

ADJUDICATOR'S REPORT

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	
Service Type:	Subscription Service
Source of Complaints:	WASPA Monitor
Complaint Number:	6392
Code of Conduct version:	Version 7.0 of the Code and version 2.3 of the Advertising Rules

Complaint

A formal complaint was submitted by the WASPA Monitor regarding a subscription service being advertised on television by the SP. The Monitor submitted that the advertisement should be stopped being broadcast further until the complaint had been resolved. The SP submitted a video recording of the advertisement. A still shot of the advertisement is set out below:



The Monitor alleged that the advertisement breached the Code in that it sold a particular content item (i.e. the "Street Fighter" game) in order to sell a subscription service.

The Monitor alleged further that the advertisement did not comply with the terms and conditions requirements of the Advertising Rules and that the font used was not of the type and size required by the Code. The Monitor alleged that the type was feint and not legible on television.

Response of SP

The SP was notified of the complaint on 6 May 2009.

The complaint was not initially responded to by the SP during the 5 day period provided for in terms of section 13.3.4 of the Code. On 28 May 2009 the SP responded to the complaint and the request that the advertisement be suspended as follows:

Dear Waspa,

We can't pull flightings for the remainder of the month as we have already booked them and with late booking notice we can't remove. we will review the advert for June flightings and make changes accordingly.

We thank you for bringing this matter to our attention and can assure the Waspa Monitor that it will get our highest attention.

In its response, the SP did not dispute that the Code had been breached in the manner alleged by the Monitor.

Decision

The complaint raised by the Monitor relates to a subscription service described in the advertisement as "Fun Club" (hereinafter referred to as "the service").

Section 13.3.4 and 13.3.5 of the Code provide as follows in respect of formal complaints:

13.3.4. The member will be given five working days to respond to the complaint, and to provide any additional information the member deems relevant to the complaint.

13.3.5. If the member fails to respond within this time period, it will be assumed that the member does not wish to respond.

In the present matter, the SP did not respond within the period stipulated in section 13.3.4, however there is no obligation on a member to do so (as is clear from the wording of section 13.3.5).

There is however a general obligation on a member in terms of section 3.1.1 of the Code that it conduct itself in a professional manner at all times in its dealings with WASPA. The submission of a late response without any explanation for its lateness was unprofessional. If a member does wish to respond, the response should either be submitted on time, or a request for additional time should be made, failing which an explanation for the lateness of a late response should be given.

The SP's late response is particularly unprofessional in light of the fact that it relies in its response on the fact that it is unable to pull advertisements already booked and says that with *"late booking notice we can't remove"*. The reference to a late booking notice is particularly vague. The possibility cannot be excluded that if the SP had not responded late to the complaint but had given its attention to the matter sooner it might have in fact been in a position to withdraw the advertising if it wished to or deemed it appropriate to do so.

Terms and conditions and pricing information

The SP did not dispute the Monitor's claim that the font used in the terms and conditions relating to the service did not comply with the Code. For television advertisements such as this, a minimum 16 point Zurich font is required in terms of section 1.3.4 of version 2.3 of the Advertising Rules.

Having viewed the advertisement in question in both video and still form, I agree with the Monitor that the font used is very faint and is very difficult to read. Although the font used resembles Zurich font in its shape, the characters used appear to be of a much narrower width to regular Zurich font. It is difficult to say what font has actually been used but it does not appear to have been regular Zurich font. Having looked at examples of other Zurich fonts available, it appears closer to Zurich Light or Zurich Light Condensed. The SP has chosen not to respond in detail to the allegations made by the Monitor regarding the font used and has not put forward any contrary assertion to the Monitor's assertion that the type font does not comply with the Advertising Rules.

Exercising my own visual judgment and based on the information before me, I find the terms and conditions text contained in the advertisement did not comply with section 1.3.4 of the Advertising Rules.

Subscription transaction request and advertising for the service

Section 2.11 of version 7.0 of the WASPA Code defines a *"content subscription service"* as including *"any subscription service providing or offering access to content including, by way of example only and not limitation: sound clips, ring tones, wallpapers, images, videos, games, text or MMS content or information. This includes any subscription service which describes itself as a "club" or which otherwise allows access to content to subscribers, at a cost which includes both a subscription element and a per content item element. Services which are not considered to be content subscription services include: dating services, chat services, location based services, GSM terminal device services, corporate application services, reminder services, synchronisation applications, corporate communications applications, VOIP, etc."*

The service which is the subject matter of this complaint constitutes a *"content subscription service"* for purposes of the Code.

The advertisement clearly promotes a specific content item being the "Street Fighter" game. The voice-over used in the advertisement also states as follows:

"SMS GO to 31194 and bring back your game with Street Fighter 2 on your mobile".

It is clear that the advertisement offers the game Street Fighter 2 as an item that will be received by a consumer if they respond to the advertisement by SMS'ing "GO" to 31194.

Section 11.1.2 of version 7.0 of the WASPA Code of Conduct states as follows:

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.

The word "*independent*" in section 11.1.2 has a clear and unambiguous meaning as the opposite of the word "*dependent*", which in turn means to be linked to or reliant upon something else. It follows that if a request to join a subscription service is linked to any other request, it would not be an "*independent*" request and could not result in an "*independent*" transaction.

In the present matter, a consumer is invited to "SMS "GO"" to the short code "and bring back your game with Street Fighter 2 on your mobile." The consumer is expressly informed that they can obtain the Street Fighter 2 game and the advert implies that the method to obtain the game is to SMS' "GO" to the relevant short code. In other words, the advert invites consumers to perform a particular action so as to obtain a particular content item. Any request submitted by a consumer responding to the advertisement is therefore likely to be a request for the Street Fighter 2 game. Although it is not wholly inconceivable that a consumer may wish to request that they *also* be subscribed to the "Fun Club" service when they SMS "GO" to the short code, even if that were the case, a subscription request made for that dual purpose would still not be an independent request or independent transaction.

The SP has chosen not to produce any information of how the subscription process technically works and what messages are sent to a consumer who responds to the advertisement. Even if one assumes that the SP, on receipt of a request from the consumer, responds by sending a message advising the consumer that he or she has not actually requested the advertised game but has in fact actually requested to be subscribed to the Fun Club service and asking the consumer to further confirm his or her intention to subscribe to that service, then that sort of message would likely come as a surprise to many consumers who would have thought the advertisement was offering them the Street Fighter game specifically.

In complaint number 0610 and 0611, which involved the same SP, the adjudicator in that matter considered the findings of the Appeals Panel in complaints no 0002, 0011, 0026, 0037 and 0058 in which the Appeal Panel had cause to consider the meaning of section 11.1.2 of the version of the Code in force at that time. In that matter the Appeals Panel stated:

"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."

The Adjudicator in 0610 and 0611 went on to describe how in complaint 0022 the Independent Adjudicator had 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 and in which the Adjudicator stated as follows:

"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."

The Adjudicator in 0610 and 0611 went on to state that:

It is clear 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.

On a review of the steps taken by the Complainant to establish its Complaint and the SP Response it is the Adjudicator's inescapable finding that the SP's conduct constitutes a serious breach of section 11.1.2 of the Code.

In the present matter, I am unable to conclusively say whether the subscription mechanism employed breached section 11.1.2 of the Code, but having considered the advertisement used to promote the service (and the voice over used), I am of the opinion that the advertisement would cause confusion in the minds of consumers and would have been very likely to mislead consumers.

In the circumstances, the SP has breached sections 4.1.1 and 4.1.2 of the Code.

Summary

In summary, I find that sections 1.3.4 of the Advertising Rules and sections 3.1.1, 4.1.1 and 4.1.2 of the Code have been breached by the SP.

Sanction

I regard a formal reprimand for breach of section 3.1.1 of the Code to be appropriate in this matter.

In considering appropriate sanctions to be applied in this matter for the breaches of section 1.3.4 of the Advertising Rules and 4.1.1 and 4.1.2 of the Code, I have had reference to a number of complaints that have been upheld against the SP previously, including complaints 0610 and 0611 in which the SP was warned of the risks it took when advertising one specific content item that was available in respect of a subscription service. In that particular matter the SP was fined a total amount of R140 000, including a fine of R50 000 for breach of section 4.1.1 of the Code.

For the breaches of section 1.3.4 of the Advertising Rules and 4.1.1 and 4.1.2 of the Code the following sanctions are imposed:

1. The SP is directed to:

- 1.1 terminate and withdraw all further flighting of this advertisement irrespective of any advertising and broadcasting fees already paid or still to be paid by the SP or any other person in respect of the advertisements;
- 1.2 preserve, retain and refrain from dissipating all revenue paid to it by any cellular network operator in respect of the subscription service that was advertised in this matter pending full compliance by the SP with the sanctions contained in paragraph 3 below;
- 1.3 furnish WASPA with monthly statements of account ("the statements") detailing all revenue either already received by the SP or that is to be paid over to the SP by any cellular network operator in respect of the subscription service advertised in this matter; and
- 1.4 deliver a written consent to WASPA within 7 days of the delivery of this adjudication report irrevocably authorizing WASPA to verify and audit the accuracy of the statements with the relevant network operators

concerned and indemnifying WASPA against any and all claims for loss, costs and expenses that may be made against it by any other person in this regard.

2. In terms of section 13.4.2 of the Code, the sanctions contained in paragraph 1 above may not be suspended pending any appeal that may be instituted in this matter but shall become effective immediately on the publication of this report.
3. The SP is further directed to pay over to WASPA a fine equal to the greater of:
 - 3.1 an amount equal to 100% of the revenue share less VAT earned or received by or accruing or allocated to the SP in respect of the subscription service between 6 May 2009 and the date of publication of this report; or
 - 3.2 R150 000;within 14 days of delivery of this report.
4. In the event of non-compliance with the above sanctions, the SP's membership of WASPA shall be suspended for a period of 30 days or until such time as the sanctions have been complied with, whichever period is the longer.