

REPORT OF THE ADJUDICATOR

WASPA Member (SP): AMV Holding Limited

Information Provider (IP):
(if applicable)

Service Type: WAP downloads

Complainant: Competitor

Complaint Number: 4737

Code version: Code v6.1 and Ad Rules v1.6

Date of Report: 2/11/2008

Complaint

1. On the 25th of August 2008 the Complainant, who is employed by a competitor of the Member, lodged the following complaint via the WASPA website:

Affiliations: I am employed by, or otherwise associated with one of WASPA's member companies

Affiliation_Information: LuckyMobile - member of codecom

Name_WASP: Unknown

OtherID: wap.blingmob.com

Code_Breached: 4.1 Provision of Information to customers

4.1.1 ,4.1.2 - with regards to pricing and the information in the TERMS

5.2 Identification of Spam

5.2.1 (b) clicking on a wap banner doesn't constitute a commercial relationship. Users that click on a wap banner start receiving wap pushes after 8pm. (083 873 8580 received one on a Sunday night after 9 pm)

6.2 Pricing of services -

6.2.2 - 6.2.4: The pricing is purposefully misleading

Detailed_Description_Complaint: Blingmob seem to be running misleading wap adverts on publisher sites such as Mocospace and Cellufun. These ads promote games and content for "free" - yet, they are not free and the pricing seems to be purposely hidden & misleading for the consumer. These ads

and the communication on the wap pages which they click through to purposely deceive the user with regards to pricing and what he/she can actually download for 'FREE'. As the pricing is not clear and users are made to believe they will be getting this content for free, I think many unsuspecting users will fall prey to this and end up being billed for content they are not sure they ordered or even requested. Even the most sophisticated wap browsing regular would get confused by this misleading price point and ambiguous terms and conditions on these pages. I will send an email with screenshots to complaints@waspa.co.za to accompany this complaint

2. The Complainant then forwarded a series of examples to the WASPA Secretariat along with two sets of screenshots of the Member's WAP site and further amplifications of the complaint. A selection of these screenshots are referred to as examples 1 and 2 respectively and attached as annexure "A".
 3. In summary, the complaint can be broken into several heads:
 - 3.1. That the Member was advertising content as free in such a way that consumers would be confused into downloading content that was not free. In both examples the WAP site contains a header exhorting the consumer to scroll down to access free content. The free content itself is then accessed by means of an inconspicuous link towards the bottom of a rather long page, which would not be displayed without scrolling down on a WAP browser.
 - 3.2. That the pricing of downloads was misleading, confusing or otherwise in breach of the WASPA Code of Conduct. Each example contained a reproduction of one of the Member's WAP pages, both of which apparently contained links to other pages containing the actual content.
 - 3.2.1. In example a the pricing for downloads appeared only at the bottom of the WAP page in small text as "game cost R30.00" (*sic*).
 - 3.2.2. A content page reproduced in example 1 listed specific games for download, but did not list pricing next to each game or indeed at all.
 - 3.2.3. In example 2 the following statement appears at the top of the WAP page: "3 items per page. Pages you click and view charged at R30 each."
 - 3.3. That by clicking on advertisements for the Member's service, consumers were automatically subscribed to a marketing mailing list, some of which were sent out of the so-called "watershed hours". The Complainant was of the view that merely clicking on a banner advertisement does not constitute a commercial relationship as contemplated in the Code of Conduct which would allow for the Member to send consumers marketing material.
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Response

4. The Member responded by email on the 3rd of September. The response to the first two heads of the complaint was as follows:

4.1. In respect of section 4 of the Code of Conduct:

The allegation is that our advertising of free content on a WAP banner is misleading, because when the user clicks the banner and navigates to our WAP page, the user is misled into purchasing premium chargeable content.

The complainant states that our site does not clearly define the pricing of chargeable items, and that it misleads users into thinking that this content is free.

We only promote content as free, whereby a user can access the promoted WAP site, easily navigate to the free content, download the free content and then leave the site, and only for the cost of the user's standard network bearer charges.

In both site examples provided by the complainant, a prominent link advertising the free content is clearly present. The user clicks on this link to access the free content. Here, the user is presented either one or several free content choices. The user may download this content and leave the site. The user will not be charged.

It is true and valid that both WAP sites in question do contain offerings of chargeable content. It is up to the user whether or not they choose to access this content.

We believe that the pricing of the chargeable content is clearly advertised both at the top of the WAP site, in the terms section of the WAP site, and by means of the confirmation page, which users must click to accept any charges.

The complainant conveniently omitted to mention the existence of these confirmation pages in their complaint. All users must accept the charges before they can proceed, by clicking their acceptance. This applies to all AMV WAP services where the access / download fee is in excess of R10.

Under section 4.1.1 we submit that our pricing on both the WAP site, coupled with the mechanics of the confirmation pages is clear and compliant with the Code. There is no breach of section 4.1.1.

With regard to section 4.1.2 we do not agree that our using the word FREE to advertise the existence of free content on our WAP site is false or deceptive.

The free content link is prominently carried on the WAP site, together with instructions to scroll down for your free game. We also emphasise close to the top of the home-page that users should see terms for full details. The first line of the terms section begins: Free game terms: Your FREE GAME must be downloaded from the link above. The link is named "Free Game" or Click here for Free Game (or item/content in some cases, depending on the WAP site).

A user can genuinely and simply gain access to the free content without spending money on chargeable content. We therefore disagree that there has been a breach under section 4.1.2.

4.2. In respect of clause 6 of the Code of Conduct:

Without repeating ourselves we believe our arguments relating to the application of section 4 of the Code are also relevant here.

We therefore refer the Secretariat back to our comments relating to section 4, above.

The complainant's assertion that users may "fall prey" is highly emotive and unfounded.

Our WAP site pricing, coupled with our pricing confirmation pages that require active consent to billing by the consumer are clear, unambiguous and compliant with the Code v6.1.

5. The Member's response to the accusation of its having sent spam was as follows:

The complainant accuses AMV of opting him/her in for receiving marketing messages without valid consent.

AMV strongly disagrees with this accusation, and can assure WASPA that no user will ever receive AMV promotions unless a genuine marketing relationship has been established. As the terms in the WAP site state, any user that accesses (with regards to the free item/s only) or purchases content from the WAP site, agrees to receive marketing messages. Clear and simple opt-out instructions are given on all sites.

We do not agree in these circumstances that section 5.2 applies, due to our defence under 5.2.1(b).

Portion of the Code Considered

6. The following sections of the Code of Conduct are relevant here:

4. Customer relations

4.1. Provision of information to customers

4.1.1. Members are committed to 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.

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5. Commercial communications

5.1. Sending of commercial communications

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5.1.8. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the upfront description of the service.

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5.2. Identification of spam

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

(a) the recipient has requested the message;

(b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or

(c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.2.2. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

5.3. Prevention of spam

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

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6. Advertising and pricing

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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.

...

6.2.11. For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:

(a) If the transaction is billed at R10 or more, the member initiating this transaction must obtain specific confirmation from the customer and keep a record of such confirmation.

(b) If the transaction is billed at less than R10, the price for the transaction must be clearly indicated as part of, or immediately next to, the link or option that will initiate the transaction.

7. The WASPA Advertising Rules, incorporated by reference into the Code of Conduct in terms of section 6.1.1 thereof are also relevant, specifically:

9.2.2.2 Position of Access Cost Text

While cost information associated with an access number may be displayed elsewhere on a web site (for example cost information also placed in the T&C page of a web site), this must be done as part of a duplication of the pricing. Hence, cost information cannot solely be placed on, for example only the T&C page where accessing the T&C page requires that the user click away from the initial page that displayed the access number.

- The consumer should thus not have to scroll down significantly on that same page or follow any links to other pages to be made aware of the full pricing and T&C associated with a unique access number.

Decision

Confusing advertising of “free” content

8. While the Member’s argument that the content advertised as free is indeed free with no associated costs whatever apart from bearer charges is an attractive one, a closer examination of the examples furnished as part of the complaint shows something rather insidious. The link for the “free download” in example 2 is nestled between several links to content pages. As discussed elsewhere, clicking on any of these content pages would result in the consumer being charged R30. In the case of example 1, the link for the free content is the last on the page, but is nonetheless very similar in appearance to the “charged” links. The conclusion is inescapable that there is a likelihood, whether this is intentional or otherwise on the part of the Member, that consumers will accidentally click on one of these “charged” links when tempting to access free content. Accordingly, while the Member has not breached section 6.5.1, it has indeed breached section 4.1.2.

Misleading Pricing

9. In respect of the complaint that the Member’s pricing as set out in the first example was hidden and misleading in that it was tucked away at the bottom of a long WAP page, I refer to section 9.2.2.2 of the Advertising Rules which makes it clear that the consumer should not have to scroll down to the bottom of the page to view the price for a download. The Member has thus clearly infringed this section.

10. More seriously, the Member's failure to display any pricing at all on the actual content page in example 1 is not only an infringement of the above section of the advertising rules, but a clear infringement of section 6.2.2 of the Code of Conduct.
11. The Member argues that consumers are required to confirm that they accept the Member's charge when the debit would be more than R10. Not only is this beside the point, it also provides scant protection to consumers whose download charge will be LESS than R10.
12. I am aware that several complaints have been made against the Member in respect of its policy of charging consumers for viewing a page of content rather than in respect of each item of content downloaded from it. I am in full agreement with the remarks of the adjudicator in that regard as set out in the report to complaint number 4613. The practice is patently misleading and exploitative of consumers, and the instance thereof set out in example 2 of this complaint is a clear infringement of section 4.1.1 of the Code of Conduct.

Spam

13. I do not believe that the mere act of clicking on a banner advertisement is sufficient to establish a commercial relationship as contemplated in section 5.2.1(b) of the Code of Conduct. Accordingly if members of the public who clicked on a banner advertisement and were taken to the Member's "landing page" were automatically subscribed to receive the Member's marketing messages, such messages would constitute spam.
14. It is not clear from the complaint at what stage the visitor's MSISDN would be recorded for marketing purposes. Certainly the visitor could not have given consent merely by visiting the "landing page". However, there is no evidence that MSISDNs were recorded at that stage rather than when the visitor actually accessed content, having read the Member's terms and conditions. Accordingly I cannot make a finding that the Member has been guilty of sending marketing material without the consent of visitors to its sites.
15. Certainly if someone downloaded content from the Member, this would constitute a commercial relationship and the Member would be entitled to address marketing material to that person. Given that the Member's current charging model is in breach of the Code of Conduct, however, those people who were charged for accessing the Member's content pages can not be said to have entered into a commercial relationship with the Member as contemplated in section 5.2.1(b), and hence the MSISDNs obtained from that source can not be used for sending promotional material.
16. The Member argues that anyone who accesses content on its site has agreed to receive marketing messages. Certainly the Member's terms and conditions in both examples state that "By accessing / purchasing content on this site you agree to receive marketing messages..." Similarly, however, given that visitors would be charged for merely visiting a page, this consent cannot be said to have been validly give.

17. Accordingly the Member has neither a commercial relationship with those who visited WAP site, nor has it obtained their consent to send commercial messages.
 18. The Member has hence infringed section 5.3.1 of the Code of Conduct.
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Sanction

19. In imposing a sanction in this matter I have taken into account the following factors:
 - 19.1. The great number of similar complaints against the Member for similar infractions of the Code of Conduct (4613, 4650, 4654, 4658, 4680, 4681, and 4885 to name but a few),
 - 19.2. The great potential for prejudice to the consumer as a result of the Member's practices.
20. The Member is fined an amount of R 25 000 for its breaches of section 4.1.1 of the WASPA Code of Conduct.
21. No fine is levied against the Member for its breach of section 5.3.1 of the Code of Conduct, but the Member is to delete all MSISDNs from its marketing database which it obtained from consumer interactions with any of its WAP sites up until the date of this adjudication, and ensure that it sends no further marketing material to any such MSISDN.
22. The Member is to suspend operation of all of its WAP sites until it has confirmed with the WASPA Secretariat in writing that it has ceased to charge by page viewed rather than by item downloaded. This means that the Member is to make the WAP sites unavailable to the public, to cease advertising such WAP sites, and to cease billing relating to the services operated from them.
23. Operation of the sanction set out in paragraph 22 shall not be suspended pending an appeal by the Member.

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Annexure A

Example 1

Wap Menu


**Game Zone
TOP GAMES**

Scroll Down for your FREE game!
See terms for full details

NEW GAMES


**ULTIMATE
SPIDER-MAN**

[Ultimate Spiderman](#)

[CLICK HERE TO VIEW MORE NEW GAMES!](#)

BEST SELLERS


Ironman

[Ironman](#)

[CLICK HERE TO VIEW MORE BEST SELLERS!](#)

SEXY GAMES


**VIRTUAL
GIRLFRIEND**

[Virtual Girlfriend](#)

GIRLY GAMES


**AMA
Speed
Date**

[Speed Date](#)

[CLICK HERE TO VIEW MORE GIRLY GAMES!](#)

LOGIC & QUIZ GAMES


**Kasparov
CHESS**

[Kasparov Chess](#)

[CLICK HERE TO VIEW MORE LOGIC/QUIZ GAME!](#)

[CLICK HERE TO VIEW MORE SPORTS GAMES!](#)

[CLICK HERE FOR THE BEST RACING GAMES!](#)

[CLICK HERE FOR MORE ACTION/ADVENTURE GAMES!](#)


**BUDGET
GAMES
R30**

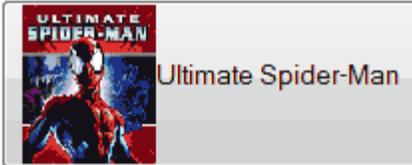
[Click here for your free game!](#)

Free game terms: Your FREE GAME must be downloaded from the link above. These are 100% no obligation FREE GAMES. No questions asked!

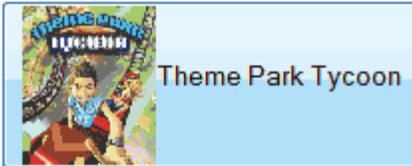
NO SUBSCRIPTIONS! Operator browsing charges may apply. Users must be aged 16+. For support call 0114610317 or email help@blue-stream.biz. game cost R30.00.
Provider BlueStream POBox 2952 London WC1N 3XX, UK.

By accessing/purchasing content on this site you agree to receive marketing messages, to opt out, reply OPT-OUT to 31434

Javagames



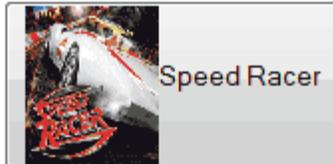
Ultimate Spider-Man



Theme Park Tycoon



The Spiderwick Chronicles



Speed Racer

Next >

[home](#)

Example 2

Wap Menu



3 items per page.
Pages you click & view
charged at R30 each.

**SCROLL DOWN FOR
YOUR FREE ITEM!**

See terms for full details



Click here for great walls!



Cute male celeb pics

Great celeb vids here!

Click here for female celeb pics



Insane movies here!

Love wallpapers!

Cute + fluffy walls!

Wicked wheels

Cool animations

**CLICK HERE FOR YOUR
FREE ITEM**



Get top tunes on your mob



Click link above for Top Games!

Free Item Terms: Your FREE item must be downloaded from the link above. This is a 100 percent no obligation free video pack. No questions asked!

16+ This WAP menu is charged at R30 per page viewed (3 Videos per page, R10 per video). All videos on each page may be downloaded inclusive of this price. To end marketing sms STOP to 31931. Provider: BS Mobile BCM Box London WC1N3XX help: 0114610317 or e-mail: help@blue-stream.biz

By accessing/purchasing content on this site you agree to receive marketing messages, to opt out, reply OPT-OUT to 31931