



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Integrat
Information Provider (IP):	Glomobi
Service Type:	Bundling
Complainants:	Anonymous
Complaint Number:	5994 / 5995
Code Version:	6.2
Advertising Rules Version:	N/A

Introduction

Due to the similarity of Complaints 5994 and 5995, the Adjudicator felt it appropriate to conjoint the two Complaints.

Complaint 5994

The Complainant lodged the following complaint:

“When a user smses JOY to 40200 as prompted in the TV ad, a user is subscribed to a club, as well as sent the ring tone advertised. This contravenes 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.”

The Complainant provided the dates of the ads flighted according to the SP’s request.

The Complainant provided additional response concerning cases 5995 and 5994:

“These complaints (#5995 and #5994) must go formal. The service uses an individual item i.e. "Turbo" to attract its customers. Exactly what clause 11.1.2 is attempting to prevent. The contravention is clear:

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.**

They ONLY demonstrate that single ring tone. Their keyword ONLY describes that single ring tone. A user is requesting the specific content item e.g. "TURBO" not FUN or SOUNDS or similar. They are trying to create the impression that there is confusion around the rule. There is NOT. The rule was changed to avoid the confusion. David Tropes was highly penalized 2 years ago and he doesn't want to have that repeated, he is therefore requesting unnecessary changes to this clause to cater for his specific style of advertising."

Complaint 5995

The Complainant lodged the following complaint:

"When a user sms TURBO to 31944 as prompted in the TV ad, a user is subscribed to a club, as well as sent the ring tone advertised. This contravenes 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."

The Complainant provided the dates of the ads flighted according to the SP's request.

The Complainant provided additional response concerning cases 5995 and 5994:

"These complaints (#5995 and #5994) must go formal. The service uses an individual item i.e. "Turbo" to attract its customers. Exactly what clause 11.1.2. is attempting to prevent. The contravention is clear:

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.**

They ONLY demonstrate that single ring tone. Their keyword ONLY describes that single ring tone. A user is requesting the specific content item e.g. "TURBO" not FUN or SOUNDS or similar. They are trying to create the impression that there is confusion around the rule. There is NOT. The rule was changed to avoid the confusion. David Tropes was highly penalized 2 years ago and he doesn't want to have that repeated, he is therefore requesting unnecessary changes to this clause to cater for his specific style of advertising."

Service provider's response 5994

In its initial response the SP asked the following information to be provided:

"We would like to enquire if the complainant can please provide more details for the complaint like the time and date of last flightings of these adverts complained about. We trust you find the abovementioned in order and await your reply hereto."

In the formal response the SP wrote:

"Integrat is of the opinion that this complaint is premature in light of the proposed changes to the Code of Conduct with special reference to 11.1.3 of the Code of Conduct.

We attach Integrat's formal response to complaint #5994 inserted beneath the initial complaint.

We have also attached hereto the advertisement by Glomobi for your ease of reference.

We can also confirm that this advertisement have been withdrawn from all stations.

We trust you find the abovementioned in order and await the adjudicators report in due course.

#5994 JOY:

It is stated clearly in Capital bold letters in the terms and conditions that this is a subscription service – so the viewer is informed that they are signing up for a subscription when SMS'ing the keyword to the short code.

- It is clear that there was uncertainty amongst all WASPA members regarding the specific clause henceforth the new addition to the Code of Conduct and incorporation of 11.1.3 to clarify clause 11.1.2. It is also clear from the discussions on the CodeCom meeting held on the 30 January 2009 that there was great confusion amongst WASPA members as to what bundling and contravention of 11.1.2 exactly entailed.
- Now that there is more clarity it will be easy for Glomobi to amend their advertising to conform to the clarified version of the Code of Conduct. As the current Code of Conduct was not clear about this and there was confusion amongst members about the exact application of the current 11.1.2 Glomobi should not be penalised unjustly and they should be afforded the chance or rectify their advertising in line with the newly accepted clauses in the Code of Conduct.

- The proposed change to the Code of Conduct inserted below for ease of reference makes it much clearer as to what is needed from the advertiser and Glomobi should be afforded the proper time to bring their advertising according to new requirement as portrayed in the proposed draft Code of Conduct **Version 6.82**
- 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.

The confusion regarding the meaning of 11.1.2 and bundling in general can clearly be seen as portrayed in the following e-mails that were distributed between CodeCom members regarding the proposed change of the clause:

1. "3) Agreement on the final wording for the bundling clause 11.1.2 - David Trope is championing - if everyone is happy can it be included into the draft. Is everyone happy? – Michael Heinebach 06-02-2009"

2. "Hi Codecom and Mancom

Firstly, I'm sorry to raise a COC issue with Mancom, but I am concerned that at this rate nothing is going to get resolved quickly. We have two very different understandings of bundling from Mike and Gavin. Mike, I think that my proposed definition and rules achieve the objective, are easy to include, enforce, and most importantly, are equitable. Thanks, David"

3. "Hi

I personally don't believe that by 'displaying' multiple ring tones or content items assists consumers to understand that the service being advertised is a subscription service more than it would if there was just a single item 'displayed'. The ads are already cluttered enough with terms & conditions, pricing etc. Surely the idea is to simplify and not to complicate the message to consumers?

I strongly agree with David's option one that a voice over would be sufficient in achieving the desired result.

Cheerio,
Russel"

4. "Hi All

As discussed at the Codecom meeting on Friday, confusion still abounds as to exactly what constitutes bundling and how bundling should be dealt with in the advertising guidelines, As mentioned, both Peach and Gozomo were almost carried out on the bundling issue in 2007. What this means is that the playing field is not level at the moment. It seems that what I thought was the ratified definition is not in

the Advertising guidelines and any mention of the word bundling has been removed. We can't manage what hasn't been defined, nor can we expect the Adjudicators to make rulings without guidelines. I therefore propose that my original definition of bundling be accepted and we further define the rules around it. The definition was:

'Bundling' means subscribing a customer to a subscription service without displaying a minimum of two content items.

Where we need to have some latitude is for the TV marketing of ring tones, for the reasons discussed (cost, confusing the creative). To this end, I propose that we vote on and accept one of the two rules below:

'Display', in the case of ring tones, means two clearly distinguishable audio samples, none at all, or more than two. In the event that only one version of audio is played, the voice over needs to make reference to the frequency at which the customer will receive content, e.g. 'receive a ring tone three times weekly'

'Display', in the case of ring tones, means two clearly distinguishable audio samples, none at all, or more than two. In the event that only one version of audio is played, the voice over needs to make reference to the frequency at which the customer will receive content, e.g. 'receive a ring tone three times weekly'. Furthermore, in such a case, the advertisement needs to have an additional block, at least as large as the 'subscription block', in the top right corner, exactly the same size as the 'subscription block', that stays on the screen for the same amount of time, that lists at least two other examples of ring tones that the subscriber will receive.

Let me know what you think.

Thanks,

David" - David Thrope – Peach Mobile

We are therefore of the confident opinion that this complaint is premature and due to the uncertainty of the proper meaning of bundling and the correct interpretation of 11.1.2 amongst Code Com Members regarding this interpretation the complaint should be handled informally as Glomobi has already withdrawn these adverts from flighting or that this complaint should be dismissed in its entirety."

Service provider's response 5995

In its initial response the SP asked the following information to be provided:

"We would like to enquire if the complainant can please provide more details for the complaint like the time and date of last flightings of these adverts complained about. We trust you find the abovementioned in order and await your reply hereto."

In the formal response the SP wrote:

"We refer to the abovementioned complaint and confirm that we have attached hereto our formal response inserted beneath the initial complaint - and a copy of the advertisement as we were unable to access the advertisement provided by WASPA.

Glomobi has confirmed that this advertisement has been withdrawn from flighting on all stations.

We trust you find the aforementioned in order and await the adjudicator's report in due course.

#5995 Turbo:

We are of the confident opinion that this complaint is premature and that it should be dismissed in its entirety. The advertisement that forms the basis of this complaint has been attached hereto for your ease of reference.

- We have taken the voice over and extracted it from the advertisement to show that it is stated in the voice over that the person will get the baby turbo ring tone and many others -so there can be no contravention of 11.1.2. Viewer is informed that they will be subscribing to a service and that they will be receiving other tones as well.
- **Voiceover:**
 - "Attention R40 Airtime credit up for grabs every half an hour SMS Turbo to 31944 and you would receive this baby turbo ring tone and many others SMS turbo to 31944 be the lucky on to get R40 airtime credit every half an hour SMS turbo to 31944 now."
 - It is also stated clearly in Capital bold letters in the terms and conditions that this is a subscription service as required by the advertising rules – so the viewer is informed that they are signing up for a subscription when SMS'ing the keyword to the short code.
 - It is clear that there was uncertainty amongst all WASPA members regarding the specific clause henceforth the new addition to the Code of Conduct and incorporation of 11.1.3 to clarify clause 11.1.2. It is also clear from the discussions on the CodeCom meeting held on the 30 January 2009 that there was great confusion amongst WASPA members as to what bundling and contravention of 11.1.2 exactly entailed. Now that there is more clarity it will be easy for Glomobi to amend their advertising to conform to the clarified version of the Code of Conduct. As the current Code of Conduct was not clear about this and there was confusion amongst members about the exact application of the current 11.1.2 Glomobi should not be penalised unjustly and they should be afforded the chance or rectify their advertising in line with the newly accepted clauses in the Code of Conduct.

- The proposed change to the Code of Conduct inserted below for ease of reference makes it much clearer as to what is needed from the advertiser and Glomobi should be afforded the proper time to bring their advertising according to new requirement as portrayed in the proposed draft Code of Conduct **Version 6.82**
 - 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.
 - The confusion regarding the meaning of 11.1.2 and bundling in general can clearly be seen as portrayed in the following e-mails that was distributed between CodeCom members regarding the proposed change of the clause:
3. "3) Agreement on the final wording for the bundling clause 11.1.2 - David Trope is championing - if everyone is happy can it be included into the draft. Is everyone happy? – Michael Heinebach 06-02-2009"
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should be dealt with in the advertising guidelines, As mentioned, both Peach and Gozomo were almost carried out on the bundling issue in 2007. What this means is that the playing field is not level at the moment. It seems that what I thought was the ratified definition is not in the Advertising guidelines and any mention of the word bundling has been removed. We can't manage what hasn't been defined, nor can we expect the Adjudicators to make rulings without guidelines. I therefore propose that my original definition of bundling be accepted and we further define the rules around it. The definition was:

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Sections of the Code considered

Version 6.2

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.

Version 7.0

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.

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 complaint and the SP's response.

The Adjudicator has noted that the SP in this matter has raised its opinion on various communications between several MANCO members. It is however not the Adjudicator's role to make adjudications on matters outside the scope of the Code of Conduct. As displayed in the relevant sections of the Code of Conduct below, the Code of Conduct is binding on all members. It is also clear that where a material breach of the Code seemed to have occurred, it must be resolved formally. The SP's contention therefore that this matter should be resolved informally is unfounded and outside the mandate of the Adjudicator. It is the responsibility of the Adjudicator to assess this Complaint according to version 6.2 of the Code of Conduct. The Adjudicator has however taken note of certain aspects of version 7.0 of the Code.

For clarification on the above, the following refers:

1. Introduction

This document is a code of practice governing the members of the South African Wireless Application Service Providers' Association (WASPA). **It is binding on all members and contains accepted procedures to be followed in the event of a complaint lodged against any WASPA member.**

1.1. About WASPA

WASPA is an independent, non-profit organisation representing the interests of organizations providing mobile application services in South Africa. The Association aims to provide a neutral forum for members to address issues of common interest and interact with industry stakeholders, network operators and government bodies. WASPA aims to ensure that end-users receive world-class services and industry participants earn a fair return on their investments. The association was founded in August 2004.

Membership of WASPA is voluntary. Voting members are required to have an existing business relationship with one or more of the network operators. **All members are required to accept the WASPA Code of Conduct and related procedures as binding.**

13.2.1. In the case of a complaint for which it is feasible for the member to provide a prompt remedy **and where no material breach of the Code seems to have occurred**, the following informal complaint procedure will be followed.

13.3.1. In the case of a complaint for which it is not feasible for the member concerned to provide a prompt remedy, **or a complaint that has been escalated from the informal complaint procedure, the following formal complaint procedure will be followed.**

13.3.9. On the basis of the evidence presented, the adjudicator will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits.

13.3.10. If the adjudicator determines that there has been a breach of the Code, then the adjudicator must determine appropriate sanctions.

In assessing section 11.1.2 of the Code, it promptly states that a request from a subscriber to join a subscription service may not be a request for a specific content item.

The Adjudicator has carefully reviewed the video clips associated with the two Complaints.

In Complaint 5994 the SP is only providing display of a single content item. Neither the voiceover nor the display informs a user that they would get anything else apart from the single content item. Although the subscription details are provided, only one item is being displayed. This form of only displaying a single content item, bundled with a subscription service, is therefore in the opinion of the Adjudicator a direct breach of section 11.1.2.

In Complaint 5995, the SP did however provide a voiceover that states that a subscriber would get “this baby ring tone and many others”. On the display in the top right hand corner, it states: “Baby Turbo”. It also provides another content item offering the opportunity (“up for grabs”) to get R40 airtime for free every half an hour. Whether this amounts to some sort of competition or lucky draw is unknown. In such an event, it would also contravene section 11.1.2 since it steers away from a specific request for a subscription service. Even if the contrary is proven, it will still be in contradiction of section 11.1.2.

In the opinion of the Adjudicator, the turbo advertisement is also in breach of section 11.1.2.

If version 7.0 of the Code was applicable, section 11.1.3 would also not have provided the SP with any recourse in Complaint 5994 since only one item was

displayed. It could have maybe provided a solution for Complaint 5995, but the Adjudicator is not willing to rule on a version of the Code that is not applicable to this specific ruling.

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; and
- The SP's subsequent conduct in eradicating any breaches.

The Adjudicator must commend the SP for its swift reaction in removing the said advertisements.

Complaint 5994:

The SP is fined R 80 000 – 00 for its breach of section 11.1.2.

Complaint 5995:

The SP is fined R 50 000 – 00 for its breach of section 11.1.2.

The fine must be paid to the WASPA Secretariat within five (5) days of notification hereof.

The SP is further ordered to amend its advertising in order to comply with the WASPA Code of Conduct before further placement and subsequently instructed to withdraw any current advertisements which are not complying with the said Code of Conduct (including the disputed advertisement in this matter).

The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this.
