

REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Blinck Mobile
Information Provider (IP): (if applicable)	N/A
Service Type:	Subscription
Complainant:	WASPA Monitor
Complaint Number:	6478
Code version:	Code v7.0 and Ad Rules v2.3
Date of Report:	26 June 2009

Complaint & Response

1. On the 14th of May 2009 the WASPA Monitor lodged the following complaint against the Member:

Date of breach: 14 May 2009

WASP or service: Blinck 31631

Clauses breached: COMPLAINT 1:

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.

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. (The welcome message display of costs)

11.1.8. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

(c) Clear and concise instructions for unsubscribing from the service;

(d) The service provider's telephone number.

COMPLAINT 2:

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.

3.7.1 (c) Decency: Members will not provide any services or promotional material that induces an unacceptable sense of fear or anxiety.

Description of complaint:

URGENT:

Please find attached complaint:

Complaint1:

Incorrect Welcome messages formats

Complaint2:

DAY service - Misleading and inappropriate advertising

Code breaches range from misleading advertising, incorrect formats of welcome messages, inappropriate content.

Due to continuous code breaches, it is recommended that this service provider unsubscribes customers to relevant services, refunds customers, remove advertising and it is recommended that Blinck are prohibited from operating in SA for a period of time.

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.

The WASPA Monitor has indicated that this is a serious offence and cannot be resolved informally. The service provider is requested to provide a formal response to the alleged breaches so that this matter can be reviewed by an independent adjudicator.

2. The WASPA Monitor also submitted a detailed report setting out the steps she took in investigating the services offered by the Member, which is attached as Annexure "A".

3. On the 14th of May, the WASPA Secretariat sent the Member notice of an emergency procedure, and attached the complaint to that notice.
4. The Member responded the same day with an undertaking to take off air all television advertisements in South Africa pending discussion and agreement with WASPA. In a further email, also on the 14th, the Member listed the channels on which it advertised, with dates on which the advertising would terminate. This date was given as the 15th of May for all channels. This email was passed on to the emergency panel before it met.
5. The Emergency Panel met on the 14th of May and issued the following notice:

Complaint 6478: Blink Mobile

Complaint 6478 was lodged by the WASPA Monitor, and relates to a number of services provided by Blink Mobile. Blink Mobile provides services via Sybase 365, who are also a WASPA member but who are not a party to this complaint.

Notification of the emergency panel hearing, as well as as a copy of complaint 6478 were sent to the the SP prior to the emergency panel hearing. The SP responded shortly before the hearing began, noting that they had voluntarily withdrawn all adverts currently airing and noting that they would not commence any further television advertising without WASPA's agreement. It should be noted that their reply does not constitute a formal response to complaint 6478, but is instead interim feedback for the consideration of the emergency panel.

After reviewing the available information, the emergency panel concluded that the sample welcome messages fall short of the requirements of clause 11.1.8 (c) of the Code. In addition the pricing information as presented in the sample welcome messages provided by the WASPA Monitor appears to be misleading when compared to sample adverts for the services offered. The mixture of "RX/sms" and "max 2sms/wk" is confusing when compared to the requirements of 11.1.8 (b). The panel therefore found evidence of a prima facie breach of clause 11.1.8 of the Code.

In addition, the panel felt that the wording of the welcome message constituted a prima facie breach of clauses 4.1.1 and 4.1.2 of the Code. Considering the "Virus" and "Day" services specifically, the panel found that there was additional evidence of a prima facie breach of clause 4.1.2 of the Code in that the content advertised as an application is actually a moving wallpaper.

Reviewing the second portion of the WASPA Monitor's complaint regarding misleading and inappropriate advertising, the panel concluded that there was not substantial evidence of breaches of clauses 3.3.1 or 3.7.1 (c) of the Code. However, the panel felt that the "day you will die" advert constituted a prima facie breach of clause 7.2.1 of the Code.

The panel did not find any substantial evidence of breaches of clauses 3.1.1, 3.1.2 or 6.2.3 of the Code.

Consequently:

1. The panel noted the SP's voluntary withdrawal of all television adverts, but requires that Blink Mobile ensure that no adverts air later than 17:00 on Friday, 2009-05-15.
2. The panel prohibits Blink Mobile from recommencing any television advertising until the formal review of this complaint is complete.
3. The panel orders that Blink Mobile immediately send a reminder message to all subscribers of all subscription services as specified in section 11.2 of the WASPA Code, with particular attention to the precise format set out in clauses 11.2.2 and 11.2.5.

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

6. The Member sent an email to the WASPA secretariat on the 15th of May advising the steps it had taken to comply with the panel's ruling. I have been given no reason to believe that the Member did not comply with the panel's ruling.
7. On the 19th of May the Member submitted its formal response to the complaint, which I attach as Annexure "B".
8. In summary, the Member is accused by the WASPA Monitor and the Emergency Panel of the following infringements of the WASPA Code of Conduct:
 - 8.1. The Member's subscription service welcome messages are misleading and incorrectly formatted as required by the Code. In this case the shortcomings infringe clauses 3.1.1, 3.1.2, 6.2.3 and 11.1.8 (c) & (d).
 - 8.2. The description of the "Day you will die" service offered by the Member is misleading, as the consumer is led to expect an application, while in fact receiving only a moving wallpaper, and as such infringes clauses 4.1.1 and 4.1.2.
 - 8.3. The service referred to as "Day you will die", and more specifically the advertisement therefor, was in poor taste and was likely to cause angst to those who saw the advert or downloaded the "application", a contravention of clauses 3.1.1, 3.1.2, 3.3.1, 3.7.1(c) and / or 7.2.1.

Portion of the Code Considered

9. The initial complaint raised possible breaches of clauses 3.1.1, 3.1.2, 3.3.1, 3.7.1, 6.2.3, 11.1.8 as set out therein.
10. The Emergency Panel further identified possible breaches of the following clauses:

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.

7. Children's services

7.2. Prohibited practices

7.2.1. Children's services must not contain anything that is likely to result in harm to children or which exploits their credulity, lack of experience or sense of loyalty.

Decision

Deficient unsubscribe instructions

11. I agree with the Emergency Panel in finding no breach of clauses 3.1.1, 3.1.2 or 6.2.3. I also agree with the Panel that the Member's notification messages, as recorded by the WASPA Monitor, infringe clause 11.1.8 in that the instructions for unsubscribing from the service are not clear and concise as required by 11.1.8(c).
12. I covered much the same ground in my report in complaint 6034: the punctuation of the messages recorded by the WASPA Monitor is confusing in this case too, having the same format. To take an extract from the Monitor's submission:
13. "...Info? www.text1.tv/0800980963 (R20/SMS) subscription stop? POLICE stop, max 3 sms/wk". As one with insight into the industry I know that this means that the subscriber should sms the words "friend stop" to the shortcode that the subscriber used to subscribe to the service in the first place. To the uninitiated however, the instruction given is confusing. The words "subscription stop" appear from the punctuation to relate to the phrase www.text1.tv/0800980963 (R10/SMS), while "FRIEND stop" seems to relate to the phrase "max 2 sms/wk". Moreover, the shortcode to which the unsubscribe request should be transmitted is not given.
14. I do not take the Member's amendment of its notification messages subsequent to the complaint as an admission of guilt. I nonetheless find that the unsubscribe instructions given by the Member in its subscription notification messages are confusing, and that the Member has consequently infringed section 11.1.8(c).

Misleading Advertising

15. I discussed the nature of an "application" at some length in my report to complaint number 6034, and concluded that marketing a moving wallpaper as an application is misleading.

16. If I accept the Member's version that in this case the download was in fact a Flash application, and where the subscriber's handset did not support Flash, a moving wallpaper was provided instead. As the Member must know that the vast majority of handsets in the market in South Africa do not support Flash applications, the Member was in effect marketing a moving wallpaper as an application, and has hence infringed clause 4.1.2 of the Code of Conduct.

Inappropriate Advertising

17. The WASPA Monitor was of the view that advertising a product such as "Day you will die" which purports to calculate the day upon which the consumer will die, has the likely effect inducing a feeling of fear and anxiety in consumers. In common with the Emergency Panel, I can find no evidence for an infringement of clauses 3.1.1, 3.1.2 or 3.3.1 in the Member's conduct.
18. I find it more difficult to dismiss a complaint based on clause 3.7.1(c) but on balance I do not feel that consumers would feel anxiety or fear as a result of downloading a wallpaper that purports to tell them when they will die: to find so would be akin to banning palm readers at fun fairs.
19. I however agree with the Emergency Panel where it finds a *prima facie* breach of clause 7.2.1. The advertisement in question was broadcast at a time when children were likely to be watching, and on a channel aimed at young people (MTV). Given the rather vacuous nature of the product, and the above factors I am of the view that the advertisement was aimed at least partly at children. Accordingly this service qualifies as a children's service and clause 7.2.1 is relevant. The advertisement itself doubtless exploits children's credulity and lack of experience and I hence find that the Member has infringed clause 7.2.1 of the Code of Conduct.

Sanction

20. While the advertisement for the "day you die" service had the potential to mislead consumers, the severity was not sufficient to require a refund to subscribers. I am also not of the view that the Member intended or indeed contemplated distress to children, even if it did contemplate that they would be the likely consumers of the "day you will die" service.
21. The Member is issued with a formal reprimand and fined an amount of R10 000 for its breach of clause 7.2.1. I took the Member's suspension of all advertising in South Africa as a mitigating factor in this regard.
22. No fine is imposed in respect of the infringements of clauses 4.1.2 and 11.1.8. These infringements arise from the same cause as that in complaint 6034 where a sanction has been imposed.
23. All fines are payable within five business days of notification of this report.
24. 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 ordered to amend the advertising of its services to ensure that the advertising

accurately describes the services being offered, particularly in respect of describing wallpaper as applications. It must also ensure that its advertising is appropriately tailored to its probable target audience, especially should such an audience consist of children.

25. 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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Annexure A

DATE: 13 May 2009
Test CELL NUMBER: 0728926487
SERVICE PROVIDER: Blinck Mobile
SHORT CODE: 31631

BACKGROUND:

Blinck Mobile have received 9 complaints from me in the last while with several breaches of Code. There are also a further 10 complaints that have been lodged with the complaints team from customers. Whilst some of these complaints were informally resolved and closed, it is of great concern that this provider has continued non-compliance of the WASPA Code of Conduct. There have been cases where they have been dishonest and misleading.

These problems range from marketing issues, misleading content and non-compliant operational issues.

They have often misled consumers promoting an application in their advertising, but would deliver a mere wallpaper or ringtone. A service such as this, Friend Tracker, was suspended a little while ago.

Please also refer to complaint 6391 (new) which also requires urgent attention where 4229 customers should be refunded for receiving incorrect content. With all the above in mind, not only does this complaint need urgent attention, but I'd like to recommend that Blinck are suspended from operating in SA for a period.

Your urgent attention is greatly appreciated on this matter as there is a cost factor to consumers (refunds are recommended). The continuous harm done to consumers from this Service Provider cannot be tolerated anymore as this affects the entire industry.

The complaints below covers:

- an operational issue: COMPLAINT 1 - WELCOME MESSAGES
- and a misleading and inappropriate content COMPLAINT 2 - A NEW MISLEADING COMMERCIAL.

COMPLAINT 1 - WELCOME MESSAGES:

Blink are marketing several commercials on television promoting a specific price, but change the format of that price in their Welcome messages. Their Welcome messages are all in the incorrect format and misleading.

KEYWORDS sent to 31631:

1. Police
2. Ducky
3. Truck
4. Virus
5. Car
6. Day

1. I smsed police to 31631

And received this welcome message:

Welcome to POLICE! You will get your 1st tone now.Info?

www.text1.tv/0800980963 (R20/sms) subscription stop? POLICE stop, max 3sms/wk

2. I smsed DUCKY to 31631

And received this welcome message:

Welcome to DUCKY! You will get your 1st tone ow.Info?

www.text1.tv/0800980963 (R20/sms) subscription stop? DUCKY stop, max 3sms/wk

3. I smsed TRUCK to 31631

And received this welcome message:

Welcome to TRUCK! You will get your 1st tone now.Info?

www.text1.tv/0800980963 (R20/sms) subscription stop? TRUCK stop, max 3sms/wk

4. I smsed VIRUS to 31631

And received this welcome message:

Welcome to VIRUS! You will get your 1st Wallpaper now.Info?

www.text1.tv/0800980963 (R15/sms) subscription stop? VIRUS stop, max 3sms/wk

5. I smsed car to 31631

I then received this welcome message:

Welcome to CAR! You will get your 1st tone now. Info?

www.text1.tv/0800980863 (R20/sms) subscription stop? CAR stop, max 2sms/wk

5. I smsed day to 31631

I then received this welcome message:

Welcome to CAR! You will get your 1st game now. Info?
 Celdorado.com/0800980963 (R15/sms) subscription stop? DAY stop, max
 3sms/wk

Conclusion:

In each of the above cases the format of welcome messages received is completely wrong. The service provider knows by now that no abbreviations of the words 'day' 'week' or 'month' may be used. This confuses the consumer completely. The pricing information is completely misleading as it first says its (R20/sms or R15/sms) which would lead the consumer to think its R20 (R15) a week, but at the end of the welcome message it states max 3 sms/wk which basically means that is R60 (R45) a week.

By displaying the cost in this way the service provider is misleading the consumer. Also the opt out instructions are very confusing and unclear, as well as missing a number 'subscription stop? CAR stop' should say: 'To opt out or stop subscription, sms CAR stop to 31631'

The format of this welcome message should be as follows:

Welcome to XYZ! This service is charged at RX a week. To unsubscribe sms XYZ stop to 31631. For Help call: XXXXXXXX

In addition to this, the Virus service and the Day service offered is completely misleading. The Virus service is merely a wallpaper when received, even though the marketing suggest you can delete contacts.

The Day service, which in the welcome message states it's a game, is actually a moving wallpaper. (see Complaint 2 below)

Breeches of the code:

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.

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. (The welcome message display of costs)

11.1.8. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number.

COMPLAINT 2 - MISLEADING and INAPPROPRIATE ADVERTISING:

The new “day you will die” commercial flighted yesterday 13 May at 13h35 on MTV.

This commercial suggests that you sms the keyword “DAY” to 31631 to find out the date that you will die. The welcome message communicates that you will receive a game. What you actually receive is a moving wallpaper.

I found this commercial to be incomplete bad taste! Although MTV is not a channel for children, I am 100% sure that children would be part of the target viewership during that time! In fact, I witnessed the response of a 15-year old watching that commercial and the stress it caused was educational!

I tested this service and my “date for dying” was in 2059. If you’re a child, this date can certainly seem to be “real”. Sensitive content like this should not be allowed.

I would therefore like this commercial to be pulled off air with immediate effect and this service not offered at all. I also recommend that all subscribers are immediately refunded.

In fact, as requested above, all Blinck services should be suspended.

I await this commercial from Ornico . It’s a brand new commercial and they’re still looking for it. Once received, I will forward to the complaints team.

Breaches of code:

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.

3.7.1 (c) Decency: Members will not provide any services or promotional material that induces an unacceptable sense of fear or anxiety.

Annexure B

BLINCK'S SUBMISSION TO WASPA COMPLAINT # 6478

Blinck Mobile Ltd ("Blinck") wishes to respond to the complaint number 6478 of May 14, 2009.

The complaint number 6478 addresses the following issues:

1. Issue 1 – operational issue: Welcome messages
2. Issue 2 – misleading and inappropriate content.

On May 14th, we received notice of a WASPA Emergency Procedure for this complaint.

We have immediately and voluntarily withdrawn all TV-advertisements for our services as of Friday May 15th and have informed WASPA accordingly.

Later in the day on May 14th, we received the findings of the WASPA Emergency Panel on this complaint. On Friday the 15th of May, we have informed WASPA that we would fully comply with measures taken by the Emergency Panel.

Please find the formal response of Blinck to this complaint below.

Issue 1 – Operation issue: Welcome Messages

The complaint claims that the format of our welcome messages is incorrect and misleading.

Blinck's Response:

Upon receiving the complaint, we have changed the welcome message as follows:

Welcome to #KEYWORD# ! This service is charged Rxx/sms, 3sms/week. To unsubscribe sms #KEYWORD# STOP to 31631. For Help call: 0800980963. Info? Celdorado.com

We trust that the format is now correct and according to the Code of Conduct: the price of the service and the frequency of the billing are mentioned and no abbreviations are used.

Issue 2 – Misleading and inappropriate content

The complaint claims that the VIRUS and DAY service offered is misleading, since the VIRUS service is "merely a wallpaper when received, even though the marketing suggests you can delete contacts". According to the complaint the DAY service is misleading because the welcome message states it's a game while it is actually a moving wallpaper.

In her findings the Emergency Panel found that the content advertized as an application is actually a moving wallpaper.

Furthermore, the complaint claims that the DAY service is in bad taste and constitutes a breach of Article 3.7.1. (c) of the Code of Conduct: "Members will not provide any services or promotional material that induces an unacceptable sense of fear or anxiety".

Blinck's Response:

The VIRUS service is already subject of complaint #6242, to which Blinck provided a formal response on 29 April 2009. With regard to the claim that the VIRUS service is misleading, we kindly refer you to the formal response we've given on this subject. We are still of the opinion that it is not misleading to market an animated/ moving wallpaper as an application.

The Day service is in fact a Flash application in which you can fill in your birth date. However, when the mobile phone of the customer does not support Flash applications, a moving wallpaper is sent instead. We are therefore of the opinion that the marketing of this Service is not misleading.

We have taken notice of the findings of the Emergency Notice Panel that this service is a breach of article 7.2.1 of the Code of Conduct ("Children's services must not contain anything that is likely to result in harm to children or which exploits their credulity, lack of experience or sense of loyalty"). We have therefore decided not to broadcast this commercial any more in the future.

Closing Remarks

Blinck is very aware of its continuing obligations to comply with the WASPA Code of Conduct and the WASPA Advertising Rules, and at all times Blinck has done its very best to comply with these requirements. Blinck looks forward to providing WASPA with any assistance required in further investigating this complaint and invites WASPA to contact Blinck's legal team directly with any further inquiries. We can be reached at:

[removed]