



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK / iTouch
Information Provider (IP): (if applicable)	N/A
Service Type:	Subscription
Complainant:	Competitors
Complaint Number:	5457, 5461, 5470
Code version:	Code v6.2 and Ad Rules v2.3
Date of Report:	17 April 2009

Complaint

1. This report relates to three complaints made against the SP, which were all made at approximately the same time. While the complaints were made by three separate complainants, they are so similar factually that it is convenient to treat them together.
2. The SP is cited as "iTouch" in all three complaints, but it appears from the WASPA website that iTouch is not a WASPA member. A visit to the iTouch website on the 17th of April indicates that iTouch was acquired by Buongiorno UK on the 28th of December 2007. I have thus cited the SP as Buongiorno UK / iTouch.

Complaint 5457

3. On the 26th of December 2008 the complainant, a competitor, lodged the following complaint on the WASPA website:

Name_WASP: iTouch

OtherID: Using number 30123

Code_Breached: Using keyword "FREE"

Detailed_Description_Complaint: Used the instruction "SMS keyword FREE to 30123" on SABC 3 at 8:15pm on 26th December.

4. No reproduction of the advertisement was submitted to WASPA.

5. The complaint was forwarded to the SP on the 5th of January 2009. On the 12th of January 2009 the SP requested an extension until close of business on the 13th to respond to the complaint, but no response was ever received, despite a reminder sent to the SP on the 16th of January.

Complaint 5461

6. On the 29th of December 2008 the complainant, a competitor, lodged the following complaint on the WASPA website:

Name_WASP: iTouch

OtherID: The brand is: Loadin with short code 30123

Code_Breached: 6.5

Detailed_Description_Complaint: The advert uses the keyword Free. This is banned unless the service is completely free and remains free. In contravention this advert only offers a week free, thereafter the service bills at R30 per month.

It is my understanding that complaints have already been lodged about this service and contravention for a previous advert. It is also my understanding that the company received that complaint before releasing this new advert. It is my belief that the company would rather pay the fine than conform (as they earn enough money to justify the fine). It is also my belief that they are exploiting the fact that the secretariate (*sic*) has closed over the festive season and they will therefore have a delay in the adjudication of these complaints. This will allow them to act with impunity over the festive season.

For the reasons above I request an emergency complaint as soon as possible to try to mitigate the damage being done as the advert is running with an immensely high frequency.

7. A reproduction of the advertisement in question was forwarded to WASPA and reviewed by the Adjudicator. The advertisement is for a subscription service which charges subscribers R30 per month and appears to allow downloads of sundry content such as pictures and music. The first week of the subscription is free of charge. The advertisement is in respect of the SP's "30123 Loadin" brand, and does indeed urge viewers to sms the keyword "free" to the shortcode "30123" to subscribe to the service.
8. The complaint was forwarded to the SP on the 5th of January 2009. On the 12th of January 2009 the SP also requested an extension to respond to this complaint until close of business on the 13th, but no response was received in respect of this complaint either, despite a reminder sent to the SP on the 16th of January by the WASPA Secretariat.

Complaint 5470

9. On the 29th of December 2008 the complainant, a competitor, lodged the following complaint on the WASPA website:

Name_WASP: iTouch

OtherID: 30123

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. A request from a subscriber to join a subscription service may not be a request for a specific content item.

6.5. Use of the word "free"

6.5.1. The keyword "free" or words with the same or similar meaning (in any language) may not be used for any service unless that service has no associated charges whatsoever, excluding network bearer charges.

Detailed_Description_Complaint: An television advertisement was show (sic) on ETV at 8:50PM on the 1st of January 2009.

The Television advertisement only shows one item of content. We (sic) you order this specific item, the Garfield game, you get subscribed to a subscription service.

The television ad also uses the keyword free. This confuses customers into thinking the content is free. The code clearly states that care must be taken when using the term free, in this case it is used as a deliberate sales mechanism to entice people into a subscription service.

- 10. No reproduction of the advertisement was submitted to WASPA.
- 11. No response to the complaint was received from the SP, despite a reminder sent to the SP by the WASPA Secretariat on the 16th of January.

Emergency Panel Procedure

- 12. On the 16th of January 2009, the WASPA Secretariat sent notice to the SP advising it that an Emergency Panel would be convened in terms of section 13.7 of the Code of Conduct to review its use of the keyword "free" in advertising.
- 13. On the 20th of January 2009 the WASPA Emergency Panel made the following order in respect of the SP's use of the keyword "free":

Complaints 5014, 5096, 5457, 5461, 5470: Use of the word "free"

These complaints all relate to the use of the word "free" in advertisements. The WASPA member operating the service is is Buongiorno UK/iTouch.

After reviewing the available information, the emergency panel concluded that there is a definite breach of clause 6.5.1 of the WASPA Code of Conduct. This is a repeated infringement occurring across a number of adverts and complaints.

Consequently:

1. The panel orders the service provider to immediately withdraw all advertising, in any format, which makes use of the keyword "free".
2. For the avoidance of doubt, the above order also applies to adverts currently booked to air. The service provider must immediately issue instructions to the relevant channels to prevent any further airing of such adverts from the date of this notice.
3. The panel orders that the service provider refrain from levying any charges whatsoever on any customer SMSing the word "free" to the service provider in response to any advert. Where it is not possible to prevent such charges from being levied in respect of this service, the service provider must refund any and all charges levied after the date of this notice.

14. On the 20th of January the SP sent an email to the WAPA Secretariat in the following terms:

Dear Waspa

With regards to the below mentioned hearing regarding the use of "FREE" as a keyword in our TV adverts:

We as iTouch do not wish to mislead the public in any way and felt that as we do not bill in the 1st week of the users subscription we could use the keyword free.

We have pulled all advertising from the market where there is use of the FREE keyword, with exception to the marketing on the 20 January 2009. This is due to the late notice given to do so and a minimum cancellation (*sic*) period. We will set all subscribers on the FREE keyword for the 20 January 2009 aside and will issue refunds where necessary.

A full breakdown of compliance will be sent shortly.

Kind regards

Rose

15. I have no information on whether or not the SP actually carried out these steps, but should it have failed to do so, this would constitute a further infringement of the Code of Conduct.

Portion of the Code Considered

16. The following portion of the WASPA Code of Conduct is relevant:

2. Definitions

The terms below have the following meaning throughout this document:

...

2.14. A “keyword” is any word used in an SMS or MMS sent by a customer to request a service.

...

6. Advertising and pricing

...

6.5. Use of the word “free”

6.5.1. The keyword “free” or words with the same or similar meaning (in any language) may not be used for any service unless that service has no associated charges whatsoever, excluding network bearer charges.

11. Subscription services

11.1. Manner of subscription

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 a request for a specific content item.

17. It is important to note that section 6.5.1 was introduced in WASPA Code of Conduct version 6.1 which took effect on the 1st of July 2008. In order to allow members of WASPA to adapt their conduct to the new rules however, a “window period” was introduced that would allow members to bring existing advertising into line with this section within 3 months of the date of the new code version, i.e. by 1 October 2008. New adverts had to comply immediately. Given that the complaints under review were in respect of adverts flighted in December 2008, however, the window period clearly does not apply.

Decision

18. Unfortunately, due to the fact that the complainants in complaint numbers 5457 and 5470 did not submit copies of the advertisements in question, and in fact do not give adequate descriptions in the body of the complaints of the context in which the keyword was used, is not possible to me to find that there has been an infringement of section 6.5.1 of the Code of Conduct in these complaints.
19. For the same reason, I am not able to make any finding regarding the allegation in complaint number 5470 that consumers were subscribed to a subscription service upon ordering one item of content. If I do not have a copy of advertisement and am also not in possession of any evidence that this allegation is true, I can make no finding.
20. With regard to the use of the keyword “free” in complaint 5461, it is not necessary to examine in any depth the provisions of section 6.5.1. Read with the definition of “keyword”, this section clearly forbids use of the keyword “free” in the context in

which it has shown to have been used by the SP in this complaint. I hence find that in this instance the SP has infringed section 6.5 of the WASPA Code of Conduct.

Sanction

21. The SP is fined an amount of R 10 000 for its infringement of section 6.5.1 of the WASPA Code of Conduct in complaint number 5470, which fine is wholly suspended for a period of six months from the date that it is notified of this decision, subject to the condition that the SP does not infringe Section 6.5.1 of the WASPA Code of Conduct during this period.

22. The SP must confirm in writing within five days of date of notification of this decision that it has complied with the order of the Emergency Panel set out above.

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