



ADJUDICATOR'S REPORT

Complaint reference number: #13039

WASPA member(s): Buongiorno SA

Membership number(s): 0002

Complainant: Anonymous competitor

Type of complaint: Subscription service

Date complaint was lodged: 2011-05-17

Date of the alleged offence: Not apparent from the complaint

Relevant version of the Code: 10.0

Clauses considered: 4.1.1, 4.1.2, 11.2.2 and 11.2.3

Relevant version of the Ad. Rules: 2.3

Clauses considered: Not considered

Related cases considered: #11258, #11582, #11626, #13038

Complaint

This complaint concerns the SP's promotional iPad giveaway offer ("the Offer"). The Offer combines a opportunity to receive an iPad with a subscription service in such a way that it has caused some concern. This complaint is one of several complaints (including the related cases listed above) dealing with similar offers by the SP and follows at least four previous complaints which were referred to in the complaint's case file and which I either adjudicated

previously or which adjudication reports were included in this complaint's case file ("the previous complaints"). This complaint further deals with an identical campaign which I considered in complaint 13038. The Offer is described in one of the attachments to this complaint, the Monitor's test, and is annexed to this report.

The complainant is an anonymous competitor and the complaint is as follows:

Code_Breached: 11.2.2. 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.

11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.

4.1.1. Members must have 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.

Detailed_Description_Complaint: http://www.youmobile-sa.com/iphone1/?77tadunit=21f60fb2&77tentry=adsiphone1&ads=1&mk=4693&subparam_mk=77pubL&ce_cid=007Rfd0000001supCC3qbjc7QL000000

Subscribers are being lured into a subscription by the use of a quiz - the competition element makes up much more than 20% of the advert.

Service provider's response

The SP raised concerns about this complaint's similarities between it and the previous complaints and the risk that the complainant could be further sanctioned for campaigns which were still effectively under consideration. The complainant referred specifically to a "double-jeopardy situation". I am mindful of the proximity of this complaint and the previous complaints as well as their similarities.

Sections of the Code considered

Version 10.0 of the Code applies to this complaint. I have considered the following provisions of the Code:

4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

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11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.

The Complainant highlighted sections 4.1.1, 4.1.2, 11.2.2 and 11.2.3 specifically

Sections of the Advertising Rules considered [if applicable]

I considered the subscription services requirements in the General Terms section, common to various sections in the Advertising Rules.

Decision

As I mentioned above, this complaint follows a number of recent complaints and adjudications. At first glance this complaint seems to be yet another complaint about variations of the Offer within a short time period. As I noted in my report on complaint 11258, this complaint and the previous complaints are the latest instances of complaints regarding similarly problematic promotions and campaigns the SP has conducted over the years:

The similarities between these various promotions and quizzes is striking. The SP has been

advised a number of times that its promotions, quizzes and competitions which preface its subscription services are in contravention of the Code, section 11.2.2 and its predecessors have been cited over and over again. These devices distract from the subscription nature of the SP's underlying services and give prospective subscribers the impression that they are participating in a quiz, entering a competition or, in this case, responding to a quiz in the hope of receiving an iPhone 3G S for a correct answer. The SP's contention that the iPhone is mentioned as a possible loyalty award available to existing subscribers is disingenuous.

In the iteration which forms the subject matter of this complaint, it is not immediately apparent that the Offer is a subscription service. That said, there are indicators on the landing page which include the following:

- The checkbox in the iPad mockup under the field to enter a mobile number states “I accept T&C’s 35050 VIP subscription Service. R3/day”;
- The Terms and Conditions for the Offer, visible under the text “Unlimited downloads! Wallpapers, Games, MP3s, apps + tons more” and accompanying images include the statement “35050 VIP is a mobile subscription service charged at R3 per day ...”.

The next screen in the Monitor’s test reinforces the impression of a subscription service by including similar wording in the iPad mockup box where a prospective subscriber may enter a PIN code and confirm the subscription. Aside from this wording which differs from the previous page’s iPad mockup box, the page is the same as the previous one.

On entering the PIN code, the Monitor was taken to a third page which clearly includes a banner stating “U can get an iPad”. The banner also indicates that “everyday someone can get a Laptop*, iPod Shuffle* or iPhone 3GS*” (the asterisks seem to refer to a line of text at the top of the terms and conditions stating “Available through the 35050 Rewards program. T&Cs apply”) and further includes the following text:

That’s right, just by being a member you could be the next person to receive a reward. Keep checking this link out. Rewards change often and they become more and more exciting!

While it is not clear from the Monitor’s screenshots, this banner seems to appear on all of the website’s pages, including the initial page soliciting a prospective subscriber’s phone

number to begin the subscription process. I also note that the text "Subscription Service R3/day" appears at the top of the banner in black text against a light grey background".

In addition to sections 11.2.2 and 11.2.3 (which I deal with below), the complainant also invoked sections 4.1.1 and 4.1.2 of the Code. I don't agree that the SP has breached section 4.1.1 as the subscription service's pricing information has been fairly well stated on the website. On the other hand, there is some merit to the contention that the Offer is deceptive or is "likely to mislead by inaccuracy, ambiguity, exaggeration or omission". As I mention below, the Offer's website is designed to emphasise the iPad offer and this may well mislead consumers into believing that the iPad on offer is the purpose of the campaign, as opposed to the subscription service with the iPad as a possible reward to subscribers. I accordingly find that the Offer breaches section 4.1.2 because it is likely to mislead by exaggeration.

Leaving aside the banner, the website appears to be compliant with the Code and the Advertising Rules in that a visitor to the website is made aware of the subscription nature of the Offer. I have already quoted text from the top, middle and bottom of the pages of the website which indicate that the SP is offering a subscription service. The banner is, however, far more prominent than the subscription service indicators on the website. The problem with this is that the text stating that the Offer is a subscription service is overshadowed by the banner and its offer of an iPad and other devices. The references to a "reward" mitigates this, to a degree, but the likelihood that a person will begin the subscription service on the basis of an iPad offer is probably fairly strong.

This is problematic in the context of section 11.2.2 which requires that prospective subscribers become subscribers with the specific intention of doing so. The banner's prominence is not conducive to such a specific intention to subscribe to the SP's subscription service. I therefore find that the Offer infringes section 11.2.2 of the Code.

The banner introduces a complexity and both the complainant and Monitor have raised concerns that the banner amounts to a competition which is bundled with the subscription service and is not permissible. While I agree that the banner muddies the waters, so to

speak, the language used on the website speaks more about rewards than prizes. The text on the pages also clearly indicates that the Offer involves a subscription service which is referred to above the banner in bold capital letters, in the iPad mockup box and in the terms and conditions. The question becomes whether the banner amounts to a “request for a specific content item” or “an entry into a competition or quiz”?

In this case, I don't believe it does amount to either. I certainly see no indication that the Offer is framed as a competition or quiz. I accordingly don't find that the SP has breached section 11.2.3 of the Code. Unlike the previous complaints where a quiz device was clearly used, there is no such device employed on the Offer's website. I also don't regard the reward opportunity as a request for a specific content item. The section below the iPad mockup gives various examples of content items available, not a specific content item either.

Sanctions

As I mentioned previously, the SP was concerned that it could find itself in “double jeopardy” given the similarities between the Offer and the subject matter of the previous complaints. The Offer differs in that the device used here does not include a competition or quiz but rather a prominent offer of an iPad or other devices which potentially subordinates the subscription nature of the service concerned in favour of the iPad offer. This is a variation of the previous campaigns and is problematic in its own right.

I find the Offer to be a breach of sections 4.1.2 and 11.2.2 of the Code for the reasons I set out above. Accordingly, the SP is ordered to -

1. Ensure that any banners used in future variations of the Offer do not distract from the subscription nature of the service being promoted and further that the reasonable visitor to the relevant website has the dominant impression of the website as promoting a subscription service;
2. Remove the current banner and either replace it with a less prominent equivalent or remove it entirely, leaving prospective subscribers with the dominant impression of

the service as a content subscription service; and

3. Send a reminder message to all subscribers to the Service in the format specified by section 11.6.2 of the Code within 48 hours of being notified of these findings.

Given the proximity of this complaint to the previous complaints, I do not believe it is appropriate to fine the SP in this instance.

Blinko Subscription Service

20 April 2011

Cellphone Number: 0764701150

Airtime balance: R195.90

SMS Code: 35050

VAS Rate: STD.

Service Provider: Buongiorno

URL: http://www.blinko.co.za/za_35050_sp_web/site/pages/ipad_check.bsp

I went to the above URL.

Enter your Cell number right now!

Continue

I accept T&C's. 35050 VIP subscription Service . R3/day

Unlimited downloads! Wallpapers, Games, MP3s, apps + tons more

Love Poems

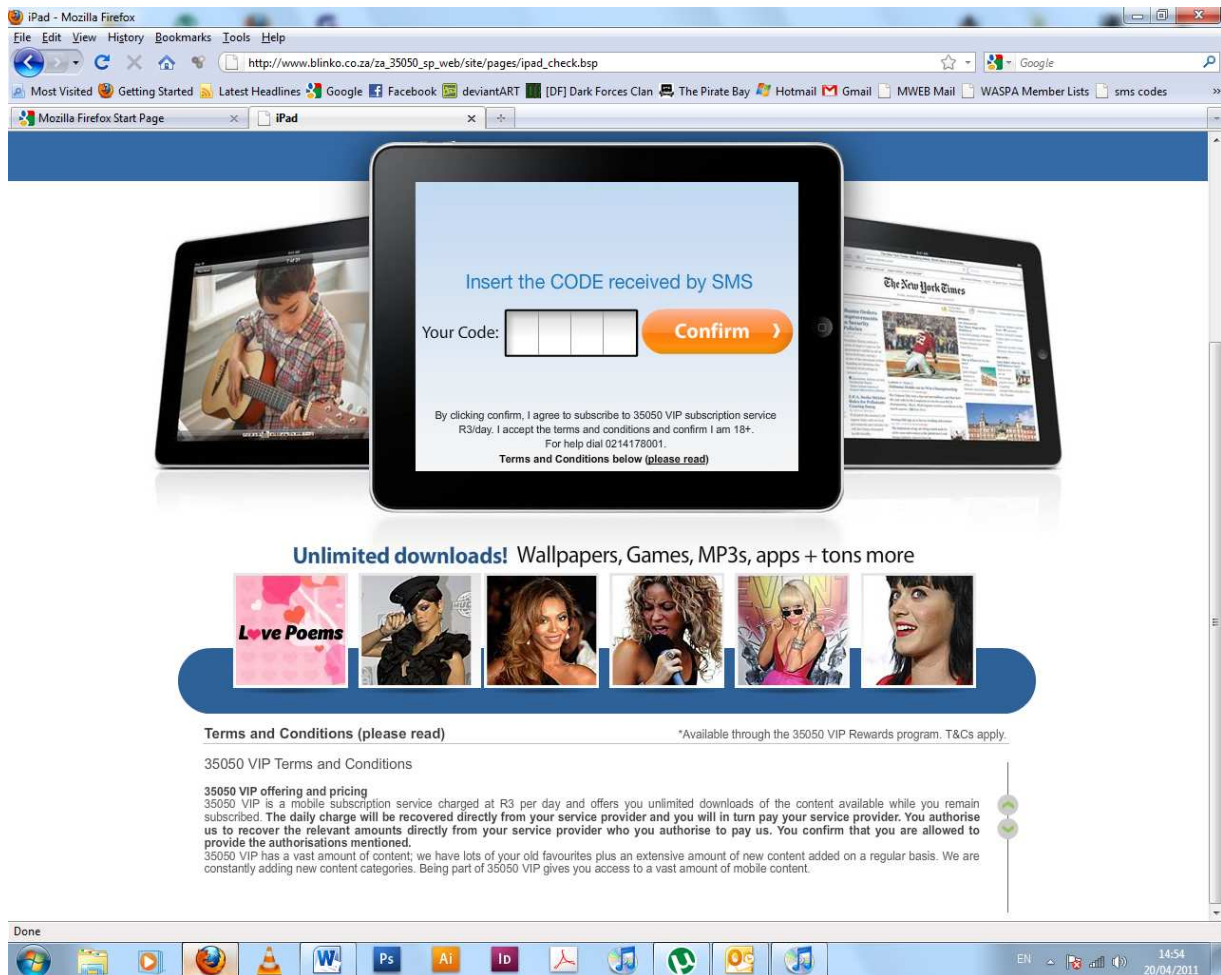
Terms and Conditions (please read) *Available through the 35050 VIP Rewards program. T&Cs apply.

35050 VIP Terms and Conditions

35050 VIP offering and pricing
35050 VIP is a mobile subscription service charged at R3 per day and offers you unlimited downloads of the content available while you remain subscribed. The daily charge will be recovered directly from your service provider and you will in turn pay your service provider. You authorise us to recover the relevant amounts directly from your service provider who you authorise to pay us. You confirm that you are allowed to provide the authorisations mentioned.
35050 VIP has a vast amount of content; we have lots of your old favourites plus an extensive amount of new content added on a regular basis. We are constantly adding new content categories. Being part of 35050 VIP gives you access to a vast amount of mobile content.

Right away I can tell that this service is not compliant. A service may not hook a customer into a subscription service by means of a competition.

I then entered my mobile number, clicked the check box and clicked on CONTINUE.



I then received an SMS with a CODE.

I entered this CODE on the WEB page.

Soccer - Mozilla Firefox

File Edit View History Bookmarks Tools Help

http://www.blinko.co.za/za_35050_sp_web/site/pages/ipad_thk.bsp?SID=787768204&subparam_mk=&mk=&stage=PIN

Most Visited Getting Started Latest Headlines Google Facebook deviantART [DF] Dark Forces Clan The Pirate Bay Hotmail Gmail MWEB Mail WASPA Member Lists sms codes

Mozilla Firefox Start Page Soccer

Subscription Service R3/day Compatible Handsets only

U can get an iPad*

Plus everyday someone can get a Laptop*, iPod Shuffle* or iPhone 3GS*

That's right, just by being a member you could be the next person to receive a reward.
Keep checking this link out. Rewards change often and they become more and more exciting!

Welcome to 35050 VIP.
You could be the next lucky owner of one of our great rewards!

Unlimited downloads! Wallpapers, Games, MP3s, apps + tons more

Love Poems

Mobango Free Mobile Content Service 20 April 2011.docx - Microsoft Word

Done

EN 14:55 20/04/2011

I then received the following messages.



Conclusion:

A service may not hook a customer into a subscription service by means of a competition. This service also needs to be more prominent in showing that they are in fact a subscription service.

Breaches in the Code:

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.

11.2.2. 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**.