



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP)</b>	Cellfind (Pty) Ltd Cell C
<b>Telephone Network(s)</b>	MTN Vodacom
<b>Information Provider (IP)</b> (if applicable)	Lucky Mobile (Pty) Ltd
<b>Service Type</b>	Subscription Service
<b>Source of Complaints</b>	Competitor
<b>Complaint Number</b>	#0022

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### Complaint

A complaint was received from a competitor of the SP in respect of a television advertisement for a subscription service offered by the IP, using the SP as a content aggregator. The specific instance of the television advertisement was aired on M-Net between 18:00 and 19:00 on Sunday 18 September 2005.

The Secretariat conducted an investigation into the service offered by the IP, using the services of the SP.

The following breaches of the WASPA Code of Conduct were raised:

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.

In addition, the following Clauses of the WASPA Code of Conduct were considered:

#### **11. Subscription services**

##### **11.1. Manner of subscription**

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.1.6. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

11.1.7. Once a customer has subscribed to subscription service, a notification message must be sent to the customer containing the following information:

- (a) The cost of the subscription service and the frequency of the charges;
  - (b) Clear and concise instructions for unsubscribing from the service;
  - (c) The member's contact information.
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## Investigation

The Secretariat received a response from the IP, through the SP, indicating:

- The advertisement in question is an advert for a subscription to weekly "rude" wallpaper.
- The term "subscription service" is prominently displayed near the middle top section of the advert for the entire duration of the advert.
- The voice over specifically states "sms rude to 31188 and get the rudest pictures sent to your mobile phone weekly".
- The price is prominently displayed as "R4.95 per week".
- The only keyword that can be used is "rude".
- A customer cannot buy any of the individual pictures advertised but can only subscribe to receive a weekly rude picture as advertised. If the purchase of a specific content item were possible, the advertisement would contain specific keywords, such as "rude1", "rude2", "rude3" etc, which is not the case.

Based on the reasons given above, the IP, through the SP, submitted that the advertisement is in full compliance with Clause 11.1.2 of the WASPA Code of Conduct, in that it is sufficiently clear that the service is a weekly subscription service.

In addition, the IP sends a customer the following SMS message through the SP, upon subscribing:

;-) U will get a weekly rude wallpaper. ";-)" means its from us. To get more fun on your phone reply MENU. Optout = STOP or mail help@luckymobile.co.za. R4.95/wk

in accordance with Clause 11.1.7 of the WASPA Code of Conduct.

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## Decision

The Adjudicator did not uphold the complaint.

The Adjudicator considered the IP's submission regarding pricing, the specific description of the service as a subscription service and the absence of content specific keywords, as well as considering the objective clarity and frequency of the information displayed in the advertisement and contained in the "voice over", in coming to this decision.

The Adjudicator considered the use of content items to advertise a subscription service and whether this practice constitutes a breach of the WASPA Code of Conduct:

- The purpose of Clause 11.1 of the WASPA Code of Conduct is to protect customers and potential customers from confusing or misleading subscription services. Clause 11.1 of the WASPA Code of Conduct requires providers of subscription services to ensure that customers and potential customers are fully informed of the nature of the service. Clause 11.1 of the WASPA Code of Conduct specifically requires an independent transaction for subscribing and prohibits the practice of automatically subscribing a customer who has requested a non-subscription content item or service.
- It is reasonable and appropriate for providers of subscription services to give customers and potential customers of their subscription service an indication of the type of content or service to be delivered. However, use of one or more specific items of content as an indication or example of content to be provided in terms of a subscription service, has the possibility of confusing a customer or potential customer so that they believe they are acquiring a specific content item or service rather than subscribing to a subscription service. This is prohibited in Clause 4.1.1 of the WASPA Code of Conduct requiring honest and fair dealings with customers and Clause 4.1.2 of the WASPA Code of Conduct requiring members to “not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission”. Advertising of this nature is also likely to be in breach of Clause 11.1 of the WASPA Code of Conduct.
- However, the WASPA Code of Conduct does not specifically prohibit the use of a content item or items in advertising for a subscription service; provided that the content item or items is clearly and only being used as an indication or example of the type of content to be provided in terms of the subscription service. This is of course subject to the further proviso that such use does not breach Clauses 4.1.1, 4.1.2 and 11.1.1 of the WASPA Code of Conduct and that the business processes involved do not breach Clauses 11.1.2 and 11.1.4 of the WASPA Code of Conduct (as these Clauses or other Clauses of the WASPA Code of Conduct may be amplified or further explained by advisories issued by WASPA from time to time, in this case the WASPA Advisory on Subscription Services).
- Assessing whether a content item or items is clearly and only being used as an indication or example, or whether it is likely to mislead (intentionally or unintentionally) can only be done in the context of the specific advertisement. There are a number of factors to be considered, both individually and in relation to each other inter alia and by way of example only, including:
  - The use of keywords. Specific content is more likely to be an example only if a single, generic keyword used for the subscription request, while the use of one or more content specific or content related keywords is likely to cause confusion.
  - The indication that the service being advertised is a subscription service and the prominence and clarity of such indication (visual, auditory or otherwise); particularly in comparison with the indication (visual, auditory or otherwise) of the content example/s.

- The indication that there will be a continual billing process and the billing frequency as well as an indication of the amount to be billed and the prominence and clarity of such indication.
- The indication that there will be ongoing, continual and regular delivery of content and the frequency of such delivery, having regard to the prominence and clarity of such indication.
- Whether there is a mix of content items and a subscription service being advertised or only a subscription service.
- Whether the same short code or access number is used for both content items and a subscription service.
- Whether similar key words are used for content items and a subscription service.
- The clear differentiation between the content examples or indicators and the subscription service itself.