



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Blinck
Information Provider (IP): (if applicable)	N/A
Service Type:	Subscription
Complainant:	Competitor
Complaint Number:	6368
Code version:	Code v7.0 and Ad Rules v2.3
Date of Report:	16 February 2010

Complaint & Response

1. On the 4th of May 2009 the Complainant, a competitor of the Member, lodged the following complaint against the Member via the WASPA website:

Name_WASP: Blinck Mobile

OtherID: This is the information provider BLINK on short code 31631

Code_Breached: 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: Blink use the keyword FREE for their advert and present teh (*sic*) price in the price box as 45/week.

This is in clear contravention to 6.5.1.

They may claim that the sending of bluetooth messages is free, and if this actually works it might be true but the meaning of the clause and appropriately (*sic*) in this case, is the fact that responding to the advert is NOT free. In act it's R45/week.

2. The complaint was accompanied by a clip of the offending advertisement, which the Adjudicator viewed.

3. In its response to the complaint, furnished per email to the WASPA Adjudicator on the 12th of May 2009, the Member made the following submission:

It is true that by downloading the promoted chat application, one can send free blue tooth messages. However, the promoted service itself is not free and we were therefore not allowed to use the keyword "Free" for this service.

Upon receiving this complaint, we have taken the commercial off the air and have immediately stopped the use of the keyword "Free". As of today, we have also disabled the sign-up process.

Currently we have 300 subscribers to this service. In order to compensate our subscribers for the non-permitted use of the keyword "Free", we have decided that our next three broadcasts for this service (taking place this week) will be free items and thus not be charged. After the last of these free broadcasts, we will immediately and automatically unsubscribe all subscribers and terminate the service completely.

We hereby apologize for this mistake made by one of our employees and will make sure it will not happen again in the future.

4. The Complainant made a rejoinder to this response, but this did not take the matter further.

Portion of the Code Considered

5. As the conduct complained of took place during or about May 2009 (no precise date was given), version 7.0 of the WASPA Code of Conduct applies to this complaint.
6. Clause 6.5.1 of the Code of conduct applies to this complaint, as cited above in the complaint itself.

Decision

7. This set of facts is an interesting one: clause 6.5.1 forbids the use of the word "free" in respect of any service that has a cost of any kind associated with it. However, in this case the application that is offered for download is undoubtedly free to use, as Bluetooth is a close range peer-to-peer networking protocol which has no cost associated with its use. Did the Member use the word "free" in respect of the service provided to the consumer, i.e. the download, or the use of the application downloaded by means of the service?
8. I am swayed by an aspect of the advertisement not mentioned by either party: in the bottom right of the advertisement is a spinning cube which contains details (not clearly visible in the clip provided) of other content items. To the left of this cube is text reading: "You will also get:" In the light of this, I rule that the word "free" applies

to the service and not to use of the application itself. Consequently, the Member has infringed clause 6.5.1 of the WASPA Code of Conduct.

Sanction

9. I have taken the following into account in determining the sanction

- 9.1. The member's history of infringements of the WASPA Code of Conduct as an aggravating factor,
- 9.2. The potential for consumer harm that can arise from conduct of this kind as an aggravating factor,
- 9.3. The Member's prompt action in remedying this misconduct as a mitigating factor, and
- 9.4. The relatively low number of subscribers to the service (on the Member's version, which is accepted) as a mitigating factor.

10. The following sanction is imposed on the Member for its infringement of clause 6.5.1:

- 10.1. A fine of R20 000 is levied on the Member, to be paid to the WASPA secretariat within 5 working days of notification of this report,
- 10.2. The Member is to give a full refund to all subscribers to this service of all monies paid to the Member in respect thereof.

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