



REPORT OF THE ADJUDICATOR

WASPA Member (SP) Blinck Mobile Ltd

Information Provider (IP)
(if any)

Service Type Competition service

Source of Complaints W Lessing

Complaint Number 5367

Date received 9 December 2008

Code of Conduct version 6.2

Complaint

The complaint pertains to an online banner advertisement that was displayed on the Facebook website visited by the complainant. The banner states the following:

"Hey, You're the Winner for Today!! You just WON one of 12 iPhones given out Today!"

Next to the banner text there is a click through button titled: "*Get your prize*". Clicking on this button brings up the SP's advert for the applicable subscription service.

The complainant alleges that the banner advert is misleading and contravenes section 9.1.6 of the WASPA Code.

SP's response

The SP has provided a comprehensive response to this complaint wherein it explains that the misleading banner advertisement that appeared on the Facebook website was placed by an affiliate in breach of the terms of a media purchasing agreement.

An affiliate is an independent third party that advertises products or services of third parties for its own risk and account. This third party permits the affiliate to promote the products or services of this third party on its own account and for its own risk. The affiliate is only allowed to use advertisements that are provided to them by the SP, and is not allowed to change or alter them in any way.

The SP provided copies of the media purchasing agreement it has with its affiliate network and highlighted the applicable provisions which disallow affiliates from using advertisements that have not been given or approved by the SP.

The SP did not provide, authorise or approve the banner advertisement which is the subject of this complaint.

Sections of the Code considered

9.1.6. Competition services and promotional material must not:

(a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;

(b) exaggerate the chance of winning a prize;

(c) suggest that winning a prize is a certainty;

(d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.

Decision

Firstly, there is no doubt that the banner advertisement complained of is blatantly misleading and in contravention of section 9.1.6 of the Code.

Secondly, based on the information provided by the SP in its response to the complaint, I am satisfied that the advert was not placed and/or approved by the SP.

The pertinent question is whether the SP should be held responsible for the actions of the unidentified affiliate who placed the advertisement? Affiliate marketing relationships are now commonplace in the online and mobile marketplaces. Due to the nature of the compensation models for such affiliate programs, affiliates often do whatever it takes to get paid and resort to misleading advertising such as that which is before me in this complaint.

The legal liability of a party for the actions of its affiliates, i.e. affiliate liability, has become an important legal issue in other jurisdictions but has not yet been addressed in SA. The normal principles of our law of contract, delict and agency would apply to this issue.

An affiliate is not employed nor does it act as an agent in the strict sense of the word. It is an independent party acting in its own right and is usually governed by the terms and conditions of an affiliate marketing agreement. If it is clear from the terms of such an agreement that certain advertising and/or promotional practices are prohibited, the party using the services of the affiliate cannot be held responsible.

I am satisfied, on the basis of the information provided by the SP, including the relevant extracts from its affiliate agreement, that the affiliate did not comply with its obligations under the relevant agreement and that the advert/promotion on the Facebook website was placed without the authorisation of the SP.

The complaint against the SP is accordingly dismissed.

However, the SP is requested to provide the WASPA Secretariat with the identity of the relevant affiliate so that the complainant may be informed to enable him to take further action against the party in question should he wish to do so.