



REPORT OF THE ADJUDICATOR

WASPA Member (SP): iTouch (Pty) Ltd

Information Provider (IP):
(if applicable)

Service Type: Display of pricing of premium-rated services

Complainant: Wireless Warriors (Pty) Ltd (competitor)

Complaint Numbers: 633, 634 and 638

Adjudicator: Kerron Edmunson

Code version: Code v4.6, Ad Rules v1.6

Complaint

The complainant submitted 3 complaints to WASPA on the 6 November 2006, each concerning the 35050 service offered by iTouch. The complaints are all based on section 6.2.5 of the Code and an appeal's panel ruling relating to complaint #0065 which the SP has reproduced, and which states:

"The Appellant claims that the publication of the premium number on its home page...was used for branding purposes only and not to sell anything. The Appellant states that it did not publish details of the price of the particular service for this reason. The Appellant has since removed the number from its website. The number,...could nevertheless be used to access content services at a fee. The Appeal Panel therefore finds the Appellant guilty of breaching clause 6.2.5 of the code which very clearly states that the price of a premium-rated service must appear with all instances of the premium number display. We therefore confirm the Adjudicator's determination."

The response by the SP also relies on a substantially similar argument in each case. In the circumstances I have decided to consider the complaints together. Where there are differences I have noted these.

The first complaint (633): This concerns the 35050 "Red Hot Groove" catalogue. The complainant states that the catalogue is in breach of clause 6.2.5 of the Code in that the catalogue does not display relevant pricing pertaining to the service being offered, even if no particular service is on offer. The complainant states further that "it is understood that the short code carries with it a "variable" cost. This, in and of itself should not exempt 35050 from having to display the relevant pricing pertaining

to the service being offered, even if no particular service is on offer. It is therefore suggested that the text: "Charges vary according to the service requested" be present with all instances of the premium number display."

The complainant has attached 5 annexures marked A to E which it lists together with the alleged infraction. In the case of A, B and E, the complainant states that the code 35050 appears without the "proper display of the appropriate pricing". In the case of Annexure C, the complainant states "there is no pricing associated to the short code 35050 contained within the Freaky Facts section of the page. The only pricing available is the R5 associated to the wallpapers." In relation to Annexure D, the complainant states that "there is no pricing associated with the short code 35050 on the entire page. There are four separate services advertised on this page, yet no pricing. The short code 35050 appears a total of 6 times on this page without a single mention of the cost involved."

The second complaint (634): This complaint refers to the 35050 website (www.35050.co.za) which the complainant alleges is in breach of section 6.2.5 of the Code. The complainant has stated, as with the first complaint, that in addition, the ruling of the appeals panel in #0065 as set out above is applicable, and the complainant has made the same recommendation as to wording as set out in the first complaint.

In addition, the complainant states that "the short code 35050 appears without the proper display of the appropriate pricing. The short code 35050 is permanently displayed on the top left hand side of the screen." A copy of a web page is attached to the complaint.

The third complaint (638): This is a complaint about a print advertisement appearing in the Huisgenoot magazine on 1 November 2006. The complainant bases his complaint again on section 6.2.5 of the Code and the appeals panel finding, as in the previous two complaints. The complainant also includes the suggestions made regarding more appropriate wording, as set out above.

Specifically the complainant states that the advertisement, a copy of which is enclosed with the complaint, contains the short code 35050 displayed at the top left corner of the advertisement without the appropriate pricing, and it is therefore in breach of clause 6.2.5 of the Code of Conduct.

SP Response

The first complaint (633): the SP has stated merely that "35050 is a brand name, and recognised as such by the public. All service pricing is clearly displayed in all our advertisements (print, portal and TV) and comply with WASPA regulations."

The second complaint (634): the SP has replied in a similar vein and states "35050 is the Brand Name of this iTouch SA service. All pricing for each and every content item is very clear on the website (which, incidentally, is not the case on the complainant's website)." The SP has also attached a screenshot of the website.

The third complaint (638): the SP refers to complaint 368 but we assume this is an error. The SP states that "Firstly, the complainant indicates that the complaint regards a Huisgenoot advertisement (1 November 2006) however, he refers to our homepage? And then he attached Annexure A which refers to complaint #634.

Secondly, regarding 'the price for a premium rated service must be easily and clearly visible in all advertisements. The price should appear with all instances of the premium number display', 35050 is a brand name, and recognised as such by the public. All services pricing is clearly displayed in all our advertisements (print, portal and TV) and comply with WASPA regulations."

Consideration of the WASPA Code

The Code:

It is also relevant to consider other over-arching provisions of the Code:

Section 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."

Section 6.2.2: "All advertisements for services must include the full retail price of that service."

Section 6.2.5 is the section of the Code relied upon by the complainant. It states: "The price for a premium-rated service must be easily and clearly visible in all advertisements. The price should appear with all instances of the premium number display."

The complainant has stated that he relies on an appeals panel finding which sets a precedent. It is important to understand the role of each of the appeals panel and adjudicators, and their mandate under the Code.

WASPA adjudicators are obliged to consider the WASPA Code and Ad Rules, where applicable, in making a decision about a complaint. The Code of Conduct is described in section 1 (introduction) as a "code of practice governing the members of the South African Wireless Application Service Providers' Association" and the Code "also sets standards for advertising mobile application services." The Code sets out the procedure to be followed in the event of a complaint lodged by a WASPA member. Section 13 of the Code deals with the complaints procedure specifically. It states at 13.1.3(c) that a complaint must contain, amongst other things, "to the extent that the information is known or available, identification of the part or parts of the Code of Conduct which has allegedly been breached". Section 13.3.7 addresses formal complaints and requires the adjudicator to carefully review the complaint, any response made by the member, the Code and any other material relevant to the complaint as supplied by WASPA. Sections 13.3.9 and 13.3.10 require the adjudicator to determine first if there has been a breach of the Code and if there has, then to determine an appropriate sanction. Section 13.6 deals with appeals. An appeals panel is also required to consider whether there has been a breach of the Code.

In light of these sections, although the complainant is free to consider the findings of an appeals panel, the adjudicator is tasked with deciding whether a WASP has correctly and fully complied with the Code – not appeals panel findings. The appeals panel finding is an interpretation of the meaning of the Code, which is helpful to adjudicators, but it does not change the wording of section 6.2.5 which the complainant has based his complaint on. The complainant is therefore not correct in stating that the ruling of the appeals panel in #0065 "sets a precedent for rules pertaining to the display of pricing in association to any premium rated short code if that short code can be used to download content or services."

Section 6.2.5 is very clear as to its meaning – it does not grant any exclusions, include any limitations, or suggest any alternatives. The price for a premium-rated service MUST be easily and clearly visible in all advertisements. The price [for the service] SHOULD appear with ALL INSTANCES of the premium number display.

Ad Rules:

The complainant does not refer specifically to the Ad Rules, but as version 1.6 was in force at the time of the complaint and as the Ad Rules do explain and describe what the Code requires in very great detail, and as the Code specifically refers to the Advertising Guidelines (the Ad Rules) in section 6.1, it is also necessary to consider the Ad Rules.

The Ad Rules define an “access number” as “any SMS number (whether a long code or a short code), MMS number....., or any other number that permits the use of an Access Channel”. “Access channel” is defined as “the common PSMS, SMS, IVR, USSD, MMS, 3G or WAP methods of obtaining Content or Content Services or such other methods of obtaining Content or Content Services as may be introduced by the Mobile Network Operators from time to time.”

Section 5 relates to magazines and specifically refers to Huisgenoot. In general, “for each unique access number, the full cost of the access must be displayed immediately below, or above, or adjacent to the unique access number or content access code in a manner that is easily visible and readable.”

Section 8 addresses below-the-line marketing and promotional material which appears to include catalogues of the sort used by the SP to promote its services. This section states “the full cost and T&C must be displayed on all media components associated with a particular content or service. For example, if a loose campaign leaflet is placed within a magazine or booklet, and both the leaflet and magazine/booklet advertise the identical campaign, then both ... must (independently and identically) show the same Access Cost and T&C details for that identical campaign.” The provisions also apply to multiple offerings in the same advertisement.

Finally, **section 9** deals with internet web sites. The section states that “no cost and T&C information may be placed on in-vue pages, No incorporation by reference may be used to indicate that T&Cs and pricing are available on another page of a web site. This means that the cost and T&C information associated with a unique access number must be immediately adjacent to, or above or below that unique access number and may not be placed solely on another web page, graphic or any other media.” This provision applies also to multiple offerings on the same web page.

I have not rewritten the full text of each of these sections but the full text is very detailed as to size, placement, colour, the surrounding text, and the requirement to display the total charge.

Decision

Can a short code also be a brand? I see no reason why not. The problem arises when the brand name is also used as a short code or “unique access number”. The Code and Ad Rules are intended to protect consumers by providing them with adequate information about the services they may wish to purchase – information in

relation to price in particular. Section 6.2.5 of the Code is very clear. Every time a short code is used, the price for the service which that short code applies to must be published. The Ad Rules are also very clear in relation to different media and go further – cost and T&C information must be published next to a unique access number.

It seems likely that 35050 has acquired some notoriety as a number which enables a customer to access services provided by iTouch. However, to advertise the number without reference to pricing is contrary to the Code and Ad Rules. I have considered each complaint separately below.

The first complaint (633): The SP did not enclose any information or copies of documents with its response. I therefore only have the copies of the Red Hot Groove catalogue pages submitted by the complainant. Annexure A appears to be a cover describing the service, and Annexure B is a set of terms and conditions which might apply generally as they are phrased fairly generally – but the other pages also contain terms and conditions so it is not clear that page 2 ought to be considered when looking at any other page of services or advertisement within the catalogue. However, the Ad Rules prohibit this in any event, so I have not taken the possibility into consideration.

On the face of the pages Annexures A to E, the complainant is correct in his statements regarding the absence of pricing information. However:

- ☎ Annexure B does mention the cost for “all SMSs sent to 35050” as R5 (incl VAT) but states that “some content, like Games, Covertones and SMS Chat have a different price. However, no need to freak out, this too will be clearly indicated in those sections”. The terms and conditions section at the bottom third of the page also states “R5 per SMS unless stated otherwise.”
- ☎ Annexure C contains a R5 in a circle at the top left hand corner next to the advertisement for wallpapers and close to the number 35050.
- ☎ Annexure E states in 4 places that SMSs cost R5, but not next to every mention of the number 35050.

The SP has complied with the requirements of the Code or Ad Rules on 3 out of 5 pages – but not in the catalogue viewed as a whole in terms of section 8 of the Ad Rules and not in terms of sections 6.2.2 and 6.2.5 of the Code on the other 2 pages. I am also troubled by the SP’s statement in Annexure B that “the price will be clearly indicated in those sections” – when it is not.

The second complaint (634): I have considered the screenshot included with the SP’s response, the screenshot included with the complaint, and the home page of the website as at the date of this adjudication and find the following:

1. The copy enclosed by the complainant does not give pricing on the face of the page.
2. The copy enclosed by the SP states “INFO R5.00” next to each of the Top Wallpapers displayed on that page.
3. The home page does not, at today’s date, contain any pricing information at all, although it advertises featured artists, games, screensavers and songs, all of which can be ordered by sending an SMS with the relevant category number, to 35050. It does not contain terms and conditions either unless one clicks through to another page, but it is not obvious that one needs to do so to obtain pricing information.

On all the pages, the 35050 number is displayed permanently on the top of the screen, and in several other places including the invitation to send an SMS.

Unfortunately, the page I looked up does not comply with the Code or Ad Rules, section 9, and neither did the page submitted for consideration by the complainant. The price for premium-rated services is not displayed at, next to or near any service advertised with the number 35050, and to access cost information it appears that one would need to click through to another page, contrary to the Ad Rules.

The third complaint (638): for purposes of this decision, and as the SP does not state that the advertisement enclosed by the complainant is not the advertisement which appeared in Huisgenoot, I am going to assume that it is, and that the complainant's reference to the "website" was an error.

The copy of the page included with the complaint appears to contain pricing information next to all services. The number 35050 which appears at the top left hand corner of the advertisement is not accompanied by a price, but it is also not advertising a specific service – the specific services are set out below in the page itself, together with pricing.

The SP has complied with the requirements of the Code in all but the one instance where the number is used at the top left hand corner of the page.

Summary:

The complaints for each of 633, 634 and 638 are upheld.

Sanction

The SP is directed to:

1. amend all of its advertisements (print, portal and TV) to comply with the Code and Ad Rules, and submit samples of the amended advertisements to WASPA for approval; and
2. in the case of the first and second complaints, pay a fine to WASPA in relation to the breach of the Code and Ad Rules in the amount of R8,000 for each of the first and second complaints (a total of R16,000),

in the case of point 1, within 30 (thirty) days of the date of publication of this adjudication, and in the case of point 2, within 5 (five) days of the date of publication of this adjudication.

As an aside, if the SP would like WASPA to consider the use of a brand as a short code for exemption from the Code and Ad Rules, the SP should make its submission to WASPA, motivating in particular why the use of a short code for premium-rated services should not require oversight by WASPA through the Code in these circumstances.