



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK/iTouch
Information Provider (IP):	Not applicable
Service Type:	Bundling, the "FREE" word usage
Complainants:	Anonymous
Complaint Number:	8392
Code Version:	7.4
Advertising Rules Version:	2.3

Complaint

It is a formal complaint.

The Complainant wrote:

“4.1.1 The service is not fair or honest - subscribers are offered free content and get subscribed when downloading the content.

4.1.2 The service is deceptive - subscribers are offered free content but can only retrieve the content by subscribing.

11.1.2 Subscribers are lured into a subscription service by an online quiz as well as a 'free' content item. When subscribers download the content item they are subscribed. Advertising guidelines Font sizes are not according to web advertising guidelines. Cost should be at least 15 points and T&Cs at least 12.”

The Complainant provided the following feedback to the SP's response:

“I think we should await the outcome from their client. All they have done is disabled it for now, if the client is going to proceed with it then it needs to be reviewed again before we can close? And by the way the URL is still live...”

The Complainant held off on adjudication:

“Happy to await further feedback, there's no need for formal adjudication just yet.”

The Complainant stated the following in the final response:

“When clicking on the items that are marked 'get these items for free' there is no hyperlink, nothing happens. It is now not a condition of the subscription to get “the free” content, but “the free” content does not work, so this is still not compliant.”

Service provider's response

The SP requested additional information:

“Please provide exact link as to where the advertisement resides. The link below does not redirect to the complainant's issue. We are unable to investigate this matter if we aren't provided the correct website links to the displayed advertisement and thus have no idea what advertisement the complainant is referring too.”

The SP provided the following response:

“We thank you for bringing this matter to our attention. We have since had the advertisement disabled for further investigation until such time, that it is compliant with the code of conduct. Once all is corrected with the amended changes with our third party advertiser, we will revert back with the outcome, weather to leave it disabled or reinstate the advert.”

The SP provided the feedback:

“The URL is live, yet no subscriptions can be acquired through the advertisement. User will not be subscribed via the interface, as no pin number is sent to the user upon entering his or her mobile number. We are currently investigating the advertisement and will revert back when changes have been done with by our developers.”

In its final response the SP stated:

“We thank you for your patience in this matter. The advertisement has been amended to read as below. The advert has been redone to exclude the “Free” item for download. On the original advertisement it was stated that the user gets to choose 1 free item on subscribing to the service.”

Sections of the Code considered

2.14. A **“keyword”** is any word used in an SMS or MMS sent by a customer to request a service.

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.

6.1.1. In addition to the provisions listed below all members are bound by the WASPA Advertising Rules, published as a separate document.

6.5.1. The keyword “free” or words with the same or similar meaning (in any language) may not be used for any service unless that service has no associated charges whatsoever, excluding network bearer charges.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

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 and may not be an entry into a competition or quiz.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent response.

It has come to the attention of the Adjudicator that the website referred to is still up and running, displaying the exact issues that were raised by the complainant, albeit the undertaking by the SP to disable the said site.

In reviewing the said website, there were a number of issues that drew the attention of the Adjudicator.

Although the subscription service text at the top of advertisement is displayed in a font that is correct, it still does not in the opinion of the Adjudicator conform to section 9.3.15 of the WASPA Advertising Rules which requires that the terms “subscription service” must be prominently displayed.

The colour of the font being used against a backdrop of similar colour is of such a nature that it would be disadvantages to anyone with a slight visual impairment to see any prominence in display, whether such impairment can be related to colourblindness or reading difficulties.

Even in the absence of any visual impairment, the Adjudicator finds it hard to see any prominent display of the text as is required by the Advertising Rules.

This in itself relates to a breach of section 11.1.1 of the WASPA Code of Conduct where in addition to the word “prominent”, the word “explicit” is also used. Nothing in the said advertisement aspires to these words.

The terms and conditions at the bottom of the page are situated at such a position that one has to scroll down, before noticing it. The website design is of such a nature that one would not necessarily think of scrolling down, therefore failing in taking note of the terms and conditions. These terms and conditions are also not fulfilling the font size 12 as is required by section 9.2.2.1 of the Advertising Rules.

The SP has failed to adhere to the Advertising Rules which would suggest a breach of section 6.1.1 of the Code of Conduct.

In its reply the SP has not denied any of the allegations made against it in the said complaint, therefore inferring acknowledgement of the alleged breaches.

The luring of consumers into subscription services by way of a quiz is a direct breach of section 11.1.2 of the Code of Conduct and further analysis of the specific content is therefore irrelevant to this matter, although also clearly a further violation of section 11.1.2.

In its breaches of the relevant sections, the Adjudicator also finds the SP in subsequent breach of sections 4.1.1 and 4.1.2.

The Adjudicator is however not convinced that the display of free items is in contradiction of section 6.5.1 of the Code read together with section 2.14.

The text “free” is prohibited when used as a **keyword**. This is not the case in this matter. However, the fact that the links on these “free” items are non functional, does not necessarily imply a breach or non-delivery of service and can merely indicate that such items would be available once subscribed. The intentions are however not clear and the Adjudicator does find it a bit misleading, further justifying the earlier finding of the SP in breach of section 4.1.1 above.

With regards to the SP's inference to its third parties, the Adjudicator feels it necessary to refer the SP to Adjudication 7631 where the relevant Adjudicator made the following remarks in its decision related to third parties:

“There is an abundance of precedent to the effect that a WASPA member cannot escape responsibility for compliance with the Code of Conduct by raising a defence that the non-compliant conduct was undertaken by a third party with which the member had contracted for the provision of marketing and other services. This position is normally expressed with regard to the relationship between WASPs as aggregators and information providers – see Appeal 4580 @ paragraph 6.1.8 and Appeal 0985 @ paragraph 6.3.4 – and this Adjudicator cannot see any cogent reason as to why this principle should not be extended to apply to the relationships between WASPA members and affiliate marketing entities. The following excerpt from the findings of the WASPA Alternative Appeals Panel in Appeal 4580 is particularly apposite:

"It is imperative that the parties have proper agreements in place to manage their contractual relationships and to define their roles and responsibilities under the Code and generally in relation to consumers."

2. It is accordingly found that the member bears direct responsibility for any breaches of the Code of Conduct related to the promotional site and sign-up procedure as tested by the Monitor."

The Complaint is upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;
- The SP's willingness to investigate but subsequent failure to rectify.

The sanctions in Adjudication 8411 refer.
