



REPORT OF THE ADJUDICATOR

Complaint reference number:	#20857
WASPA member(s):	Buongiorno SA
Information Provider(s):	Not provided
Membership number(s):	0002
Complainant:	Consumer
Type of complaint:	Non-compliant subscription service advertising
Date complaint was lodged:	18 June 2013
Date of the alleged offence:	18 June 2013
Relevant version of the Code:	12.4
Clauses considered:	4.1.1; 4.1.2; 11.1.1; 11.2.1; 11.2.2; 11.2.3
Relevant version of the Ad. Rules:	2.3
Clauses considered:	9.2.1.1; 9.2.2.1

Complaint

Complaint #20857 relates to online banner advertising alleged to breach the WASPA Code of Conduct ("the Code"). The facts of this case and the relevant advertising materials appear within the complaint bundle annexed to this report.

The Complainant alleged that the SP was in breach of sections 4.1.1; 4.1.2; 9.1.7; 11.2.1; 11.2.2; 11.2.3 of the Code.

Service Provider's Response to the Complaint

The SP's responses to the original complaint, and to the additional questions raised by the adjudicator in response to other potential breaches of the Code not identified by the initial complaint, appear in full on pages 3 – 7 and 12 - 18 of annexed complaint bundle.

Sections of the Code considered

- 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.
- 6.1.1 In addition to the provisions listed below all members are bound by the WASPA Advertising Rules, published as a separate document.
- 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.
- 11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be reasonably clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.

Decision

- 1. It is apparent that the promotional advertisement giving rise to the original complaint was amended sometime after the time the complaint was lodged but before the complaint was sent for formal adjudication.
- 2. During the course of the formal adjudication process, and after further questions were posed to the SP by the Adjudicator, the relevant advert then underwent a further, second amendment.
- 3. The first advertisement giving rise to the complaint will be referred to in this report as the "Original Campaign" and the amended materials that arose after the complaint was lodged will be referred to collectively as the "Amended Campaign".
- 4. Since the Amended Campaign was created and published after the complaint was lodged this is not strictly relevant to a determination of the original

complaint. However the Amended Campaign shall be taken into account when considering any need for particular sanctions that may arise from this adjudication if the complaint is upheld.

5. The SP was provided with an opportunity to comment fully on whether or not it felt the Original Campaign was deceptive, likely to mislead the consumer by inaccuracy, ambiguity, exaggeration or omission and furthermore whether it felt this campaign breached section 9.1.7, 11.1.1, 11.2.1, 11.2.2 and 11.2.3 of the Code.
6. Unfortunately, the SP confined the main part of its responses to a discussion of the Amended Campaign materials and for the most part avoided dealing with the characteristics of the Original Campaign.
7. With respect to the Original Campaign, I have considered the advertising material used by the SP, its responses to the complaint and its subsequent responses to the further questions asked of it in relation to matters not raised in the initial complaint, as well as recent decisions of the WASPA Appeals Panel and have now come to a conclusions below.
8. With regard to advertising for subscription services, section 11.1.1 of the Code expressly requires that “[p]romotional 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.”
9. Section 11.1.1 expressly requires the identification of a subscription service to be both “explicit” and “prominent” in any material in which any portion of a service is promoted. While the promotional web page used by the SP to promote the service and the rewards facility arguably does contain an “explicit” identification of the service as a subscription service (putting aside for the moment whether that explicit reference is reasonably associated with the advertised service), it is most certainly not “prominent”.
10. The SP has pointed out in the appeals report on complaints 15477, 15722, 16851, 16977, 17184 and 17236, that “prominent” is not defined in the Code.
11. However the Appeals Panel on the above named complaints also held that “[t]he Advertising Rules effectively give much needed substance to many of the Code’s prominence requirements by expanding on those requirements in many respects. The two frameworks have developed at different paces over the years and may well be due for a co-ordinated update but contrary to the Appellant’s (SP’s) assertions that adjudicators should have limited themselves to the Code’s “prominence” provisions, our view is that adjudicators are correct to look to the Advertising Rules for clarity on what those prominence requirements are, where appropriate”.
12. The Appeals Panel further held that “[n]on-compliance with the Advertising Rules is, essentially, non-compliance with the Code (by virtue of section 6.1.1 of the Code) and, particularly where the Advertising Rules’ requirements correspond with the Code’s “prominence” requirements, failure to comply with the Advertising Rules is a breach of the Code’s provisions”.

13. As a guideline the Appeals Panel held that they consider the “position, size and colouring of the text informing a consumer to be important when deciding whether the text is sufficiently prominent *to comply with clause 11.1.1 of the Code as read with chapter 9 of the Advertising Rules.*”
14. The Rules for websites require certain minimum font sizes to be used for displaying access costs in advertisements. Section 9.2.1.1 of the Rules states as follows:

“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 non-serif font.”
15. The words “at least” clearly apply to the words “80% of the largest access number on the page” but, due to the comma before the word “or” it is not clear whether they were intended to apply to the words “or 15 point font size”.
16. Section 9.2.2.1 of the Rules provides a useful comparison. 9.2.2.1 deals with font formats and sizes for terms and conditions text and reads as follows:

“The T&C text must be 12 point font size, or 50% of the largest access number on a Web page, whichever is the greater. The T&C must be in a non-serif font.”
17. Section 9.2.2.1, dealing with alternatives for T&C font sizes, does not preface the alternatives with words “at least” whereas 9.2.1.1, dealing with alternatives for access cost text font sizes, does.
18. In the Original Campaign, the initially grey background of the text row (later amended to be white) and the fact that its horizontal width stretches to match the width of the browser window frame, serve to blend the subscription service notice into the browser window frame rather than make it stand out prominently within the advertisement.
19. The Appeals Panel has stated that *“[i]t would appear that WASPA members have assumed that the subscription services text may be placed anywhere on the email or Web page if no unique access number or Content access code exists. **We cannot support this approach. Clearly a member is still required to place the subscription service text in a position of prominence**”*.

[own emphasis]
20. In my opinion, the dominant impression a visitor to the landing page of this updated advert would likely have is the impression of a single item service of downloading a Facebook Chat application, rather than subscribing to a R5 per day subscription service.
21. The Code requires a “specific intention” to subscribe to a subscription service and confusing indicators of both a subscription service and a single item information service are not conducive to such a “specific intention”. Such “specific intention” is contained in section 11.2.2 which states:

“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."

22. In addition, section 11.2.1 of the Code further requires an informed request by the customer to join a subscription service by stating that "*[c]ustomers 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.*"
23. Furthermore, section 4.1.2 provides that "members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission."
24. It is my opinion that the reference to a subscription service is not appropriately associated with the offer of the single item download service and it is highly likely that a consumer would enter in their mobile number intending only download the Facebook Chat application and then be very surprised to find themselves subscribed to a regular subscription service at an ongoing daily cost of R5. As such the SP has knowingly disseminated information that is deceptive or likely to mislead.
25. Any person requesting the download would become a subscriber to the R5 day subscription service and this is problematic. This is indeed the very reason that the Code requires offers of subscription services to be prominently displayed and completely separated from offers of specific items and disguising subscription services in the form of single content downloads is a serious violation of the Code.
26. The appeals report on complaint #10787 dealt with an advert where the reference to a subscription service appeared once, at the top of the page, and appeared to have no relation to the offering of a subscription service. The Appeal Panel held that the mention of subscription was in no way linked to the offer of content in the advert and the Panel found that this was an overt and flagrant breach of Clause 11.2.2.
27. Based solely on the objective evidence put forward by the SP, I find that the SP has breached sections 4.1.2 and 11.1.1 of the Code.

Sanctions

28. I have taken into consideration the Amended Campaign sent as an annexure of the SP's response to questions posed on the Original Campaign and while I do not find the Amended Campaign to be relevant to the finding of breach, it is at least an indication that, when sufficiently motivated, the SP can take practical steps to address issues its non-compliance with the Code. I say this without making any determination as to whether the Amended Campaign itself complies fully with the provisions of the Code or the Advertising Rules. The fact is that no complaints regarding the Amended Campaign appearing at page 17 of the bundle have been made in this matter. It may however be that other complaints in relation to the Amended Campaign may be made and adjudication on those complaints should not be prejudiced by any *obiter*

findings that I may make in relation to the Amended Campaign in this matter. The fact that the SP can quickly amend its campaigns when it feels compelled to do so mitigates against any need to impose an outright withdrawal of the service at this time.

29. I have also had regard for the prior adjudication record of the SP (a summary of which is enclosed with this report). For purposes of this adjudication, I have only had regard for complaints upheld against the SP prior to the date on which this complaint arose. The SP has been held to be in very serious breach of the Code of Conduct on many occasions and several very large fines have already been imposed (and mostly paid).
30. Repeated breaches of the Code are very seriously damaging to the reputation of an industry that is already the subject of consumer protection journalists' constant gaze. The purpose of WASPA is stated in paragraph 1.2 of the Code as being ***"to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing association with those services"***.
31. The very purpose of the Code of Conduct has been repeatedly undermined by the SP and numerous findings of breach and significant sanctions have not prevented the SP from persisting in repeatedly breaching the Code.
32. The experience of the SP, the relatively high number of previous complaints upheld against it for non-compliant subscription services and the relative ease of compliance with the particular provisions of the Code and Advertising Rules breached in this particular matter must be considered against the importance of these specific provisions in safeguarding the interests of consumers and in upholding the reputation of the WASP industry as a whole.
33. In the light of all relevant circumstances, and the mitigating factor of the Amended Campaign, the SP is fined an amount of R150 000 payable to WASPA within ten working days of delivery of this Adjudication Report, failing which the SP's membership of WASPA shall be suspended until payment has been made.