



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	MTN Airborn t/a Airborn Messaging MTN
Telephone Network(s)	Vodacom Cell C (added after complaint #0004 lodged)
Information Provider (IP) (if applicable)	MDG London Ltd / Bombasties / Stixi
Service Type	Content Downloads (Java Games, ring tones, wallpapers, logos etc)
Source of Complaints	Competitor
Complaint Numbers	#0004 #0012 and #0036

Complaint

Complaints were received from a competitor of the SP, concerning advertisements placed by the IP (which appears to be MDG London Ltd, trading under both the names Stixi and Bombasties) in Huisgenoot magazine with dates 2 September 2005 (Complaint #0004), 8 September 2005 (Complaint #0012) and 8 October 2005 (Complaint #0036) respectively. The advertisement bears the brand name "Bombasties" but references also the "Stixi" brand name.

The Complaints concern the appearance of adult content in a magazine with a mass-market circulation.

The following breaches of the WASPA Code of Conduct were raised:

8. Adult services

8.1. Required practices

8.1.2. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult services. Explicit confirmation of a user's age must be obtained prior to the delivery of an adult service.

The Secretariat investigated the Complaint and determined that there may be an additional breach of the WASPA Code of Conduct, namely:

8.2. Prohibited practices

8.2.2. Promotions for adult services must not appear in publications or other media specifically targeted at children.

Investigation

Huisgenoot describes itself as a “general interest family magazine”. According to the South African Advertising Research Foundation’s All Media and Products Survey, Huisgenoot has an average weekly circulation of 340 570 and an average readership of 2 107 000 with more recent figures from the publisher showing a weekly circulation of over 350 000. Of the total readership, 471 000 fall within the 16-24-year-old age group and make up 22.3% of Huisgenoot’s regular readers. Of these readers, 199 000 are described as “students”. There is also a significant amount of content aimed at children in the publication, including regular features including “Disneypret”, “Jongspan” and school projects for children.

The WASPA Code of Conduct defines “adult services” as any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature. There is no requirement that adult services be pornographic in nature, or fall within any specific age categorisation, in terms of the Film and Publications Act, 65 of 1996 or any other applicable standard.

The advertisement in question all have a section for animated pictures, within which is a sub-section titled “volwassene animasie” (adult animations). In this sub-section, all of the graphics are either partially or completely obscured with a red block superimposed on them containing the legend “18+”. Java games, underneath which is a subsection titled “volwassene speletjies!!!” (adult games). In this sub-section of adult games, the content appears to be sexual in nature (“Kamasutra”, “Kamasutra II”, “King of Sex City”, “Oskar and the College girls” and the like) certain of the graphics associated with the games are partially obscured with a red block superimposed on them containing the legend “18+”. Similarly, all three advertisements have a section for colour wallpapers underneath which is a sub-section for “volwassene muurpapier!!!” (adult wallpaper). In this sub-section, all of the graphics are either partially or completely obscured with a red block superimposed on them containing the legend “18+”.

The IP’s practice of superimposing a red block bearing the legend “18+” over the graphics relating to a specific content item is either:

- A clear admission that the content item is adult in nature and restricted to persons over the age of eighteen; or
- Designed to give the impression or implies that the content item is adult in nature and restricted to persons over the age of eighteen.

Access to a sampling of the content indicated that the wallpapers are erotic images of nude or partially clothed models in sexually suggestive poses. Games likewise contain pictures of nude or partially clothed models (both live and drawn / animated) as well as sexually suggestive content. There was no suggestion of “hard core” or

overtly sexually explicit content. There is no indication that the content has been rated by an appropriate rating body (such as the Film and Publications Board) and neither the WASPA Secretariat nor the Adjudicator have the authority or ability to assess the proper rating of the content, however the practice of superimposing a red block bearing the legend "18+" over the graphics relating to a content item can be regarded as a voluntary restriction of content to persons over the age of eighteen.

The Secretariat also considered the provisions of the Display of Certain Publications Regulations 2003, published in terms of the Film and Publications Act, 65 of 1996. These Regulations deal with "sexually-explicit materials" being "images or descriptions of a person or persons, whether real or simulated, engaged in sexual conduct". The Regulations provide, inter alia, that "Any publication containing sexually-explicit materials and which is not enclosed in an opaque wrapper, may not be displayed within easy reach of children or next to or among publications intended for children."

The Secretariat received a response from the SP in respect of all three complaints. The response indicates that the IP placed the advertisements in accordance with the publisher of Huisgenoot's Policies and Procedures and that the advertisements had been approved by the publisher.

The Secretariat obtained a copy of the publisher's policies in respect of the Huisgenoot publication and discussed this policy generically (and not in respect of a specific advertisement) with a representative of the publisher, who indicated:

- There is no formal set of Policies and Procedures and the document provided only an internal guideline. Relevant excerpts of this document specifically provide:
 - 3. Geen naakfoto's. Geen suggestiewe of eksplisiete maniere van poseer nie.
 - 4. Geen suggestiewe prentjies nie.
 - 6. Laat wel gespierde lywe toe, asook meisies wat bikini's aanhet.

(3. No naked photographs. No suggestive or explicit poses. 4. No suggestive pictures. 6. Will allow muscled bodies [explained as a reference to pictures of male models, particularly those showing muscled abdomens or "six packs"] and girls in bikinis)

- They are concerned about the use of graphics to obscure pictures that would otherwise be disallowed, but have allowed these to date.
- They do examine advertisements before publication, to ensure compliance with their guidelines, but this cannot be regarded as an ongoing "approval".
- The considerations in the guidelines apply to a number of publications and are applied more restrictively on a publication such as Huisgenoot, due to its family orientation.

The Secretariat confirmed that there is no age verification mechanism in place to control access to the relevant content.

The Secretariat took note of the Terms and Conditions applicable to the SP's service and in particular, the provision that "The Customer agrees not to submit any SMS

messages for transmission by AM (ie Airborn Messaging), the content whereof is improper, immoral or unlawful or which contains any violent, offensive, discriminatory, illegal or pornographic material.”

While the possible breach of clauses 8.2.2 of the WASPA Code of Conduct was not specifically put to the SP, the nature of the Complaints and the SP’s response thereto are sufficiently general to allow a consideration of this issue.

Decision

The Adjudicator decided to consolidate the three complaints as they relate to the same SP, the same IP and substantially the same advertisement published in substantially the same format and in the same publication.

The Adjudicator upheld the Complaint in respect of 8.1.2 and 8.1.3 of the WASPA Code of Conduct regarding all three advertisements, on the basis that the material referred to in the “volwassene animasie”, “volwassene speeletjies” and “volwassene muurpapier” sub-sections of the advertisement is an “adult service” as broadly defined in the WASPA Code of Conduct and the family orientation of the Huisgenoot publication. The Adjudicator further finds a breach of 8.2.2 of the WASPA Code of Conduct.

The Adjudicator made a specific finding that the practice of obscuring portions of graphics for adult services, in an attempt to render the graphics acceptable for publications of a general nature, to be in contravention of 8.1.2 of the WASPA Code of Conduct. Promotions for adult services **MUST** be in context with the publication or other media in which it appears and obscuring the graphics either indicates that the material is unsuitable for publication or creates the reasonable impression that such material is unsuitable.

The Adjudicator made the further specific finding that adult services may not be promoted in a family orientated publication, such as Huisgenoot, because such a publication is specifically targeted at children. The WASPA Code of Conduct does not require the publication to be “exclusively” targeted at children, only “specifically targeted at children”. While the Huisgenoot publication is not exclusively targeted at children, the presence of a number of sections specifically aimed at children is sufficient for Adjudicator to make the finding that the publication is “specifically targeted at children”. Such prohibition must apply irrespective of the graphics associated with such promotion or the means used to promote the adult services.

The Adjudicator made no finding regarding:

- Whether the material advertised could be regarded as “pornographic material” or not;
- What an appropriate age categorisation for such material would be;
- Compliance with the Display of Certain Publications Regulations 2003,

as this is outside the Adjudicator’s mandate in terms of the WASPA Code of Conduct. The Adjudicator warned that certain of the adult services advertised might possibly be considered “sexually-explicit materials” in terms of the Display of Certain

Publications Regulations 2003, with potentially disastrous consequences for the publisher of Huisgenoot.

The Adjudicator expressed his concern that the SP did even address the question of applying its own Terms and Conditions to the content provided by the IP.

The Adjudicator has imposed the following sanctions in respect of the three Complaints:

- The SP is formally reprimanded for its failure to comply with the WASPA Code of Conduct;
- The SP is ordered to pay a fine totalling R6 000 in respect of its breach of clauses 8.1.2 and 8.2.2 of the WASPA Code of Conduct;
- The SP is ordered to pay a fine totalling R6 000 in respect of its breach of clause 8.1.3 of the WASPA Code of Conduct;
- The SP is required to remedy its breach of 8.1.3 of the WASPA Code of Conduct; and
- The SP is required to amend its advertising to comply with the WASPA Code of Conduct. It is noted that different publications have different lead times for submission of advertisements. The SP is accordingly ordered to notify the WASPA Secretariat of any advertisements placed prior to notification and which advertisements cannot reasonably be amended to comply with this order and an explanation why such amendment cannot reasonably take place.

The Adjudicator notes that the age verification requirement applies irrespective of whether an appropriate body has rated the content or not; particularly as the practice of superimposing a red block bearing the legend "18+" over the graphics relating to a content item can be regarded as a voluntary restriction of content to persons over the age of eighteen.

Fines are payable to the WASPA within five (5) working days of notification of this sanction. Should an appeal be lodged, the fine will be suspended until the determination of the appeal. Should the fine be upheld (in whole or in part, or increased) the fine will be payable within five (5) working days of notification of the appeal finding.