REPORT OF THE ADJUDICATOR

WASPA Member (SP):	**Blinck Mobile**
Information Provider (IP): (if applicable)	**N/A**
Service Type:	**Subscription**
Complainant:	**WASPA Monitor**
Complaint Number:	**6242**
Code version:	**Code v7.0 and Ad Rules v2.3**
Date of Report:	**10 January 2010**

Complaint

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

> Date of breach: 16 april 2009
>
> WASP or service: Blinck 31631
>
> Clauses 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.
>
> 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.
>
> 3.3.1. Members will not offer or promise services that they are unable to provide.
>
> 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 attached tv commercial flighted on air from 14 April 2009.

The commercial features two parts: Part 1: SMS \"halo\" Part 2: SMS \"virus\"

The new rules in the code state: 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.

However, if a viewer was to sms both those keywords to 31631, R60 would be taken off for each service offered i.e. R120-00 in total. This commercial therefore is not one commercial with two examples of that content, but rather two separate services. We tested this service and we were charged for two separate subscriptions.

Part 1 of the commercial is not in breach of 11.1.2 - making use of one content item to sell a sub service. (Copy reads: New, the hottest hits from the charts - implying there are many ringtones to choose from). Part 2 however is in breach.

Part 2:

The commercial is making use of one content item \"Virus\" in an effort to sell a sub service - this is in breach of code 11.1.2. (Copy reads: Send your friends A VIRUS).

Also, the creative execution suggests that a customer can download a virus that will delete all contact details on a phone. This advertising concept is misleading to viewers as no virus is actually downloaded - the copy \"send your friends a harmless virus\" does not adequately describe the service. The content received is merely a wallpaper. This service / commercial too has been produced on the same principal as the Friend Tracker service, recently suspended.

It is suggested the commercial be taken off air with immediate effect and it is also recommended that the tv creative executions promote the actual product - ie promoting wallpapers rather than viruses.

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.

2. No emergency panel hearing was ever held.

3. The WASPA Monitor also provided copies of the advertisements concerned.

4. The Complainant raises three issues:

4.1. The advertisement is misleading as it really consists of advertisements for two subscription services and that SMSing both keywords to the Member would result in two separate subscriptions.

4.2. Use of the word “virus” is misleading when the product being downloaded is really a wallpaper.

4.3. As the advertisement is really for two separate subscription services, the Member has not complied with section 11.1.3 of the Code of Conduct by providing two examples of the items which form part of the subscription service.

Response

5. The Member responded to the complaint on the 29th of April and I record its response to the above elements *seriatim*:

5.1. The Monitor erred in thinking that the advertisement was purportedly for a single service containing two content items – there were really two advertisements for separate services which were broadcast back-to-back. Only one subscription service appeared in each.

5.2. The voiceover for the “Virus” advertisement enjoins subscribers to “…send your friends a harmless virus…” and “…it will look like all their contacts are being deleted…” This coupled with a conspicuous logo stating “fun applications” would not have the effect of misleading the consumer as to the nature of the service. The Member also states that it is not confusing to refer to this offering as a virus when it is only a wallpaper, as it is in fact a moving wallpaper and hence an application.

5.3. The Member admits that only one content item appeared in the “Virus” advertisement, but states that it did not have adequate time to change its advertising before the new Code of Conduct came into force with the provision requiring two content items. The Member says that it had advised WASPA that it would be unable to modify its advertising timeously.

Portion of the Code Considered

6. As the conduct complained of took place in April 2009, version 7.0 of the Code of Conduct applies to this complaint.

7. The following provisions of the Code of Conduct are applicable or were raised by the WASPA Monitor:

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

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.

11.1.2. 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.

11.1.3. 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

Misleading advertising – two separate products advertised as a single service (clauses 4.1.1 and 4.1.2)

8. On the first issue, that the advertisements in question were misleading in that they appear to constitute only one advert while in fact two subscription services are being offered, I accept the Member's contention that two adverts are clearly differentiated. I see little scope for confusion in this aspect. Accordingly the Member has not breached clauses 4.1.1 and 4.1.2 of the Code of Conduct in this respect.

Misleading advertising – the product being advertised is not a "virus" at all, but a wallpaper (clause 4.1.2).

9. This ground has been covered in respect of the Member in the adjudicator's decision in complaint 6034. In a nutshell, a moving wallpaper is NOT an application (or a virus, which would be a species of application), and to describe it as such is misleading. The facts are too similar to admit of any other conclusion but that the Member has infringed clause 4.1.2 of the Code of Conduct in this respect.

Bundling (clauses 11.1.2 and 11.1.3)

10. Version 7.0 of the WASPA Code of Conduct came into force on the 25th of March 2009, and the Member admits that it was aware of its pending implementation. The Member further does not deny that the adverts in question do not comply with the new clause 11.1.3, in that they do not display at least two examples of content. The Member however contends that it advised WASPA in advance that it would be unable to comply with the deadline to make its advertising compliant with the new clause. Apart from the rather arrogant attempt to impose its own terms on WASPA, the Member's advert was still being broadcast on the 14th of April, some three weeks after the new version of the Code of Conduct came into force. This constitutes a clear infringement of clause 11.1.3. As this clause has the effect of

qualifying clause 11.1.2, it is not necessary to rule on any infringement of clause 11.1.2.

Sanction

11. The facts surrounding the Member's infringement of clause 4.1.2 are very similar to those found in complaint 6034, also involving the Member. The Member had received an emergency panel ruling in this complaint on the 31st of March ordering it to withdraw an advertisement for a similar product, the "friend tracker" subscription service. If the emergency panel's ruling were definitive I would take a very dim view of the Member continuing to advertise services that were similar to that which attracted the ire of the emergency panel. However, the procedure set out in the Code of Conduct is that a complaint that has been the subject of an emergency panel hearing is referred to formal adjudication. In other words, the emergency panel hearing is a stop-gap measure, and the formal adjudication is the final resolution of the complaint (unless an appeal is made against the Adjudicator's ruling of course). Accordingly, as the emergency panel did not order the Member to remove advertising for all wallpapers that posed as applications (or "viruses" as the case may be), the date at which the Member received notice that all such advertising was a breach of the Code of Conduct was the date of the formal adjudication in complaint number 6034, which was the 26th of June 2009. As the conduct complained of in this complaint took place on the 16th of April, I cannot find that the Member acted contrary to the Adjudicator's ruling in that complaint.

12. Accordingly, it would be unjust for me to impose a further sanction on the Member for conduct that has already been punished by the ruling in complaint 6034. I accordingly impose no sanction on the Member for its infringement of clause 4.1.2 in this matter.

13. The same argument applies to the Member's infringement of clause 11.1.3 of the Code of Conduct. The facts surrounding the infringement are similar to those found in complaint 6240, where the Member was found to have infringed this clause. As the instant complaint was made by the same Complainant on the same date involving the same Member, it would be unjust to levy a further sanction on the Member for misconduct that has already been sufficiently punished. Accordingly I do not impose any sanction in respect of the Member's breach of this clause beyond that already imposed under complaint number 6240.

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