

REPORT OF THE ADJUDICATOR

WASPA Member: Opera Interactive

Service Type: No price information displayed for entry to competition

Complaint Number: 4782

Adjudicator: Kerron
Edmunson
Kerron Edmunson

Code and Ad Rules: v6.2 (14 August 2008) read with v1.6 of the Ad Rules

Introduction

The offence complained of was a repeat offence. In my adjudication of complaints 4781 and 4783 substantially the same issues have been considered, since those complaints are against the same SP for the same reason. Because these have all taken place within a short space of time (August and September 2008) the findings are similar, the principles applied in each will be similar, and importantly, because of the abbreviated time period, the decisions and sanctions will take account of the number of complaints and similarity of the repeated breaches, regardless of print media schedules.

Complaint

The complaint was submitted on 18 September 2008. The complainant, apparently the same person as in complaints 4781 and 4783, has referred to an advertisement for entry to a competition advertised in Heat magazine (issue 229, 13 – 19 September), which does not stipulate how much it costs to send an SMS and so to enter the competition. Specifically the advertisement states “This week we’ve got a special treat to give away... A, wait for it, Take A Break treatment worth R590 at the Chocoholic Heaven at Elixir Spa in Cape Town! Just SMS **ELIXIR** and the answer to the question below to 34979 by 12 September 2008. **QUESTION:** In which city is the Elixir spa located?”

SP Response

On 18 September, the SP sent a message to WASPA which was identical to the message captured in the adjudication of complaint 4781, indicating that it and its “client” and the editor of Heat Magazine acknowledge that the price was not mentioned in the advertisement, but that the publication accepted responsibility for the omission which was “an honest mistake”, and that the SP had previously informed Heat of the requirements of the Code.

In addition, the SP then listed 4 additional matters for consideration in the adjudication of the complaint, which I am repeating in full because it is important to understand the reason for the finding within this context:

- “1. we have taken all reasonable steps to ensure our media and brand/ad agency clients are aware of the WASPA rules;
2. Opera is not responsible directly for creating promotional material for third party campaigns;
3. it is not practical for our media clients with tight print deadlines to submit page proofs to us for approval;
4. and that we cannot be responsible for internal communications at our clients (e.g. we have to rely on the persons/division responsible for mobile services to disseminate the WASPA CoC which we have provided).

For this reason we accept the costs were not displayed but we request an urgent meeting with WASPA Mancom to discuss how we can deal with these issues going forward and what appropriate sanctions should be in place.”

This message was not received by WASPA.

On 1 October, the SP confirmed it had sent a response previously, specifically saying “We actually [respond] in the same manner as to complaint #4783, since this transgression occurred before we had a chance to rectify (the Editor wrote to us in response to complaint #4783, two days after the print deadline for the magazine which contained the ad relating to [#4872]). So, we repeat – there needs to be some understanding or rule from WASPA regarding print publications.”

Consideration of the WASPA Code

The complainant has referred to section 9.1.4 of the Code but it is clear from the complaint and the SP response that the pricing provisions are also relevant. Sections 4 (customer relations), 6 of the Code (advertising and pricing), and 9 (competitions) provide that:

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.

6.2.2: all advertisements for services must include the full retail price of that service.

6.2.5: 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.

9.1.1: Any promotional material for a competition service must clearly display the full cost to enter the competition and any cost to the user to obtain the prize.

9.1.2: Any promotional material for a competition service must include details of how the competition operates.

9.1.4: Promotional material must clearly state any information which is likely to affect a decision to participate, including: ...(b) any significant terms and conditions...

The Ad Rules also provide for pricing provisions in relation to all media including tv, print (magazines and newspapers), websites, emails, SMS, BTL and marketing/promotional material, and content booklets.

The Ad Rules contain several sections that are applicable to the current complaint including section 1 which provides that “these rules are an integral part of the Code v3.2 and should be read concurrently with the Code.... Examples are given in each case to be as helpful as possible ...including...the minimum criteria for formatting and information and best practise.... WASPs and their IPs may not seek to circumvent these criteria in any way by attempting to exploit any potential loopholes in the Rules where by doing so they may deprive the consumer of the minimum information required to make informed choices such as the cost of access to content/ services and the terms and conditions associated with such access.”

In each section is a heading entitled “Information required for disclosure” which states that “where applicable, the following is mandatory information that must be displayed in any advertisement in any media where an access channel is advertised.” Point 1 in each case states: Provide a clear indication of the total cost.

Section 4 deals with rules applying to advertisements in newspapers and classifieds, and section 5 deals with the rules for magazines. Section 6 applies to content booklets, section 8 to below-the-line and marketing and promotional material, and section 9 applies to websites.

Decision

The Rules and Code have been quoted in full above so that it is clear that they do in fact deal extensively with the pricing of services and the entry to competitions is no exception.

I note that the SP is of the view that the Code should take account of print deadlines in considering whether or not to apply the rules, if I understand the following comment correctly, which the SP makes in its response to further correspondence with WASPA, “Maybe the WASP monitor doesn’t understand print media schedules”, which comment was made in the context of the 4 questions set out above. In addition, and as quoted above, the SP states, “So, we repeat – there needs to be some understanding or rule from WASPA regarding print publications”.

As I have stated in the other 2 adjudications, it is also important to note that ultimately the SP is responsible for the acts and omissions of its service providers and that it should (as suggested in numerous other findings) enter into contracts with those parties that protect it in the case where those parties’ acts and omissions cause it to suffer loss. Where, as in this case, a penalty is applied against the SP for breach of the Code, the SP’s remedy lies then against its service provider or “client”.

As the SP has confirmed that the pricing was not mentioned on the advertisement, the SP cannot and does not seek to escape the fact that it breached the requirements of the Code and Ad Rules.

WASPA is required to apply the Rules and the Code against all those to whom it applies. Good intentions and remedying breaches does not detract from the fact that they were committed in the first place, and the nearness in time of each transgression to the other (see complaints 4781 and 4783) tends to compound the “honest mistake” made by the SP in each case.

Specifically with reference to the comments made concerning WASPA’s attitude to print deadlines and rules regarding print publications, perhaps the following summary will help clarify the position:

1. As set out in the Code at section 1, the primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services.The Code of Conduct also sets standards for advertising mobile application services...
2. The Code applies to all SPs and affiliate members of WASPA.
3. SPs are liable for the acts and omissions of their IPs, affiliates and service providers. Whilst it is important that SPs make these parties aware of their (the SP's) obligations under the Code, that is not sufficient. Where those parties carry out a function which is related to or is in fact a function covered by the Code (as advertising a mobile application service is), then the SP remains responsible for compliance with the Code. To the extent that an SP must "rely on the persons/division responsible for mobile services" within the service provider to disseminate the Code is no more or less unusual than would be the case in any contract for services where a person subcontracts the carrying out of certain services to a third party, but remains primarily liable to the customer for completion of the task for which they are paid.
4. The fact that publications operate in a particular way and according to a certain timetable is irrelevant to a determination of compliance with the Code. So too is it irrelevant that the breach may have resulted from an "honest mistake". As there were unfortunately a number of breaches within a relatively short space of time, regardless of print deadlines, each breach must be penalised.

Sanction

The complaint is therefore upheld. Payment of the fine set out below should be made to WASPA within 5 days of the date of the publication of this adjudication:

1. breach of sections 4, 6 and 9 of the Code and breach of the Ad Rules: R10,000 of which R5,000 is suspended for a period of 6 months provided that no further similar complaints against this SP are made; and
2. refund of entry fees to subscribers requesting a refund (proof to be provided to WASPA).