

REPORT OF THE ADJUDICATOR

WASPA Member (SP): Blinck Mobile

Information Provider (IP): N/A
(if applicable)

Service Type: Subscription

Complainant: WASPA Monitor

Complaint Number: 6034

Code version: Code v6.2 and Ad Rules v2.3

Date of Report: 26 June 2009

Complaint & Response

1. On the 16th of March 2009 the WASPA Monitor lodged the following complaint against the Member:

Date of breach: 16 March 2009

WASP or service: Blinck 31631

Clauses breached: 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.

3.1.2. Members are committed to lawful conduct at all times.

3.3.1. Members will not offer or promise services that they are unable to provide.

3.3.2. Services must not be unreasonably prolonged or delayed.

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.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

Description of complaint:

The advertising and promotion of the Friend Tracker service implies you can download a friend tracker – this implies the friend tracker is an application. What viewers receive, is wallpapers. The operation of the wallpaper download is not a tracking service.

They are almost certainly passing themselves off as a location based service. The words and graphics they use in their advertising immediately suggest this.

I would like to request the following:

An emergency panel hearing.

ALL promotion of this service to be withdrawn with immediate effect.

ALL subscribers to this service to be refunded.

Test results attached.

Urgent complaint:

The Monitor considers this to be an urgent complaint and requests that the Secretariat considers this for review by an emergency panel.

The WASPA Monitor has flagged this complaint for an emergency panel review. This may be avoided if you take immediate steps to remedy the breaches identified and notify the WASPA Secretariat accordingly.

The WASPA Monitor has indicated that this is a serious offence and cannot be resolved informally. The service provider is requested to provide a formal response to the alleged breaches so that this matter can be reviewed by an independent adjudicator.

2. The WAPA Monitor also attached a record of two tests that she conducted of the service in question, which is attached as Annexure “A”.
3. On the 24th of March 2009 the WASPA Secretariat advised the Member via e-mail that the emergency procedure set out in clause 13.7 of the WASPA Code of Conduct had been invoked for this complaint. The details of the complaint set out above were sent to the Member.
4. On the same day, the Member sent the WASPA Secretariat a response to the complaint. The salient points were as follows:
 - 4.1. In respect of the alleged breaches of clauses 3.1.1, 3.1.2, 3.3.1, 4.1.1 and 4.1.2, the Member responded as follows:

The ‘Friendtracker’ product is a so-called moving wallpaper application and is marketed as a ‘fun application’. Even though the application is based on moving wallpapers, it is still an application. The fun aspect of this moving wallpaper application is that someone who has purchased it can give his friends the impression he can track other friends and that he ends up finding them kissing. It is a way to have a joke with one’s friends, this ‘fun

application', and that is also the way Blink markets the product. We have received a lot of positive feedback on this product from our subscribers.

Blink regrets the fact that the WASPA Monitor has misunderstood the workings of this application, but believes that the average consumer does not really think one can actually track friends wherever they are. First of all, Blink believes the average consumer does not really believe that for the price of this fun application one would receive a proper GPS tracking device on one's mobile phone including all maps of South-Africa and corresponding data. Second of all, Blink believes that it is clear to the average consumer that, even if it would be technically possible to track all of one's friend on one's mobile phone, such a tracking device would clearly be illegal because of its breach of several acts and laws, such as one's right to privacy. Third of all, like explained above, the words "Fun Application" are conspicuously and clearly visible during the commercial.

Based on the above, Blink believes that the average consumer knows it is buying a fun application and not a real tracking device. A fun application is exactly what they receive. Blink is therefore of the opinion that it has not breached section 3.1.1., 3.1.2, 3.3.1, 4.1.1. and 4.1.2 of the Code.

4.2. In respect of the alleged breach of clause 3.2.2, the Member responded as follows:

According to the WASPA Monitor, Blink has breached section 3.3.2 of the Code by unreasonable delaying or prolonging the service.

If this alleged breach refers to the first unsuccessful attempt of the WASPA monitor to download the Friend Tracker application we can inform you as follows:

According to our system the cell phone number 0763160212 did indeed subscribe to our service on 14:13:35. At 14:13:36 the service message was sent. We don't know why it took a few hours to receive the first service message but it could possibly be an Operator issue. With regard to the failed download of the application we did not retrieve any download request for the application from our system whatsoever. This means that there was no contact between this MSISDN and our servers. This also excludes failed contact because we would have seen that in our systems. This would indicate the problem does not lie within our system, but is outside Blink's control. Considering the fact that the second attempt with the different MSISDN was successful, this would imply that our service worked correctly.

5. On the 27th of March 2009 the WASPA Secretariat forwarded a request from the WASPA Monitor to the Member asking for a copy of the revised "Friend Tracker" advertisement, with a "flash" with the words "Fun Application" on it as well as terms and conditions in a revised format. This the Member duly provided. Presumably then the advertisement was revised at some stage after the complaint was made, but this does not appear from any other document in the record.
6. A copy of the original, unrevised advertisement was not made available to me initially, but fortunately the WASPA Secretariat managed to obtain a copy from the WASPA Monitor.

7. I viewed both versions of the advertisement, which both feature a voice-over enjoining viewers to download the "Friend Tracker", saying that it will allow users to track down their friends. The voice-over also says "get them all", which implies that this is one of a series. The visual element features satellites being used to zero in on a location with a pseudo-satellite view. The revised version is the same as the first, with the exception that it also includes a "flash" with the words "fun application". The terms and conditions were apparently also changed, but given the low resolution of the first version provided to me, the only difference that I can make out is that they have been placed in a white block in the revised version, while the first version shows the terms and conditions against a transparent background.
8. On the 31st of March 2009 the WASPA Secretariat has sent the WASPA Emergency Procedure Notice of the same date to the Member. The findings of the emergency panel were as follows:

Complaint 6034 was lodged by the WASPA Monitor, and relates to the "Friend Tracker" subscription service. The service provider for this service is Blink Mobile.

This complaint has been sent to the SP for a response, as part of the formal complaints procedure, and a reply was received prior to the emergency panel hearing, and made available to the panel.

After reviewing the available information, the emergency panel concluded that there is prima facie evidence of breaches of clauses 3.3.1 and 4.1.2 of the WASPA Code of Conduct.

The emergency panel did not make a decision on the alleged breaches of clauses 3.1.2, 3.3.2 and 4.1.1 of the Code.

In addition to the clauses reference in the original complaint, the emergency panel expressed a concern that there may also be a breach of sections 11.1.2 and 11.2.1 of the Code of Conduct.

Consequently:

1. The panel orders Blink Mobile to immediately suspend all advertising for the "Friend Tracker" service.
2. The panel orders Blink Mobile to immediately suspend all new subscriptions to the "Friend Tracker" service.
3. The above orders apply until the conclusion of the formal review of the applicable complaint.
4. The panel orders Blink Mobile to immediately send a notification message to all current subscribers of the "Friend Tracker" service in the format specified in clause 11.2.2 of version 7.0 of the WASPA Code of Conduct.

The panel requests that the WASPA Secretariat expedite the adjudication of this complaint.

9. On the 2nd of April 2009 the WASPA Secretariat send an e-mail to the Member in which it expressed concern that the Member has continued to flight the advertisement for the service complained of more than 24 hours after the emergency panel had ordered that could be withdrawn:

It has come to our attention that subsequent to the issuing of the emergency procedure notice appended below, the commercial that is the subject of the complaint has continued to air.

Most recently, we are aware that it aired on eTV at approximately 13:00 yesterday, more than 24 hours after the emergency panel ordered that the advert be withdrawn.

We would like to draw your attention to the following clause of the WASPA Code of Conduct:

13.7.6. The member concerned must comply with the urgent remedy as soon as practicable. Failure to do so constitutes a breach of this Code.

It appears that Blink Mobile has acted in breach of the WASPA Code of Conduct by failing to comply with the orders of the emergency panel to withdraw this advert.

We would appreciate your most urgent feedback regarding this matter, and your compliance with the emergency procedure notice.

10. The Member responded on the same date as follows:

When we received the emergency procedure notice we immediately took the following actions:

1. Redirect of internet traffic to another application, so no customers could enter the landing page of the Friendtracker product.
2. Removal of the FRIEND keyword in our signup module so no customer can be subscribed to this application This action is the strongest one, and is a 100% guarantee that no customer an subscribe anymore!
3. We instructed the TV stations to remove the FRIEND TV-Commercial from the rotation schedules. I am aware of the fact that some TV stations take more than 24 hours to change their schedule, but due to the action nr 2 no customers are able to subscribe. Instead of this they will receive the message that the Keyword FRIEND is unknown. Latest news is that all channels have confirmed that they have adjusted their schedules.
4. A reminder message with the prescribed format was sent to all FRIEND subscribers last Tuesday.

I hope this explanation is sufficient for you and shows that we followed the required actions of the emergency procedure.

11. The complaints against the Member are hence the following:

- 11.1. That the Member's advertisement for the service was misleading in that it supposedly advertised applications that would allow the subscribers to really track down their friends and family, while in fact the product was merely a dynamic wallpaper. This conduct is alleged to constitute infringements of clauses 3.1.2, 3.3.1, 4.1.1 and 4.1.2 of the WASPA Code of Conduct.
 - 11.2. The service was not immediately available when the WASPA Monitor subscribed to it, and the Member is hence accused of infringing clause 3.3.2 of the WASPA Code of Conduct.
 - 11.3. The emergency panel noted that the advert in question may constitute "bundling" as set out in clause 11.1.2 of the Code of Conduct.
 - 11.4. The emergency panel also noted a possible infringement of clause 11.2.1 in that the subscription service termination instructions provided by the Member were deficient.
 - 11.5. The WASPA Secretariat has alleged that the Member did not fully comply with the urgent remedy dictated by the Emergency Panel notice in that the advert in question continued to be broadcast more than 24 hours after the notice was provided to the Member.
 - 11.6. Finally, I note that the terms and conditions in the first version of the advertisement were set against a transparent background rather than in a white box with no transparency; this is an apparent contravention of clause 2.3.4 of the Advertising Rules.
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Portion of the Code Considered

12. As the conduct complained of occurred on the 16th of March 2009, version 6.2 of the WASPA Code of Conduct and version 2.3 of the Advertising Rules are applicable. The alleged failure to comply with the Emergency Panel's ruling, however, took place on or after the 31st of March, by which time version 7.0 of the Code was in force. I will thus apply version 7.0 to this complaint. This distinction is however academic as the Codes are not materially different as regards this alleged infringement.
13. The following clauses of the Code of Conduct are of relevance here:

3. General provisions

3.1. Professional and lawful conduct

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.

3.1.2. Members are committed to lawful conduct at all times.

...

3.3. Service levels

3.3.1. Members will not offer or promise services that they are unable to provide.

3.3.2. Services must not be unreasonably prolonged or delayed.

...

4. Customer relations

4.1. Provision of information to customers

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.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

...

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.

...

11.1.11. The format of the both the initial notification message and the monthly reminder should comply with the relevant section of the WASPA Advertising Rules.

...

11.1.7. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number.

...

11.2. Termination of a service

11.2.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

14. Clause 6.1.1 incorporates the WASPA Advertising Rules into the Code of Conduct by reference, and the following extract from clause 2.3.4 thereof (apparently listed incorrectly as 1.3.4 in the source document) is relevant:

Display Text Position:

- On bottom edge of title face of the screen superimposed on a solid white box surrounding all of the text.
- No transparency whatsoever in the solid white box is allowed.
- All text must be centered
- If advertising a subscription service, the words subscription service must be placed at the top, centre section of the solid white box. These two words must be in CAPS and in BOLD.

ie "SUBSCRIPTION SERVICE"

• T&C Display Text Rules:

- No Caps (except for the first letter of the first word, or for proper nouns, as well as for an 'SMS') or italics may be used as the display font for the T&Cs.
 - The T&C text must be static and horizontal for the requisite minimum display time.
 - The T&C text may not scroll on the screen, either right to left, left to right nor any other direction.
 - The T&C text may not be positioned or formatted in a manner where it may be obscured by other text or visual information that may be displayed as part of the ad.
 - The T&C must be formatted so that each sentence is distinct. Each sentence must end with a period.
 - The T&C text must not be part of a colour scheme that may obscure easy reading of complete details of the T&C text.
 - The T&C text must not be obscured by any background flashing or other visual animations that practically and objectively obscures easy reading of complete details of the T&C text
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Decision

15. I will deal with the complaints against the Member *seriatim*.

Misleading Advertising

16. The emergency panel was of the view that the advertising for the service was *prima facie* an infringement of clause 4.1.2 of the Code of conduct. Their reasoning is not given in their ruling.

17. The Member contends that the average consumer would not believe that a cellphone is capable of actually tracking down individuals merely by use of a simple downloaded application, and that such a consumer would further be aware that such an activity would be illegal. I disagree, and take the view that the South African market has a high proportion of consumers who are not of a high level of sophistication, and may very well believe that the downloaded “application” will indeed allow them to track down their acquaintances. I myself thought for a brief moment that it might be possible to enter an acquaintance’s MSISDN and have the associated handset’s location calculated by cellular triangulation. The inclusion of the words “Fun Applications” in the revised version of the advertisement in no way dispels the possibility for confusion. Such an application – were it to work – would indeed be fun. The advertisement is hence misleading as contemplated in clause 4.1.2.

18. The advertisement is also misleading in that it promises applications when the consumer is actually provided with a series of moving wallpapers. The Member admits that the downloads are moving wallpapers, but contends that the moving wallpapers *are* applications. This reasoning is flawed. It is generally recognised that computer programmes (often called software outside of legal circles) are broadly divided into operating systems and applications. The best definition of a computer programme in South African law is that contained in section 1 of the Copyright Act 98 of 1978:

‘computer program’ means a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result;

19. Using this definition, the “moving wallpaper” can not possibly fall to be classified as an application. In order for a download to be advertised as an “application” it would have to be a computer programme other than an operating system that is downloaded to and executes on the customer’s handset itself. If the customer submits data to a server which generates a moving wallpaper for download based on that data there is certainly an application involved, but as this application is executed on the server and not on the customer’s mobile phone, and the product can not be advertised as an application for download.

20. I hence find that the Member has infringed clause 4.1.2 of the Code of Conduct in two distinct ways in a single advertisement.

Prolonging or Delaying of the Service

21. The Member considers that the WASPA Monitor is accusing it of breaching clause 3.3.2 in that provision of the service was unreasonably prolonged or delayed because the WASPA Monitor could not access the service immediately after receiving a link to it indicates that the Member.
22. The Monitor does not state this explicitly but I can certainly see no other context in these facts where the alleged infringement of that clause would “fit”. I however agree with the Member that the facts do not support such an accusation.

Bundling

23. I note that the accusation of bundling was made against the Member not by the WASPA Monitor, but by the Emergency Panel, which could not have known that this very issue was addressed relating to this advertisement in complaint number 5718. I can thus not adjudicate on this particular issue.

Deficient unsubscribe instructions

24. As stated above, the conduct complained of took place on the 16th of March 2009, when version 6.2 of the Code of Conduct was in force, and indeed the Emergency Panel seems to have been referring to that version when they raised their concern about the quality of the Member’s unsubscribe instructions. Clause 11.1.11 of version 6.2 of the Code of Conduct refers to the Advertising Rules for the content and format of initial notification and monthly reminder messages. Unfortunately, the Advertising Rules at section 12 only describe the content and format of monthly *reminder* messages, not initial notifications, and are thus of no assistance. I am thus forced to rely purely on the general instruction given in clause 11.2.1 that the unsubscribe instructions must be “...clear, easy to understand, and readily available”, and in clause 11.1.7, which deals with subscription notification or “welcome” messages, and in particular 11.1.7(c) which calls for such messages to contain “clear and concise instructions for unsubscribing from the service.”
25. Certainly the punctuation of the messages recorded by the WASPA Monitor is confusing: “...Info? www.text1.tv/0800980963 (R10/SMS) subscription stop? FRIEND stop, max 2 sms/wk”. As one with insight into the industry I know that this means that the subscriber should sms the words “friend stop” to the shortcode that the subscriber used to subscribe to the service in the first place. To the uninitiated however, the instruction given is confusing. The words “subscription stop” appear from the punctuation to relate to the phrase www.text1.tv/0800980963 (R10/SMS), while “FRIEND stop” seems to relate to the phrase “max 2 sms/wk”. Moreover, the shortcode to which the unsubscribe request should be transmitted is not given.
26. On balance I find that the unsubscribe instructions given by the Member are confusing, and that the Member has consequently infringed clauses 11.1.7 alternatively 11.2.1. It is not helpful to record this infringement as a breach of both clauses, as they relate to essentially the same thing, so I will record an infringement merely of clause 11.1.7.

Failure to comply with Emergency Panel ruling

27. I turn finally to the allegation that the Member did not comply with the Emergency Panel's ruling by allowing the commercial in question to flight some 28 hours after transmission to it of the emergency notice.
28. My understanding is that while "pulling" an advertisement within 48 hours is possible, it is unrealistic to expect television channels to consistently obey such an instruction within a shorter period, whether or not the channel penalises the advertiser for the short notice of withdrawal. Hence I am prepared to give the Member the benefit of the doubt in this case; if the delay had been much longer, however, I would have taken a different view.
29. There is no indication that the Member failed to comply with the ruling in any other respect.

Incorrect display of Terms and Conditions

30. The initial version of the advertisement did not include its terms and conditions in a solid white box; moreover the background to the text of the terms and conditions was entirely transparent, and the moving visuals behind the text had the effect of obscuring it. While the revised version of the advertisement amended these defects there is no question that the initial version was broadcast.
31. I hence find that the Member has infringed clause 2.3.4 of the Advertising Rules which specifically provide for the white box and lack of transparency, and forbids any obscuring of the terms and conditions text by background visuals.

Sanction

32. In my view the advertisement in question had the potential to severely mislead consumers as contemplated in clause 4.1.2 of the Code of Conduct, and as a result I order that the Member should make a full refund of all monies paid by subscribers in respect of the "Friend Tracker" subscription service. The network operator(s) concerned should give effect to such a refund as contemplated in clause 13.4.3(g) of the Code of Conduct.
33. The Member is fined an amount of R60 000 for its breach of clause 4.1.2 of the Code of Conduct. The scale of the fine is in direct proportion to the misleading nature of the advertisement.
34. The Member is fined an amount of R15 000 for its breach of clause 11.1.7 of the Code of Conduct.
35. The Member is fined an amount of R 20 000 for its breach of the Advertising Rules. This fine is imposed with reference to that imposed in complaint number 4189.
36. All fines are payable within five business days of notification of this report.

37. The Member is ordered to amend the advertising of its services to ensure that the advertising accurately describes the services being offered.
38. I note that the Member has suspended all of its television advertising in South Africa pending the outcome of complaints relating to such advertisements. The Member is ordered to amend the advertising of its services to ensure that the advertising accurately describes the services being offered, particularly in respect of describing wallpaper as applications, and that it follows the Advertising Rules and the portions of the Code relating to subscription services.
39. The Member must note that complaint numbers 6014, 6240 and 6478 were the subject of Emergency Panel hearings, and have been expedited on the request of the Panel. There are some ten further complaints against the Member awaiting adjudication by this adjudicator. In order to dispose of these three urgent complaints the other ten matters have not been taken account of in determining the sanction. Ideally all thirteen should have been disposed of together, but this is not practicable under the circumstances. Accordingly, I reserve the option of taking all thirteen into account in making a determination of further sanctions against the Member when adjudicating the remaining complaints.

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Annexure A

CELL PHONE NUMBER: 0763160212

SERVICE PROVIDER: Blink

SHORT CODE: friend

REASON FOR TEST: This service promises to be able to keep a “tracker” on your friends, the point of this test is to see if this is actually possible. I did this test on two different phones/ phone numbers.

1. FIRST TEST:

I smsed friend to 31631

I then got a sms:

Welcome to FRIEND! You will get your 1st wallpaper now. Info? www.text1.tv/0800980963 (R10/SMS) subscription stop? FRIEND stop, max 2 sms/wk

I then got a service message a few hours later:

Title:

Friendtrackereng.wml

Address:

<http://dl1.sms247.tv/bin/get/1/918ccf11d13ac747f1d64100bfd9ccd/friendtracker%20eng.wml>

I then clicked retrieve...

- Then I got the response:

Link not available. Try again

I tried this several times and still got the same response.

2. SECOND TEST:

CELL NUMBER: 0824397282

SERVICE PROVIDER: Blink

SHORT CODE: friend

REASON FOR TEST: This service promises to be able to keep a “tracker” on your friends, the point of this test is to see if this is actually possible.

- I smsed friend to 31631.
- I then got a sms:

Welcome to FRIEND! You will get your 1st wallpaper now. Info? www.text1.tv/0800980963 (R10/SMS) subscription stop? FRIEND stop, max 2 sms/wk

I then clicked retrieve and the page said:

- **Download file- Friendtracker eng**
- Have fun with your download! For info call 0800-980963
- **Then it said downloaded to images**

When opening up the image in my images all it was, was a wallpaper that you click play on and then it flashes and says tracking with a green background....it flashes for a few seconds and ends on a image of two people kissing. Then the play button comes on again for you to replay it!

This service is therefore merely a delivery of wallpapers. And it definitely cannot track any friends!

Conclusion:

The advertising and promotion of this service implies you can download a friend tracker – this implies the friend tracker is an application. The operation of the wallpaper download is not a tracking service.

Breeches of the code:

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.

3.1.2. Members are committed to lawful conduct at all times.

3.3.1. Members will not offer or promise services that they are unable to provide.

3.3.2. Services must not be unreasonably prolonged or delayed.

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.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.