

## REPORT OF THE ADJUDICATOR

WASPA Member (SP): Blinck Mobile Ltd

Information Provider (IP): Not applicable

**Service Type:** Advertising Irregularities / Bundling

Complainants: Waspa Monitor / Rose (iTouch) / Waspa Monitor

**Complaint Number:** 5718 / 5757 / 5800

Code Version: 6.2

Advertising Rules Version: 2.3

## Complaint

This Complaint is joined with formal Complaint 5757 and formal Complaint 5800. The reasons behind the filing of complaints in all instances are in essence the same and the Adjudicator finds it only necessary to provide details of Complaint 5718 which provides more detail.

The Complainant lodged the following complaint:

"The purpose of this complaint is to have all Blink Mobile advertising removed from television, revised, approved by WASPA, prior to flighting again.

In early January 2009, I lodged complaints 5562 and 5563. The complaints detailed the following: "The attached TV commercial does not correctly display the T&C's block and the Access Cost block.

Both these areas are to be black type on a white background, as per the new Advertising rules."

Responses to both complaints were received from Blink Mobile and read as follows:

Dear Sir / Madam,

In response to the complaints Blinck International B.V. is currently adjusting the TV advert to fully comply with the WASPA advertising rules. We are changing both the T&C box and Price box to be as specified by clause 2.1.1 of the advertising rules.

The revised version of the advert will start airing on Wednesday, 28 January 2008. It takes us seven (7) working days to switch television commercial and hence 28 January. We will however push the channels to air the revised version earlier if possible.

I closed both the complaints, in good faith.

However, up to today, 7 February 2009, Blink have continued to flight various commercials on television that are not abiding by the Code or Advertising Rules. "Old" (current at the time) commercials that were on air from 1 January 2009, were meant to have been revised conforming to the new Advertising Rules.

The commercials that have been noted are:

Keyword: Baby to 31631 Keyword: Friend to 31631 Keyword: Radar to 31631 Keyword: Glass to 31631 Keyword: View to 31631

These commercials feature illegible T&C's, moving backgrounds, no box, swimming text, incorrect Access Cost boxes.

This Service Provider is in complete violation of the Advertising rules. Furthermore, we have flagged the issues around their television advertising for this Service provider, and still they are continuing to air commercials that do not abide.

It must be noted, there may be other commercials on television currently that have not yet taken on the new advertising formats. I therefore suggest that this Service Provider checks ALL their advertising, and not only the commercials listed above.

# **BREACH OF CODE:**

**ADVERTISING RULES:** 

**TELEVISION & CINEMA ADVERTISEMENTS:** 

2.1.1

1.3.4

Furthermore, the Friend tracker commercial was lodged as complaint 5563. We were given the undertaking that this commercial would be revised and new flighting would commence 28 January 2009. As said previously, I closed this complaint in good faith. Wednesday, 4 February 2009, this commercial was still flighting.

It has since also come to my attention that this commercial is making use of one content/application to join a subscription service.

## **BREACH OF CODE:**

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."

## Service provider's response

In its final response the SP stated the following:

"Blinck Mobile Ltd ("Blinck") wishes to respond to the complaint number 5718 of February 10, 2009.

The complaint number 5718 addresses 2 different issues, those being issues of:

- 1. Alleged breach of Article 2.1.1. and 1.3.4 of the Advertising Rules;
  - 2. Alleged breach of Article 11.1.2 of the Code of Conduct

Below we will reply to both issues separately.

# Issue 1 – Alleged breach of Article 2.1.1 and 1.3.4 of the Advertising Rules

Originally, complaints 5562 and 5563 were lodged against Blinck in January 2009, for not complying with the new WASPA Advertising Rules that came into effect as of January 1, 2009. The TV commercials on which the complaints were based did not correctly display the T&C's block and Access Cost block, a breach of Article 2.1.1. and 1.3.4 of these Advertising Rules.

WASPA was so kind to inform us that if Blinck would alter the commercials immediately, it was likely that the complaints would be resolved informally. On January 16, 2009 we therefore informed WASPA that we were adjusting the TV commercials to fully comply with the WASPA advertising rules and that the revised versions of the TV commercials would start airing on Wednesday, 28 January 2009.

However, the WASPA Monitor has noticed that up until the date of February 7, 2009 Blinck continued to air various commercials that were not abiding with the new Advertising Rules. The following commercials were noted by the WASPA monitor:

Keyword: Baby to 31631 Keyword: Friend to 31631 Keyword: Radar to 31631 Keyword: Glass to 31631 Keyword: View to 31631

## Blinck's Response:

First of all, Blinck would like to apologize for not fulfilling the promise that revised and fully compliant versions of the TV commercials that were subject of complaint # 5562 and #5563 would air as of January 28. Furthermore, we would also like to apologize for not revising the other TV commercials that were noted by the WASPA Monitor in time.

Blinck takes this matter very seriously and in response to this incident, Blinck has taken strict internal measures to make sure similar incidents will not happen again in the future.

All Blinck TV commercials that were noted by the WASPA monitor have been taken off the air and will only be broadcasted again after we have made sure that they are fully compliant with the new Advertising Rules. With regard to the TV Commercials that were noted by WASPA, we will only air them again once they have been approved by WASPA. The revised version of the Friend tracker commercial (attached to this response) has already been approved by WASPA and the other noted commercials shall be revised accordingly.

# Issue 2 – Alleged Breach of Article 11.1.2. of the Code of Conduct

Article 11.1.2. of the WASPA Code of Conduct states:

"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."

According to the WASPA Monitor, the Friend tracker commercial not only breached Article 2.1.1. and 1.3.4 of the Advertising Rules, but also Article 11.1.2. of the WASPA Code of Conduct. According to the WASPA Monitor, the commercial makes use of one content / application to join a subscription service

## Blinck's Response:

The complaint implies that the advertisement tries to sell a subscription while offering a single product ("bundling").

First of all, in order to make the customer aware they are signing up for a subscription service we clearly displayed the words 'subscription service' in the commercial, as we always do. Furthermore, the voice over in the commercial clearly says "Get them All!" To a subscriber this should make sufficiently clear that this is an application subscription service.

Blinck is therefore of the opinion that it has not has not breached Article 11.1.2 of the Code of Conduct.

However, to show our good will, in the revised version of the commercial Blinck has clearly and conspicuously added a logo with the words "Fun applications", in order to avoid any further discussions on this subject. The revised version of this commercial has already been approved by WASPA and is attached to this response.

We trust that this is a sufficient measure.

## **Closing Remarks**

Blinck is very aware of its continuing obligations to comply with the WASPA Code of Conduct and the WASPA Advertising Rules, and at all times Blinck has done its very best to comply with these requirements. Blinck looks forward to providing WASPA with any assistance required in further investigating this complaint and invites WASPA to contact Blinck's legal team directly with any further inquiries.

#### Sections of the Code considered

- 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.
- 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.
- 11.1.3. An advert for a subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed.

## Sections of the Advertising Rules considered

- 1.3.4 Mandatory Voice-Over Requirements for Game-Show Type Programming.
- 2.1.1 Mandatory Cost Of Access Text Display Rules

#### **Decision**

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the SP's response and has reviewed the various amended advertisements submitted.

On the first issue the SP has admitted to its various breaches of the Advertising Rules. However, even so, the WASPA Monitor agreed not to file a complaint subject to the SP's undertaking of amending the various advertisements. The SP promised to deliver on its promises before the 28th of January 2009.

This did not happen and the advertisements in its original format continued to be aired on TV. The SP offered a response indicating that the stations are not willing to commit on such a short notice and that a period of at least two weeks are required to remove the advertisements without the SP incurring substantial costs. The Adjudicator takes cognizance of the cost implications and the time periods.

However, what is unacceptable is the fact that the SP only requested the stations to pull the advertisements on the 11<sup>th</sup> of February 2009. Not only does this display unwillingness on the SP's behalf to fulfill its promises but can it also be seen as a delaying tactic by the SP to generate income under the false intention of doing everything possible to pull its advertisements.

In this matter the SP had ample time to comply with the Advertising Rules. The initial deadline was 1 January 2008. It was then given another opportunity by the WASPA Monitor to comply. Whether it was a male fide act or just bad management and gross negligence on behalf of the SP is uncertain.

Whatever the reason, it remains the opinion of the Adjudicator that the SP has conducted gross misconduct and that it has not provided a sufficient enough response to negate its responsibilities.

Apart from its continuous breaches of the Advertising Rules the Adjudicator also finds the SP in a direct breach of section 3.1.1 of the WASPA Code of Conduct, which is considered to be a serious breach by the Adjudicator.

On the second issue. The Adjudicator has reviewed the Friend Tracker advertisement. Although the SP has indicated that the words "get them all" coupled with the words "subscription service" should be a clear indication of this service being a subscription service, the Adjudicator is not convinced that this advertisement conforms to all aspects of section 11 of the Code. Section 11.1.3 of the Code states that an advert for a subscription service which includes examples of the content provided as part of that service must include at least **two** examples of that content clearly displayed. This is clearly not being followed by the SP. The Adjudicator does not find a breach of section 11.1.2 of the Code. The amended version of the Advertisement should however incorporate compliance with section 11.1.3.

With regards to Complaint 5800 the Adjudicator however does find a direct breach of section 11.1.2 with regards to the "Fluffy" advertisement.

The Complaint is upheld.

### **Sanctions**

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct:
- The SP's subsequent conduct in eradicating any breaches; and
- The SP's failure to fulfill its promises.

The SP is fined the sum of R200 000, 00 of which R100 000, 00 is suspended subject to the following conditions:

- The SP immediately amend all its TV advertising in order to comply with the WASPA Advertising rules before any further placement; and
- To immediately withdraw any current advertisements which are not complying with the said rules (including the disputed advertisements in this matter).

The WASPA Secretariat is ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this. Should the SP fail to comply with the conditions, the suspension will be lifted and a sanction in terms of section 13.4 (e), which proposes a temporary suspension of the WASPA member, must be weighed in against the WASPA Member.

The fine of R100 000, 00 is payable to the WASPA Secretariat within five (5) days of notification hereof.