

REPORT OF THE ADJUDICATOR

WASPA Member: 37MAX (IP) and Integrat (SP)

Service Type: No price information displayed for SMS

Complainant: Anonymous

Complaint Number: 4781

Adjudicator: Kerron
Edmunson
Kerron Edmunson

Code version: 6.2 (14 August 2008 – present) read with v1.6 of the
Advertising Guidelines

Introduction

The complaint was initially referred to an emergency panel on 4 September 2008 in response to the complaint, and specifically the breach of section 6.1 of the Code. However the panel confirmed that the IP and SP had in fact rectified the site after receiving the complaint (set out below) and that accordingly there was no immediate risk of harm to users and the complaint should proceed in the usual way, by adjudication.

The emergency panel did recommend that the SP provide certain information as part of their formal response to assist adjudication of the matter, namely:

1. the number of customers who made use of the service prior to the amendment of the website; and
2. the manner in which the website had been marketed prior to the amendments, including information on the linking of other sites to the “Ask the Guru” site.

The findings of the emergency panel and the information subsequently provided by the SP was taken into account in considering the complaint. This adjudication should be read with that made in 4782 and 4783 as all of these are very similar.

Complaint

The complaint was submitted on 3 September 2008. The complainant included screen shots of the relevant website with the complaint, which concerned the advertising of a service called “Ask the Guru” on website www.1999guru.com/gurusa/. The service offers to answer any question by sending the answer to a phone. The question and phone number of the user must be entered on screen.

The complainant duly sent his first question and received his first answer for free, and then sent a further question, the answer to which was sent to his phone and he was billed R7,50 on that occasion.

None of the web pages nor SMS's sent by the service contained pricing information save to indicate that "the first one is a freebie!"

The complainant alleged a breach of sections 3.1.1, 4.1.1, 4.1.3, 4.1.10, 6.2.3 and 6.2.6 of the Code. The emergency panel also considered the breach of section 6.1 of the Code.

SP Response

Initially the SP claimed that it acted purely as "conduit and aggregator" for its IP and had no liability in its own name for the breaches, which it did not deny.

Following or simultaneously with notification about the emergency panel hearing, the SP confirmed that it would in fact be managing the response to the complaint on behalf of its IP as that IP was not a WASPA affiliate and was located in Australia. They also confirmed at this time that the site had been amended to accord with the Code's requirements.

A more detailed response followed from the SP on 15 September 2008 in which the SP confirmed that the site had been rectified, and both it and its IP were committed to honest and fair dealings with end users and consumers. Consequently they stated that the failure to provide pricing information on the site was not malicious in any way, but an honest mistake or oversight. The IP apologised for the error and offered refunds to consumers affected by it.

In response to the emergency panel's request for information, the IP stated that 87 customers had used the service prior to its amending the site, and 457 billable messages ensued. In response to the second question, the IP confirmed that the site had not been actively marketed but was for a short period of time a pop-up which followed a subscription request on other websites (the names of which were not supplied by the IP).

Consideration of the WASPA Code and Ad Rules

The pricing provisions cited by the complainant are indeed the sections referred to, namely sections 3 (general provisions), 4 (customer relations), and 6 of the Code (advertising and pricing) which provide that:

3.1.1: 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.

4.1.1: Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

6.2.2: All advertisements for services must include the full retail price of that service.

6.2.5: The price for a premium-rated service must be easily and clearly visible in all advertisements. The price should appear with all instances of the premium number display.

The Ad Rules also provide for pricing provisions in relation to all media including tv, print (magazines and newspapers), websites, emails, SMS, BTL and marketing/promotional material, and content booklets.

The Ad Rules contain several sections that are applicable to the current complaint including section 1 which provides that “these rules are an integral part of the Code ... and should be read concurrently with the Code.... Examples are given in each case to be as helpful as possible ...including...the minimum criteria for formatting and information and best practise.... WASPs and their IPs may not seek to circumvent these criteria in any way by attempting to exploit any potential loopholes in the Rules where by doing so they may deprive the consumer of the minimum information required to make informed choices such as the cost of access to content/ services and the terms and conditions associated with such access.”

In each section is a heading entitled “Information required for disclosure” which states that “where applicable, the following is mandatory information that must be displayed in any advertisement in any media where an access channel is advertised.” Point 1 in each case states: “Provide a clear indication of the total cost.” Section 4 deals with rules applying to advertisements in newspapers and classifieds, and section 5 deals with the rules for magazines. Section 9 applies to websites.

Decision

The SP response is not unfortunately sufficient to overcome the omission and consequent failure to comply with the Code and Ad Rules. The Rules and Code have been quoted fully above so that it is clear that they do in fact deal extensively with the pricing of services including services provided over websites and by SMS. As the SP has confirmed that the pricing was not mentioned on the website, the SP cannot escape the fact that it breached the requirements of the Code and Ad Rules and it is responsible for the actions and omissions of its IPs.

WASPA is required to apply the Rules and the Code against all those to whom it applies. Good intentions and remedying breaches does not detract from the fact that they were committed in the first place, but I have taken the rectification of the website into account in determining the amount of the fine.

I am assuming that each of the 457 billable messages was charged at R7,50, so a total of R3,427.50 would have accrued to the SP (assuming also that the SP receives the entire amount from the network operator, as they have not said that this is not the case). I am also assuming that the rectification of the website includes the pop-up.

Sanction

The complaint is upheld and the SP is liable to pay the following fine to WASPA and to take the following action, both such things within 5 days of the date of the publication of this adjudication:

1. R10,000; and
2. Refund fees to subscribers requesting a refund, proof of payment to be provided to WASPA and an offer to refund unhappy subscribers should be published on the website immediately, alternatively the affected subscribers should be sent a text to this effect.