

<b>WASPA Member (SP)</b>	Sybase 365
<b>Information Provider (IP)</b>	Cellcast Media Sarl
<b>Service Type</b>	Subscription
<b>Source of Complaint</b>	Competitor
<b>Complaint Number</b>	#2407
<b>Code of Conduct Version</b>	5.3
<b>Date of Adjudication</b>	16/01/2008

---

## **Complaint**

The competitor Complainant in this matter, who requested and was granted anonymity, alleged a breach of section 11.1.2 of the WASPA Code of Conduct which requires any request from a customer to join a subscription service to be an independent transaction entered into with the specific intent to join the subscription service.

---

## **SP Response**

The Response provided by the SP is reproduced in full:

“The WASPA formal complaint procedure email for complaint number 2407 (the “WASPA email”) contains details of the complaint (which was the first notification of the complaint) and details the section of the Code of Conduct that the complainant alleges has been breached and identifies the WASP (Wireless Application Service Provider). Under section 13.3.4 the WASPA member identified in the complaint is given five working days to respond to the complaint. In the WASPA email and the complaint, Sybase 365 is identified as the WASP. As detailed above, while Sybase 365 is a WASP for the purposes of the Code of Conduct the Services are provided by the Information Provider and as such, Sybase 365 bears no substantial responsibility for any breaches of the Code of Conduct that might occur and is taking all reasonable steps to ensure that the risk of any breaches is minimised.

Sybase 365 as a matter of course monitors complaints received from consumers and other interested parties as it is a useful way of identifying those services that require closer scrutiny and Sybase 365 has received very few complaints for the

Services. As soon as we received the WASPA email, Sybase 365 liaised with the Information Provider and the website promotional materials were removed from circulation and will be reviewed and amended where necessary to ensure that they are compliant with the Code of Conduct. It should also be noted that on the page identified in the complaint where a user is prompted to send a code to the shortcode 31636, the promotional materials clearly stated the price next to the shortcode, i.e., '31636(R30/week)' with the following words just below the shortcode: 'Please note that this is a subscription service'. The same page also details the following 'Get 3 hot Ringtones + 10 bonus wallpapers per week. R30/week. Stop service at anytime by sending STOP to short code 31636'. In addition, the user receives the usual introduction and confirmation message."

---

## **Sections of the Code considered**

The following sections of Version 5.3 of the WASPA Code of Conduct were considered:

2.5.1. "**Bundling**" means automatically subscribing a consumer to a subscription service in response to a request from that consumer for a single content item.

### **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".

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 bundled with a request for a specific content item.

11.1.3. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

The following sections of the WASPA Advertising Rules were considered:

**2.3.13 SUBSCRIPTION SERVICES:** Show Total Subscription Charge, Frequency of Charge, any bearer charges and any additional charge/s

(i) **Must Use The Words "Subscription Service"**

If the Content provider is providing a continuous, subscription-like or subscription based service, then the words “Subscription Service” must be prominently displayed at the top section of the advertisement as well as at each Content or service section in the advertisement where various subscription types are displayed.

No acronym, letter (eg “S”), number, abbreviation (eg “Subs”), icon, or any other mark may be used as an alternative to the words “Subscription Service” anywhere in the advertisement when that Content is only available at all and/or at a particular cost as part of a subscription service.

**(ii) Must Indicate Charge/s:**

The advertisement must indicate in the font size, position and type as indicated:

- (a) The TOTAL charge that the consumer will incur for the subscription component of their access to that subscription service.
- (b) The frequency (and the minimum frequency, if applicable) at which they will be charged for the subscription component of access to that subscription service.
- (c) Whether, in addition to the periodic subscription charges in (a) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement.

---

**Decision**

In the reviewing the matter at hand the Adjudicator had to rely on the screenshots given to him and further apply his mind to the subsequent response received from the SP.

In assessing what would precisely constitute a breach of section 11.1.2 the Adjudicator found it appropriate to refer to some previous precedents and opinions formulated on the issue of bundling.

In the adjudication of complaints #0610 and #0611<sup>1</sup> the Adjudicator in that matter provided a comprehensive summary for the interpretation of section 11.1.2:

“Has the SP breached section 11.1.2 of the Code by bundling a request from a subscriber to join a subscription service with a request for a specific content item?

At the outset it should be noted that section 11.1.2 of the WASPA Code of Conduct has been amended with effect from 25 August 2006 by the addition of the underlined portion:

“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

---

<sup>1</sup> <http://www.waspa.org.za/code/download/0610.pdf>

a service. A request from a subscriber to join a subscription service may not be bundled with a request for a specific content item.”

The addition has, it is submitted, the effect of clarifying what has, to date, been a somewhat controversial area of the Code.

In the WASPA Appeal Panel Findings for Complaint no #0002 #0011 #0026 #0037 #0058 the Appeal Panel had cause to consider the meaning of section 11.2 (as it then existed without the underlined portion) of the Code. After noting that the clause did admit to some ambiguity, the Appeal Panel stated:

“The meaning of clause 11.1.2 becomes apparent if it is read in context with the rest of clause 11.1, especially the heading of clause 11.1 (*“Manner of subscription”*) and clause 11.1.4. Clause 11.1.4 provides that customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. It becomes clear that clause 11.1.2 prohibits the subscription service from being dependent on the ordering of content and that the customer must be specifically intent on subscribing to a subscription service and not the ordering of content.

The second part of clause 11.1.2 also makes it clear that an offer to customers to sign up for a subscription service should not mislead customers to believe that they are subscribing to anything other than a subscription service. We are therefore of the view that clause 11.1.2 prohibits requests for subscription services from being dependent on requests for specific items of content.” (my emphasis)

In the Adjudicator’s Report in respect of Complaint #0022 the Independent Adjudicator laid out the approach to be taken and some of the factors to be taken into account in determining whether any particular advert breaches section 11 of the Code.

“It is reasonable and appropriate for providers of subscription services to give customers and potential customers of their subscription service an indication of the type of content or service to be delivered. However, use of one or more specific items of content as an indication or example of content to be provided in terms of a subscription service, has the possibility of confusing a customer or potential customer so that they believe they are acquiring a specific content item or service rather than subscribing to a subscription service. This is prohibited in Clause 4.1.1 of the WASPA Code of Conduct requiring honest and fair dealings with customers and Clause 4.1.2 of the WASPA Code of Conduct requiring members to “not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission”. Advertising of this nature is also likely to be in breach of Clause 11.1 of the WASPA Code of Conduct.

However, the WASPA Code of Conduct does not specifically prohibit the use of a content item or items in advertising for a subscription service; provided that the content item or items is clearly and only being used as an indication or example of the type of content to be provided in terms of the subscription service. This is of course subject to the further proviso that such use does not breach Clauses 4.1.1, 4.1.2 and 11.1.1 of the WASPA Code of Conduct and that the business processes involved do not breach Clauses 11.1.2 and 11.1.4 of the WASPA Code of Conduct (as these Clauses or other Clauses of the WASPA Code of Conduct may be amplified or further explained by advisories issued by WASPA from time to time, in this case the WASPA Advisory on Subscription Services).

Assessing whether a content item or items is clearly and only being used as an indication or example, or whether it is likely to mislead (intentionally or unintentionally) can only be done in the context of the specific advertisement. There are a number of factors to be

considered, both individually and in relation to each other inter alia and by way of example only, including:

- The use of keywords. Specific content is more likely to be an example only if a single, generic keyword used for the subscription request, while the use of one or more content specific or content related keywords is likely to cause confusion.
- The indication that the service being advertised is a subscription service and the prominence and clarity of such indication (visual, auditory or otherwise); particularly in comparison with the indication (visual, auditory or otherwise) of the content example/s.
- The indication that there will be a continual billing process and the billing frequency as well as an indication of the amount to be billed and the prominence and clarity of such indication.
- The indication that there will be ongoing, continual and regular delivery of content and the frequency of such delivery, having regard to the prominence and clarity of such indication.
- Whether there is a mix of content items and a subscription service being advertised or only a subscription service.
- Whether the same short code or access number is used for both content items and a subscription service.
- Whether similar key words are used for content items and a subscription service.
- The clear differentiation between the content examples or indicators and the subscription service itself.” (my emphasis)

It is clear from the above that so-called “hybrid” adverts – adverts that combine the promotion of a subscription service with specific content – are neither expressly prohibited nor permitted by the Code. SPs who use such adverts should, however, be aware of the clear risk of heightened confusion in the minds of consumers and the accompanying possibility of other breaches of the Code and/or Advertising Rules.”

Firstly, it is important to note that section 11.1.2 and section 2.5.1 of the Code, in the opinion of the Adjudicator, must be read in conjunction with one another to provide better clarity as to its interpretation.

Having reviewed the first screenshot of the advertisement given, the Adjudicator is of the opinion that such page has all the characteristics of a specific content request. But having said that, and taking all of the above (#0610 & #0611) in consideration, it might also be interpreted as an example or indication of what might be expected in the subscription service. What is important to note here is the definition provided for “Bundling” in section 2.5.1 of the Code:

““**Bundling**” means automatically subscribing a consumer to a subscription service in response to a request from that consumer for a single content item.”

The customer at this stage is not **automatically subscribed** to a subscription service.

On the second screenshot given, a request is issued to the customer wherein he/she must provide full details of his/her country and type of phone. Once again here, the customer is not **automatically subscribed** to a subscription service.

When reviewing the third screenshot, clear indication is given that the item requested, is in fact part of a subscription service and a detailed description of the costs involved are provided. It would only be **after** this stage has been completed that the customer would be subscribed to a subscription service.

As was indicated in the above adjudication of complaints #610 and #611, so-called “hybrid” adverts – adverts that combine the promotion of a subscription service with specific content – are neither expressly prohibited nor permitted by the Code. The adjudication went further and stated that SPs who use such adverts should, however, be aware of the clear risk of heightened confusion in the minds of consumers and the accompanying possibility of other breaches of the Code and/or Advertising Rules.

It seems clear that this advertisement does indeed fall under the so-called “hybrid” adverts. However, whether there is confusion in this matter is something that the Adjudicator is not too convinced about. The complaint is dismissed.

---