently the panel finds that the appellant has not satisfied the requirements of clause 11.1.3, and that accordingly it has infringed clause 11.1.2.
- 5.19. The panel does not understand the second half of the first paragraph quoted above. The adjudicator’s comments regarding the appellant’s intention are somewhat cryptic, but the panel assumes that the adjudicator is referring to the SP’s reported submission that it was promoting “...multiple content items and not a single content item”, which can be found at the top of page 3 of the adjudicator’s report.
- 5.20. Finally, the appellant alleges that “...the adjudicator openly lashed out at the SP personally in his report.” The panel can find no statement in the adjudicator’s report that would support such an allegation.
- 5.21. Sanction
- 5.22. The adjudicator did not give reasons for imposing the sanction that he did, and so the panel must consider the sanction imposed and the appellant’s submissions in respect thereof in the light of the member’s record, the relevant provisions of the Code, and previous sanctions imposed for similar infringements.
- 5.23. The appellant only addresses the fine imposed by the adjudicator in its submission, and consequently the panel will only examine this and not examine the other sanctions imposed. It maintains that the fine is excessive with reference to clause

14.4.2 (c) of the Code, but does not say why this is so. The appellant does however make certain submissions in mitigation, which are as follows:

- 5.23.1. The advertisement was only flighted “a handful of times”, and was immediately “pulled” once the original complaint was made. The advertisement was not flighted again.
- 5.23.2. The appellant has an “exemplary” complaints record with WASPA.
- 5.24. The appellant’s rapid reaction to the initial complaint is noted, but the panel is concerned that this was not raised in the appellant’s initial response to the complaint.
- 5.25. The panel has examined the appellant’s record as at the date the complaint was lodged and, while it is not exemplary, it does not indicate a pattern of infringements of the Code, or of indifference to compliance with the Code. The appellant had moreover never before infringed clause 11.1.2 as at the date the complaint was lodged. It is also noteworthy that no similar complaint has been made against the appellant in the rather significant period that has elapsed between the initial complaint and this report.
- 5.26. Sanctions imposed for breaches of clause 11.1.2 by other members have not been terribly onerous:
 - 5.26.1. In complaint number 10447 the member was found to have infringed clauses 11.1.1 and 11.1.2. The member was found to have a good record with WASPA and was issued with a formal reprimand and ordered to amend its promotional material.
 - 5.26.2. In complaint 11003 the member was found to have breached clause 11.1.2 and was fined the amount of R10 000.
 - 5.26.3. Finally, in complaint 11066 the member was found to have infringed *inter alia* clause 11.1.2, but the adjudicator also found that it had no intention to mislead consumers. The member was fined the amount of R2 500 for its breach of clause 11.1.2.
- 5.27. A television advertisement has the potential to reach, and hence to mislead, a large number of consumers. While the panel does consider the fine imposed by the adjudicator to be excessive, it does not want to make light of what is potentially a very misleading practice.
- 5.28. Consequently the fine imposed by the adjudicator in this complaint is reduced to an amount of R10 000.
- 5.29. The appeal has been partially successful, and consequently 50% of the appeal fee should be refunded.