



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP):</b>	<b>Blinck Mobile</b>
<b>Information Provider (IP): (if applicable)</b>	<b>N/A</b>
<b>Service Type:</b>	<b>Subscription</b>
<b>Complainant:</b>	<b>WASPA Monitor</b>
<b>Complaint Number:</b>	<b>6240</b>
<b>Code version:</b>	<b>Code v7.0 and Ad Rules v2.3</b>
<b>Date of Report:</b>	<b>26 June 2009</b>

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### Complaint & Response

1. On the 16<sup>th</sup> of April 2009 the WASPA Monitor lodged a complaint against the member in the following terms:

Date of breach: 16 april 2009

WASP or service: Blinck 31631

Clauses breached: 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 a request for a specific content item.

11.1.3. An advert for a subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed.

3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

3.1.2. Members are committed to lawful conduct at all times.

3.3.1. Members will not offer or promise services that they are unable to provide.

Description of complaint:

The attached tv commercial flighted on air from 10 April 2009.

The commercial is making use of one content item in an effort to sell a sub service - this is in breach of code 11.1.2.

Also, the commercial is featuring a cellphone as a remote device that can open cars. Whilst this is a advertising concept, and it features a voice over saying "it's not real but it's fun", the advertising can definitely mislead an average viewer. The content received when sms'ing "car" to 31631, is purely a tone. This service / commercial has been produced on the same principal as the Friend Tracker service, recently suspended.

It is suggested the commercial be taken off air with immediate effect and it is also recommended that the tv creative executions promote the actual product i.e. ringtones.

Urgent complaint:

The Monitor considers this to be an urgent complaint and requests that the Secretariat considers this for review by an emergency panel.

The WASPA Monitor has flagged this complaint for an emergency panel review. This may be avoided if you take immediate steps to remedy the breaches identified and notify the WASPA Secretariat accordingly.

2. The WASPA Monitor also provided a video clip of the advertisement in question.
3. The WASPA Secretariat informed the Member of the complaint per email on the following day. On Tuesday the 21<sup>st</sup> of April the Member informed the WASPA Secretariat that it had decided to take the advertisement off the air before the weekend.
4. The following day the Member submitted its response to the complaint, the relevant portions of which read as follows:

**Issue 1:** Alleged breach of Article 11.1.2 and 11.1.3 of the Code of Code of Conduct

Blinck's response:

Due to the short advance notice period of the new Code of Conduct, we have not been able to revise our commercials in order to comply with the new Code of Conduct before the 1st of April, but are in the process of doing so. We have pro-actively informed WASPA of this process on the 8th of April by email of Marc Bovy but adjusting the TV-commercials takes some time because of the need for new design, the need for a new Voice Over and the trafficking of the new commercials to the TV Stations. Blinck will send another update to WASPA on this process before the end of this week.

Considering the fact that we have informed WASPA pro-actively that we were in the process of adjusting our TV-commercials, we were surprised to receive a formal complaint about non-compliance with the new Code of Conduct.

**Issue 2:** Alleged breach of Article 3.1.1., 3.1.2 and 3.3.1 of the Code of Conduct.

The Complaint claims that in respect to the above Articles, the commercial is misleading to an average customer, since the commercial advertises a remote device that can open cars, but that the customer will only receive a tone.

Blinck's Response:

Blinck does not believe this commercial misleads a customer into thinking they will receive a remote device that can open cars. An average customer does not think that with downloading an item on its cell phone he/she can open any car. Even if it would be technically possible, a customer would know that it would be illegal and that such an illegal device would not be sold by a. a big ringtone service provider and b. advertised on television. Furthermore, the voice-over clearly says: "It's not real but it's fun!". In our view, the commercial makes it clear to the customer that the item he or she is buying can only be used for fun purposes, in this case by playing the sound of a car opening on your mobile letting your friends believe that you can open a certain car, e.g. an expensive car on the street where you and your friends are walking.

Blinck is therefore of the opinion that no breach of the Articles 3.1.1., 3.1.2 and 3.3.1 of the Code of Conduct has occurred.

**Closing Remarks**

Following this complaint, we have taken the commercial off the air in order to avoid any further escalation of this matter. Furthermore, by the end of this week, we will send WASPA another update on our process of adjusting our other TV-commercials.

5. The WASPA Monitor responded to the Member's submission on the 24<sup>th</sup> of April as follows:

Blinck often makes use of concepts that are "not real" and we need some direction from an adjudicator, for ourselves and for Blinck going forward. In my view, if a ringtone service is being promoted, that is what the advertisement should communicate. Our average public / viewer cannot be expected to come to a conclusion that (a) a big SP or (b) it's illegal and therefore it must be a ringtone; within a 30 second commercial. There is so much information on an average commercial: What number to sms, what keyword to sms, how much does this cost etc etc etc.

6. On the 12<sup>th</sup> of May 2009 the WASPA Secretariat notified that the matter was being referred to an emergency panel as the offending advertisement had been broadcast as late as the 29<sup>th</sup> of April. The Member responded the same day as follows:

In our response to WASPA complaint # 6240 we informed WASPA that the advert would be withdrawn before the weekend. This was in accordance with the information I received from our sales team who had instructed the stations to do so. However, because of the fact that the 22nd, 24th and 27th of April are public holidays in South-Africa, the stations needed more time to implement the new rotation schedule. In this new rotation schedule we had removed the CAR opener advert. Because of this delay, the advert was still broadcasted on the following days:

Commercial	Date	Channel aired							
		MTVBase	MTV	MK89	GO	STYLE NETW	BOOMERANG	CARTOON	CO
Car	Sat 25 Apr	MTVBase	MTV	MK89	GO	STYLE NETW	BOOMERANG	CARTOON	CO
	Sun 26 Apr	MTVBase	MTV	MK89	GO	STYLE NETW	BOOMERANG	CARTOON	CO
	Mon 27 Apr	MTVBase	MTV			STYLE NETW			
	Tue 28 Apr	MTVBase	MTV			STYLE NETW			
	Wed 29 Apr	MTVBase	MTV			STYLE NETW			
	Thu 30 Apr	MTVBase	MTV						

After 30 April, the advert was not broadcasted again.

I have informed our sales team that next time I need to be informed of these kind of delays, so that I am able to inform WASPA accordingly.

7. The Emergency Panel considered the matter on the 13th of May and issued the following notice:

Complaint 6240: Blink Mobile

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Complaint 6240 was lodged by the WASPA Monitor, and relates to an advertisement for an "Open Any Car" service. The service provider for this service is Blink Mobile.

This complaint has been sent to the SP for a response, as part of the formal complaint procedure, and the SP's reply was made available to the emergency panel.

Of particular concern in this case is the fact that the WASPA Monitor reports that the advert that is the subject of this complaint aired on 2009-04-29, despite a commitment provided by the SP on 2009-04-21 that the advertisement would be withdrawn "by the weekend".

After reviewing the available information, the emergency panel concluded that there is evidence of prima facie breaches of clauses 11.1.2 and 11.1.3 of the WASPA Code of Conduct, as well as prima facie evidence of breaches of the Advertising Rules regarding subscription service advertising.

In addition, based on the SP's undertaking to withdraw the advert and consequent failure to do so promptly, the panel found that there was also a prima facie breach of clause 3.1.1 of the WASPA Code of Conduct.

Consequently:

1. The panel orders Blink Mobile to withdraw the advert which is the subject of complaint 6240 with immediate effect.
2. The panel orders Blink Mobile to also withdraw any advert which has been identified by the WASPA Media Monitor as being allegedly in

breach of clauses 11.1.2 and 11.1.3 of the WASPA Code of Conduct with immediate effect.

3. The above orders apply until the conclusion of the formal review of the applicable complaints.

4. The panel orders that Blink Mobile send the following SMS notification to all subscribers of the "Open Any Car" service: "U r subscribed to Blink Mobile's OPEN ANY CAR. Cost R60/week. For help call 0800980963. To unsubscribe sms CAR STOP to 31631. This notice ordered by WASPA."

The panel requests that the WASPA Secretariat expedite the adjudication of this complaint.

8. There was further correspondence regarding the correct format to be used by the Member in complying with point 4 of the notice, which need not concern us here.
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### **Portion of the Code Considered**

9. The conduct complained of took place on the 16<sup>th</sup> of April 2009, and accordingly version 7.0 of the Code of Conduct is applicable.

10. The following sections of the Code of Conduct are relevant to this complaint:

#### **3. General provisions**

##### **3.1. Professional and lawful conduct**

3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

3.1.2. Members are committed to lawful conduct at all times.

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##### **3.3. Service levels**

3.3.1. Members will not offer or promise services that they are unable to provide.

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#### **11. Subscription services**

##### **11.1. Manner of subscription**

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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 a request for a specific content item.

11.1.3. An advert for a subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed.

11. The Emergency Panel referred to the advertising rules, which are incorporated by reference into the Code of Conduct by clause 6.1.1 of the Code of Conduct.
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## Decision

12. It is alleged that the Member has infringed the Code of Conduct on three counts, which I will deal with *seriatim*:
- 12.1. That the commercial in question infringed clauses 11.1.2, 11.1.3 and the advertising rules relating to subscription services in that it amounts to “bundling” of a subscription with a request for a single content item;
  - 12.2. That the advertisement was misleading and offered a service that the Member was not really able to provide, allegedly an infringement of clauses 3.3.1 and 4.1.2 of the Code of Conduct; and
  - 12.3. That the Member acted unprofessionally in undertaking to withdraw the advertisement in question and then failing to do so within the timeframe it had promised to adhere to, an infringement of clause 3.1.1.

## Bundling

13. Previous versions of the Code of Conduct were somewhat vague as to what Members had to do to ensure that they did not give the impression that only a single content item was being advertised when in fact the item was an example of items that would be available under a subscription service. Version 7.0 of the WASPA Code of Conduct introduced clause 11.1.3, requiring that advertisements for subscription services should display at least two such items.
14. The service being advertised is for downloads of sound files to be played on a handset. The WASPA Monitor is of the view that these are really ring tones, but they are probably not intended to be used as such. While the advertisement does display a succession of motor vehicles each being “unlocked” when the sound is played, the sound played in the advertisement does not vary between vehicles. Accordingly the Member has not complied with the provisions of clause 11.1.3 of version 7.0 of the Code of Conduct. In its defence the Member says both that it was not able to modify its advertising quickly enough to take account of the change when version 7.0 came into effect (which it says occurred on the 1<sup>st</sup> of April rather than the actual date of 25<sup>th</sup> of March), and that it had made WASPA aware of its inability to do so on the 8<sup>th</sup> of April.
15. There were no transitional arrangements made by the WASPA Secretariat giving Members a certain time to make changes to their advertising so as to comply with

the insertion of clause 11.1.3 into the Code of Conduct. Accordingly the Members would be expected to have made such changes within a reasonable time. Three weeks is not a reasonable time under the circumstances. Further, advising the WASPA Secretariat of an inability to adhere to the changes AFTER they have been implemented is no excuse for failing to comply with the changed Code of Conduct. If the Member could not make changes to its advertising in time it should have withdrawn its advertising. Accordingly I find that the Member has infringed clause 11.1.3 of the Code of Conduct.

16. The advertisement only features a single “tone” unlocking a variety of cars. While the advertisement clearly displays the words “subscription service” this does not serve as a talisman against all accusations of “bundling”. The overriding impression is of a single product being acquired, and the advertisement does not feature the voice-over “get them all” as is the case in similar advertisements by the same Member. Accordingly I find that the Member has infringed clause 11.1.2 as well.

#### Misleading Advertising

17. While the WASPA Monitor is of the view that this advertisement is of the same ilk as the “Friend tracker” product dealt with in complaint 6034, it is distinguished by the fact that the voiceover “of course it’s not real but it’s fun” qualifies the claim made that the product will unlock any car. I am satisfied that consumers would not be confused in this case.

#### Failure to withdraw the advert timeously

18. The Member advised the WASPA Secretariat that it was pulling the advertisement in question on the 21<sup>st</sup> of April, with the assurance that it would be off the air by the weekend. The following Saturday was the 25<sup>th</sup> of April. The advert was however last screened on the 30<sup>th</sup> of April – according to the Member. The Member contends that the large number of public holidays in the intervening period made it difficult to administer a change in broadcasters’ schedules. Certainly in the week of the 21<sup>st</sup>, both the 22<sup>nd</sup> and the 24<sup>th</sup> were public holidays, as was the following Monday the 27<sup>th</sup>. Thus the advertisement was “pulled” after a period of 5 business days from the 21<sup>st</sup> to the 30<sup>th</sup>, inclusive.
19. I am of the view that where a Member gives an undertaking to withdraw an advertisement by a certain date it should at the very least make best efforts to meet its own target. Certainly were a withdrawal of an advertisement ordered by an Emergency Panel I would view any period beyond two working days as being an excessive delay. Accordingly a period of 5 working days is excessive under the circumstances and the Member has breached clause 3.1.1 of the Code of Conduct.

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#### **Sanction**

20. The bundling of subscription services is a practice that can lead to gross consumer exploitation and give the WASP industry a very bad name indeed. Accordingly every effort is to be made in stamping it out. Version 7.0 of the Code of Conduct specifically includes provisions obliging Members to include two content items when advertising a subscription service, yet the Member not only failed to comply

with the new provision, but made itself guilty of “bundling” as contemplated in previous versions of the Code of Conduct too. I note further that the Member infringed clause 11.1.2 in complaint 4413, for which it was fined an amount of R30 000. The only mitigating factor that I can find is that the Member advised the WASPA Secretariat of its failure to comply with the provision of the new clause 11.1.3. Taking the above factors into account, the Member is fined an amount of R75 000.

21. The Member is further issued with a formal reprimand for its infringement of clause 3.1.1 of the Code of Conduct, and issued with a fine of R10 000.
22. All fines are payable within five business days of notification of this report.
23. I note that the Member has suspended all of its television advertising in South Africa pending the outcome of complaints relating to such advertisements. The Member is to ensure that all television advertisements that it airs from the date hereof comply with clause 11 of the Code of Conduct, and especially clause 11.1.3 thereof.
24. The Member must note that complaint numbers 6014, 6240 and 6478 were the subject of Emergency Panel hearings, and have been expedited on the request of the Panel. There are some ten further complaints against the Member awaiting adjudication by this adjudicator. In order to dispose of these three urgent complaints the other ten matters have not been taken account of in determining the sanction. Ideally all thirteen should have been disposed of together, but this is not practicable under the circumstances. Accordingly, I reserve the option of taking all thirteen into account in making a determination of further sanctions against the Member when adjudicating the remaining complaints.

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