



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Exactmobile
Information Provider (IP):	
Service Type:	Subscription
Source of Complaints:	Competitor (Anonymous)
Complaint Number:	# 9752
Code of Conduct version:	9
Advertising Rules version:	2.3

Complaint

Complaint #9752 was lodged by an anonymous competitor regarding a television commercial making use of the word "free" - sms Cry to 39594. The complaint was lodged via the WASPA website.

A copy of the complaint is set out below:

Complaint #9752 (lodged via the WASPA website):

Affiliation_Information: Complainant wish to remain anonymous

WASPName: EXACT MOBILE

OtherID:

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:

The use of the keyword free is used within the TV Commercial. This is sms Cry to 39594 commercial

Tick as appropriate: I have not contacted the service provider and believe this matter requires WASPA's attention

Declaration Good Faith: Information provided is true and correct and provided in good faith.

Notification of the complaint was sent to the WASP on 2010-06-15.

SP Response

The WASP responded on 2010-06-18. Relevant extracts of the response are shown below:

Dear Waspa Secretariat,

Please find our response to this complaint below. I hope that you will find this response satisfactory.

Regards

Karlyn Stapelberg

Marketing Manager Exactmobile (Pty) Ltd

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.

Please note that the Keyword used in this advert for the service is CRY, and is clearly advertised as such.

The use of the word 'FREE' is in context with the promotional give away to members – it is a joining bonus of 5 free full tracks worth R100.

The word 'FREE' appears on the screen concurrently to the voice over which states that as a member you will receive a club bonus of free music.

"Subscribe today and get a Bonus of R100 of free Music'.

We interpret 6.5.1 to refer only to keywords. The clause does not indicate that the word FREE cannot be used at any time in a TV commercial.

We interpret this to mean that a keyword cannot be the word free or 'words with the same meaning' such as MAHALA or GRATIS.

When we issued this advert, we were satisfied that it did indeed comply with 6.5.1.

On 2010-06-25 the complainant refused resolution of the complaint and stated as follows:

I am not happy with the Service providers response as the advert is clearly in breach of the code of conduct.

The advert is not Waspa compliant.

Decision

The complaint submitted by the competitor appears to relate solely to the use of the word "free" in an advert that promotes commercial subscription content.

The SP has explained that the use of the word "free" relates only to "free bonus music" that is made available to subscribers. No complaint has been made that the advertisement is confusing or that a proper delineation between commercial subscription content and free content has not been made. The complaint, in a

nutshell, is that the word “free” cannot be used in an advert promoting a commercial subscription service. The complainant cites section 6.5.1 of the Code of Conduct in support of the complaint. This section reads as follows:

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.

A keyword is defined in section 2.14 of the Code to mean “any word used in an SMS or MMS sent by a customer to request a service”.

The question that falls to be considered is whether the use of “words” of section 6.5.1 in the component of that section which reads “or words with the same or similar meaning” relates to “keywords” only or includes words used for any other purpose in relation to a particular service that carries associated charges, such as for the purposes of promoting a particular service that carries associated charges.

Although some ambiguity is present in the wording of section 2.1.4, that ambiguity should be resolved in a manner that renders the interpretation of section 2.1.4 consistent with other provisions of the Code and its accompanying Advertising Rules (to the extent that this is possible). In this regard, it is illustrative to note that the wording of section 6.5.1 of the Code is repeated verbatim in section 1.4.11 of the Advertising Rules and that section 1.4.15(v) of the Advertising Rules states further as follows:

Taking into account the provisions in the WASPA Code of Conduct regarding subscription services, if an advertisement has components to it that promote:

(a) Content that is ordinarily made available to a consumer on payment of a once-off payment for that individual Content without the need to subscribe to that service, and

(b) Content that will be available at all, and/or at a particular price or even free only if the consumer subscribes to a subscription service, then this distinction between the availability of non-subscription and subscription charging must be made clear by unambiguously demarcating in separate sections (and not just wording) the non-subscription portion from the subscription service portion or Content in the advertisement [own emphasis].

Furthermore, the introductory section to the Advertising Rules includes a paragraph that states as follows:

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’.

Section 1.4.15(v) of the Advertising Rules and the introductory section thereof make it clear that “free” content may, in certain circumstances, be promoted in an advertisement for commercial content.

In light of the above, it follows that section 6.5.1 should not be interpreted to mean that the word “free” can never be used in any advert that promotes commercial services and that the ambiguity in section 6.5.1 should be interpreted to mean that use of the word “free” is prohibited in the context of keywords only.

Provided that great care is taken in the use of the word and provided that all other rules relating to pricing information are adhered to, an advert for services with associated charges containing the word “free” would not ipso facto amount to a breach of the Code.

As no other complaint has been made relating to the particular advertisement in question, the complaint is dismissed.