

REPORT OF THE ADJUDICATOR

WASPA Member (SP): Sybase 365

Information Provider (IP): Blinck Mobile Ltd
(if applicable)

Service Type: Subscription Service

Complainant: Competitor

Complaint Number: 3106

Code version: Code v5.7 and Ad Rules v1.6

Complaint

1. The Complainant, an employee of a WASPA member who wishes to remain anonymous, lodged the following complaint via the WASPA website in early January 2008 (the exact date is not clear from the record):

Name_WASP:Sybase365

OtherID: 31631

Code_Breached: 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.

What this means:

An advert must not appear to offer the customer a single ring-tone, image or other piece of content for free or for a fee, if it is actually an advert for a subscription service.

Detailed_Description_Complaint:

A subscription service is being bundled with a specific content item, the silent ringtone, in this marketing. The specific bundled content item is also given away free. The code clearly states that this is not allowed. The link to the ad is:

http://za.celldorado.com/ZA/ADS/948906574/index.php?trackid=1429085612&clickid=0002u500624N3AEFfg1L&tick=0&ce_cid=0002u500624N3AEFfg1L

2. A screenshot of the cited URL made by the adjudicator on 1/2/2008 is attached as annexure "A".

Response

3. The SP responded to the formal complaint on the 21st of January 2008, which response can be summarised as follows:

3.1. The SP did not supply the advertised service, which was in fact provided by Blink Mobile Limited ("the IP"), which has an "SMS Services Agreement" with the SP in terms of which the SP makes shortcode(s) available to the IP. The IP in turn agrees to abide by the WASPA Code of Conduct (as required by clause 3.9.1 thereof) and agrees to become a member of WASPA. I note that the IP is indeed listed as a WASPA affiliate member on the website at URL www.waspa.org.za.

3.2. As the IP is an affiliate member of WASPA, the proper party against whom the complaint should have been lodged is the IP.

4. Attached to the SP's response as a schedule was the IP's response, the upshot of which was as follows:

4.1. A "Silent Ringtone" (whatever that might be) is offered free with the subscription:

The complainant implies that the advertisement tries to sell a subscription while offering a single product ("bundling"). The item "Radar" mentioned and shown in this advertisement is an example of content that a customer can expect to receive when they subscribe to the advertised service. In order to make the customer aware they are signing up for a subscription we display the words 'subscription service' in the both the bottom of the advertisement and in the disclaimer below the advertisement. Additionally the advertisement states "Get this and many more screensavers!" and displays pictures of some of those available screensavers (in this advertisement, those being the "laser", "virus", and "equalizer" screensavers) clearly indicating that this is not a one-off purchase, and that there are many screensavers provided through the subscription service.

As part of the promotion the subscriber also receives a free ringtone, the "silent ringtone". This is clearly indicated as an additional "extra", both in the advertisement graphic (twice) and in the disclaimer, and is not what the subscriber is entering into a transaction to receive.

The complainant's statement that "An advert must not appear to offer the customer a single ring-tone, image or other piece of content for free or for a fee, if it is actually an advert for a subscription service." is an interpretation of the code which is neither correct nor relevant in this circumstance. The subscriber is not offered a "ring tone" to which the screensaver subscription is bundled, but is offered a screensaver subscription with a complimentary ringtone. This is clear from the advertisement, the text at the bottom of the advertisement, and the disclaimer.

4.2. The IP also describes the process by which parties subscribe to the service, which is not relevant to the complaint, except insofar as the confirmatory SMSs sent make it clear that this is a subscription service.

- 4.3. The report of the adjudicator in complaint number 1730 found that a advertisement that was substantially the same as this one was found to sufficiently inform consumers that the service was a subscription service.

Portion of the Code Considered

5. The following portions of the WASPA Code of Conduct are relevant:

2.5. "Bundling" means automatically subscribing a consumer to a subscription service in response to a request from that consumer for a single content item.

2.23. A "subscription service" is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

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.

6. The following portion of the Ad Rules is relevant:

9.2.16(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. *(my emphasis)*

Decision

7. It appears that the IP is offering a subscription service with a free ringtone thrown in as an incentive for signing up.
8. If the IP had made an offer of a free ringtone, and the consumer was automatically subscribed to a subscription service when taking up that offer, then the IP would be guilty of bundling as set out in clause 11.1.2 of the Code of Conduct.
9. In this case however the offer is in respect of the subscription service and clearly **not** the free ringtone. What the IP is doing is thus perfectly acceptable as long as it is made abundantly clear to the consumer that this is in fact a subscription service.
10. Unfortunately for the IP, however, it is not made sufficiently clear to the consumer that this is a subscription service. The words "Subscription Service" are not **prominently** displayed, as required by clause 11.1.1 of the WASPA Code of Conduct. The words appear in what looks like 9 point Arial script at the bottom of the main frame and in the terms and conditions.

11. Ad Rule 9.2.16(i) cited above moreover makes it clear that where a subscription service is advertised on an internet website, the words "Subscription Service" should appear at the **top** of the advert.
12. While the Complainant is wrong in accusing the IP of bundling, the advertisement is nevertheless misleading because it is not made clear what the nature of the product being offered is: the general practice in question is acceptable but its execution by the IP was wrong in this case.
13. The report cited in paragraph 4.3 (which involved the same SP and IP) does not contain a reproduction of the advert which led to the complaint in that case, so I am unable to determine whether the advert in question was substantially the same. If it was so, then that advertisement was also in breach of the Code of Conduct.
14. The allegation of an infringement by the IP of clause 11.1.2 of the WASPA Code of Conduct is thus dismissed, but the IP is found to have infringed clause 11.1.1 of the WASPA Code of Conduct and clause 9.2.16(i) of the Ad Rules.

Sanction

15. I must take issue with the SP's assertion that it cannot be held liable for breaches of the Code of Conduct by the IP: it is trite that SPs **can** be so liable and have frequently been held to be so. In the present case the fact that the IP happens to be an affiliate member of WASPA means that sanctions can indeed be directed at the IP, but WASPA is not constrained from directing sanctions at the SP merely because the IP is an affiliate member.
16. The IP is fined R25 000 for an infringement of clause 11.1.1 of the WASPA Code of Conduct and clause 9.2.16(i) of the Ad Rules.
17. The IP is to amend the advertisement in question immediately so as to comply with clause 11.1.1 of the WASPA Code of Conduct and clause 9.2.16(i) of the Ad Rules.
18. Given the possibility that the report in complaint number 1730 may have confused the IP, R20 000 of the above fine is suspended for a period of 12 months from the date hereof on the condition that the IP does not infringe clause 11.1.1 of the WASPA Code of Conduct or clause 9.2.16(i) of the Ad Rules during that period.
19. Should the fine set out above not be paid with 5 days, the SP shall be liable to WASPA for its payment.

4/2/2008

Annexure A

PLUS FREE SILENT RINGTONE !!!

NOBODY WILL BELIEVE YOU KNOW WHO IS NEAR!

GET THIS AND MANY MORE SCREENSAVERS!

1. PLAY LISTEN HERE

2. ENTER YOUR MOBILE NUMBER

3. CLICK ON SEND

RADAR ON YOUR MOBILE!

Receive one bonus sound when you join; subscription service. R30 per week.

*Bonus sound is for free. Bonus sound will be sent the first week of subscription. This subscription service is available only to MTN and Vodacom users. You will receive 3 wallpapers per week which will be charged at R 10 per item. Download charges may apply. The shown item(s) form(s) part of the subscription service and is/are indicative of the content items that will be received. To cancel the service, send STOP WRADAR to 31631. Bill payer's permission required. Min. age 18+ or with permission of parent or guardian. Celldorado operates according to the South African Wireless Application Service Providers' Association Code of Conduct. Celldorado offers innovative information and entertainment for your mobile, such as ringtones, Javagames and wallpapers. Celldorado offers original, unique services with the highest standards. IP: Blink. Helpdesk: 0800 980 963.

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