



REPORT OF THE ADJUDICATOR

WASPA Member (SP) Blink Mobile

Information Provider (IP)
(if any)

Service Type Subscription service

Source of Complaints WASPA Monitor

Complaint Number 7037

Date received 15 July 2009

Code of Conduct version 7.4

Complaint

The complaint concerns the following email advertisement promoting content about the late Michael Jackson.

A TRIBUTE TO MICHAEL JACKSON

[GET YOUR MICHAEL JACKSON SONGS NOW](#)

Get all the hit singles of Michael Jackson like Billie Jean on your cell with this Michael Jackson tribute.



The advertisement features a large, stylized image of Michael Jackson in profile, wearing a white fedora and a dark, patterned jacket. His signature is visible on the jacket. To the right of this main image is a grid of smaller, square images showing various photos of Michael Jackson. At the bottom right of the grid is a button with the South African flag and the text "CLICK HERE". Below the grid, there is a blue hyperlink: [Click here and get your Michael Jackson songs](#). At the bottom of the advertisement, there is a grey bar with the text: "If you don't want to receive these offers, [click here](#)".

The complainant states that the advertisement does not contain any pricing information and makes no reference to that fact that it is promoting a subscription service.

The complainant alleges that the advertisement contravenes clause 6.2.2 and 11.1.1 of the WASPA Code of Conduct. It is also stated that this is a repeat offence that cannot be resolved informally.

SP's response

The SP responded by stating that the email in question was only sent out to people who actively gave their permission to receive newsletters from the SP. This newsletter was sent out as an invitation to email recipients to click on the link in the email to view the advertising material for a Michael Jackson real tone subscription service.

Once a person clicks on the link, he or she will be directed to the promotional material for this service, on which the pricing is clearly mentioned and on which it is clearly mentioned that this service is a subscription service.

The SP disagreed with the complainant's opinion that the newsletter itself is to be regarded as "promotional material" and "advertisements" as defined in article 6.2.2 and 11.1.1 of the WASPA Code of Conduct. The SP regards the newsletter as an invitation to view promotional material, and not the promotional material itself. Only if the email recipient clicks on the links in the newsletter, the promotional material can be viewed and this promotional material fully complies with the articles 6.2.2 and 11.1.1 of the WASPA Code of Conduct.

The SP states further that no access channels are displayed in the email and that customers are not subscribing directly through this newsletter. The SP acknowledges that if access channels were mentioned in the newsletter, clause 10 of the WASPA Advertising Rules and clauses 6.2.2 and 11.1.1 of the Code of Conduct would be applicable and that it would have to display the costs and terms and conditions for the service.

Complainant's reply

The complaint argues further that the email newsletter clearly states a call to action: *"Click here and get Michael Jackson songs"* and is therefore an advertisement.

The complainant does not accept the SP's claim that they are promoting an advertisement, and not the actual product, i.e. they are advertising an advertisement.

Sections of the Code considered

4. Customer relations

4.1. Provision of information to customers

4.1.1. Members must have 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.

6.2. Pricing of services

6.2.1. All advertised prices must include VAT.

6.2.2. All advertisements for services must include the full retail price of that service.

6.2.3. Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.

6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display.

6.2.6. Unless otherwise specified in the advertising guidelines, the name of the WASP or the information provider providing the service must appear in all advertisements for premium rated services.

6.2.8. Pricing on any promotional material must use one of the following generally accepted formats for prices in Rands: “Rx” or “Rx.xx”.

11. Subscription services

11.1. Manner of subscription

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

Advertising rules

General

For subscription services, providers should take all reasonable steps to ensure that all promotional material, whether in print media, on the Internet, television or transmitted via text message, clearly explains how the subscription service works. Consumers should have ready access to an explanation of their “purchase” and what, if anything, they need to do to access the Content. Great care should be exercised in using the word ‘free’.

Definitions

Access Channels (or Bearers)

The common PSMS, SMS, IVR, USSD, MMS, 3G or WAP methods of obtaining Content or Content Services or such other methods of obtaining Content or Content Services as may be introduced by the Mobile Network Operators from time to time.

Access Number:

Any SMS number (whether a long code or short code), MMS number (whether a long code or short code), IVR number (whether a long code or short code), USSD-based number, or any other number that permits the use of an Access Channel.

Message

In relation to Access Channels only, any communication sent or received by a Customer.

*Section 10 – Email offers***Scope**

Applies to all emails where Access Channels are displayed.

Decision

The crucial issue to be determined in this complaint is whether the email sent by the SP to customers is to be regarded as an “advertisement” or “promotional material” which must be compliant with the Code and Advertising Rules.

According to the SP, the email in question is a newsletter sent to its customer base and is not promotional material in its own right. The SP alleges that the link provided in the email directs customers to the actual promotional material for the content referred to.

I have been unable to access the promotional material referred to when clicking on the link in question. Instead I am directed to the Celldorado website where a number of the SP’s services and content items are promoted.

The terms, “advertisement” and “promotional material”, are not expressly defined in the Code or in the Advertising Rules. Section 10 of the Advertising Rules refers to “email offers”. The scope of these rules is limited to emails where Access Channels are displayed. The email message that forms the subject matter of this complaint does not display any access channels and therefore does not fall within the scope of section 10.

However, an advert or promotion does not always constitute an offer, and section 10 does not provide a comprehensive answer to this question.

Guidance may be taken from the definition of commercial message which includes any message which is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.

I agree with the complainant that the email in question clearly includes a call to action which is designed to promote the sale of the Michael Jackson songs on offer from the SP. I fail to see why it would be a problem for the SP to have included the required pricing and other information in this email when they allege that they have done so in a separate promotion.

I am therefore of the view that the SP has contravened section 6.2.2 and 11.1.1 of the WASPA Code of Conduct.

Sanction

Contraventions of these provisions of the Code are viewed in a serious light. As I have stated above, it would have been a relatively simple task for the SP to include the requisite information in the body of its email. It failed to do so.

I have noted the SP's statement that the link on the email directs customers to further promotional material that is compliant with the Code and Advertising Rules. Unfortunately, when I clicked on the link I did not gain access to this further material.

The following sanction is given:

1. The SP must cease any further transmission of this email campaign until such time as it is compliant with the Code and Advertising Rules.
2. The SP must refund all subscribers in full.
3. The SP must notify all subscribers that they are entitled to a full refund.
4. The SP is fined R 120 000.00.

These sanctions may not be suspended pending any appeal.