

REPORT OF THE ALTERNATIVE APPEALS PANEL

Date: 31 July 2008
Appellants: Africa2You
Complaint Number: 3579
Code version: v5.7 and Rules 1.6

1 INTRODUCTION TO THIS APPEAL

- 1.1 The SP, Africa2You, appealed 3 out of 4 of the sanctions imposed upon it by the adjudicator. Of the sanctions, 2 were in direct response to the complaint and 2 were imposed by the adjudicator in relation to additional breaches noted by the adjudicator in the same advertisements.
- 1.2 The adjudicator correctly notes that it is not only the Code applies to WASPA members, the Advertising Rules also apply.
- 1.3 The finding made in this appeal is relatively short as the facts are simple and set out in full in the adjudication, which also contains copies of the advertisements complained of.
- 1.4 As an aside, we note that the appellant has included several advertisements belonging to their competitors where they indicate that those advertisements are similar to their own, and therefore that the alleged infringements are either widespread and the “norm”, or not infringements at all. We have not examined those advertisements in any detail as they are not the subject of this complaint. However, two points must be made – (i) the fact that others do something similar does not exonerate wrongdoing, and (ii) if those other advertisements do in fact suffer from the same faults, then this should be a warning to those WASPs to remedy their advertisements post haste before they are the subject of a complaint or investigation by WASPA.
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2 RELEVANT INFORMATION

- 2.1 *WASPA and the public interest*
- 2.1.1 We often mention the public interest in our findings. This is because we consider this to be an overriding and significant factor when applying the Code. WASPA is required to take the public interest into account when considering any complaint.
- 2.1.2 The General provisions of the Code have application in all cases in relation to matters dealt with by WASPA. Section 3.1.1 provides that: “Members will at all times conduct themselves in a professional

manner in their dealings with the public, customers, other wireless application service providers and WASPA.” Section 3.1.2 provides that “Members are committed to lawful conduct at all times.”

- 2.1.3 These general rules should always be uppermost in the minds of members when checking that an advertisement complies with the Code, particularly when there is any suggestion that the advertisement may be suitable only for adults, or that it will contain adult content, or that it should be available only to adults.

3 BASIS OF THE COMPLAINTS

3.1 The advertisements complained of

- 3.1.1 The 2-page advertisement in People magazine was alleged to contain both subscription and non-subscription content, without distinguishing sufficiently between the two, and without having indicated sufficiently well which content was part of a subscription service.

3.1.2 The adjudicator found that in addition to these complaints:

3.1.2.1 the font used for the terms and conditions was not 8-point but was a smaller font;

3.1.2.2 the terms and conditions were in fact, in addition to their size, almost illegible;

3.1.2.3 certain ringtones were labelled “full tracks” but were not original recordings by original artists, and that this label could be confusing;

3.1.2.4 certain content appeared to be of an adult nature but was not adequately described as adult content; and

3.1.2.5 the SP had not taken “reasonable” steps to ensure that no children could use the chat service advertised.

3.2 The Code

3.2.1 The adjudicator took into account the following:

3.2.1.1 **section 1.2.3.1 of the Advertising Rules** which requires that information regarding terms and conditions of services published in a magazine be published in sans-serif 8-point font size;

3.2.1.2 **section 1.3.13(i) of the Advertising Rules** which requires that subscription services be described with these words displayed prominently at the top section of the advertisement

as well as next to each content or service section in the advertisement;

- 3.2.1.3 **section 4.1.2 of the Code** which states that “Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission”;
- 3.2.1.4 **section 1.3.2 of the Advertising Rules** in relation to “adult content” which section includes this content within the list of services which must be age-restricted; and
- 3.2.1.5 **section 10.2.2 of the Code** which requires that providers of contact and dating services must take reasonable steps to ensure that no children make use of the services.

4 DECISIONS OF THE ADJUDICATOR

4.1 Findings on Complaints

- 4.1.1 In summary, the adjudicator found that the SP was in breach of:
 - 4.1.1.1 section 1.2.3.1 of the Advertising Rules by virtue of printing the terms and conditions applying to services in a smaller font than that required by the Rules (namely font 7 and not font 8);
 - 4.1.1.2 section 1.3.13(i) of the Advertising Rules by virtue of having not adequately displayed the words “subscription service” not only at the top of the page but also next to each piece of content;
 - 4.1.1.3 section 4.1.2 of the Code by virtue of referring to songs not by original artists as “full tracks” with the name of the original artist and original song displayed in the advertisement, when this could have confused a customer by suggesting they would receive an original song; and
 - 4.1.1.4 section 10.2.2 of the Code because it was not clear to the adjudicator that reasonable steps had been taken by the SP to ensure that children could not access what amounted to “adult content”.

4.2 Sanctions

- 4.2.1.1 R15,000 in respect of the breach of section 1.2.3.1 of the Rules;
- 4.2.1.2 R10,000 in respect of the breach of section 1.3.13(i) of the Rules;
- 4.2.1.3 R5,000 in respect of the breach of section 4.1.2 of the Rules; and

4.2.1.4 R20,000 in respect of the breach of section 10.2.2 of the Code.

5 GROUNDS OF APPEAL

5.1 **Sanction 1:** None.

5.2 **Sanction 2:**

5.2.1 The appellant noted that it used the words “subscription service” some 11 times in the 2-page spread in addition to heading the advertisements with these words. They also state that the terms and conditions applying to the advertisements refer to subscription services. They do admit that the chat service was not specifically described as a subscription service.

5.2.2 The appellant notes further that it has subsequently cancelled the chat service and therefore that they should be warned for an oversight rather than any deception.

5.3 **Sanction 3:**

5.3.1 The appellant contends that use of the term “full track” is widespread in the industry, and although “true tone” might tend to lead a customer to believe that the song they bought was by the original artist, since other WASPs use “full track” for non-originals, this is an industry norm and not likely to cause confusion. The word, they say, simply means that you will get a full length track for your money.

5.4 **Sanction 4:**

5.4.1 In relation to the finding that the services were not properly marked for adults, the appellant states that on the first line of the terms and conditions, the advertisement is stated to be for over 18s only, and in the very last line, the terms state “Adults only, age verification may be required.” They state further that as the terms and conditions are on the same page as the advertisement one can assume that they in fact apply to all content on that page.

5.4.2 They further examine the requirements of the Rules in relation to adult content, and conclude that there is no obligation on WASPs to print the words “adult content” next to every advertisement which might be of the nature of an adult service.

5.4.3 The appellant goes on to argue that there is no industry standard for what is meant by content which is suitable for over 16s, or over 18s, or what is “child friendly”. They also aver that People magazine is a family magazine, and therefore “questions should be raised as to the classification of adult content”.

5.4.4 Finally in relation to the obligation on WASPs to ensure that no children use adult services, they argue that there is no indication in

the Code as to what these steps might consist of. In the circumstances, they conclude that because they had applied the terms and conditions to the page which was dedicated to adults only, it would be “fair to assume that a reasonable step has been taken by the SP to ensure children do not use the service”.

6 FINDINGS OF APPEALS PANEL

6.1 Sanction 1:

6.1.1 We do not need to consider sanction 1 as this was not the subject of the appeal. The sanction therefore stands.

6.2 Sanction 2:

6.2.1 Having looked carefully at the advertisements, we consider them to describe the services which are subscription-based, adequately. We also consider that the difference between the subscription and non-subscription services was, in the main, adequate. We recommend less text on a page to avoid any confusion, as the less space there is the less opportunity there is to include appropriate descriptors in the right places. One might describe the page as “visually chaotic” and this is not conducive to easy reading and comprehension.

6.2.2 We do find that the failure to describe the chat service as a subscription service to be a very unfortunate omission on the part of the WASP, given the nature of this service, and reduce the fine in this regard to R5,000. The cancellation of the chat service is irrelevant to the finding, as it took place after the complaint was made.

6.3 Sanction 3:

6.3.1 We also find the use of various terms confusing and although we do not uphold the arguments made by the appellant in full, particularly where they rely on the use of the term “full track” by competitors, we do find that there is sufficient doubt to support the appellant, and we overturn the sanction here.

6.3.2 We may well recommend to WASPA that the Panel carefully consider and publish a list of recommended terms in relation to music downloads but in the interim, suggest to WASPs that they describe the music download as accurately and in as much detail as possible without relying on vague industry terms – it would not be difficult for example, to include the words “not original track”.

6.4 Sanction 4:

6.4.1 While we take the point that there may be no strict benchmark in relation to the meaning of “reasonable steps”, we do not agree that

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this is without a benchmark. Clearly where a service is likely to be of an adult nature, or where, were one's own children to access it that would be acceptable (for example), and where an abundance of caution would not be misplaced, then it should be marked appropriately and the means of accessing the service should be far more strictly monitored than any other service. Indeed, bearing in mind the provisions of section 3,1 of the Code, any attempt to access the service should require more than a casual check of the user's identity, but some sort of positive, pro-active enquiry about the age and service profile of the user, for example, requesting a confirmatory SMS to say "yes" in response to a question "over 18?", at the very least, or preferably a system check against the subscriber's registered age, where possible.

- 6.4.2 We note that the terms and conditions applying to the advertisements appear only on one page – not both. In addition to the size and relative difficulty in reading the terms, we believe that the terms should appear on all pages of advertisements, regardless of whether they are on facing pages or not.
- 6.4.3 We take the point that the fact that the terms and conditions applied to all services on the one page could be interpreted as meaning that all of the content was of an adult nature, and therefore that the terms and conditions would have acted as a warning in relation to all the content.
- 6.4.4 We further note that the appellant argues that People magazine is a family magazine but seems to find it acceptable to include a full page of adult-only content in its advertisements in that sort of magazine. We disagree with the classification of the magazine, but more to the point, if it were a family magazine, we do not support the inclusion of adult-only content in such a publication, and feel sure that this could be regarded as a generally acceptable benchmark.
- 6.4.5 Finally, the SP did not mention what steps are taken in practise to check the user's identity if a user were to place a request for content which might have been of an adult nature (in other words, was selected from the advertisement), or to access the chat service. It is therefore not possible to conclude that proper steps were taken by the SP to comply with section 10.2.2, since we do not consider the publication of terms and conditions alone to be sufficient in this regard and as the SP has not provided us with evidence that they have an internal procedure in this regard, we must assume that they do not have one.
- 6.4.6 In the circumstances, we uphold the finding in relation to the second part of the sanction, in respect of the failure by the SP to take reasonable steps to ensure that children do not use its contact and dating services, and reduce the fine to R15,000.

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- 6.5 In summary:
- 6.6 The appellant is ordered to pay R15,000 plus R5,000 plus R15,000 within 5 (five) days of the publication of this appeal finding.
- 6.7 The appeal fee is not refundable.