



## REPORT OF THE ADJUDICATOR

**WASPA Member (SP):** Integrat (Pty) Ltd (“Integrat”)

**Information Provider**

**(IP):** Peach Mobile  
(if applicable)

**Service Type:** “Truetone” or “soundalike”

**Complainant:** Gavin Penkin, competitor company representative, director of eXactmobile

**Complaint Number:** 0063

**Adjudicator:** Kerron Edmunson

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### Complaint

The complainant states that the Peach Mobile advertisement for content downloads published in You magazine dated 3 November 2005 by Peach Mobile contravenes section 4.1.2 (provision of information to customers) of the WASPA Code in that:

1. “the advertisement has a section referring to Truetonez;
2. the content which is being offered is a sound alike and not a True (original) tone;
3. the ad makes the user belie[b]e they will be getting a True Tone, but in fact gets a sound alike”.

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### SP Response

2 responses were received by WASPA in relation to this complaint, the first dated 9 November 2005 from Peach Mobile (the IP), and the second dated 8 November 2005 from Integrat (the SP).

The IP makes several lengthy arguments in direct response to the complaint which for the sake of convenience I have grouped together under headings which deal with the subject matter of the response:

1. *Identity of the respondent*

“The complainant in this matter has lodged a complaint against Mantella. We should point out that although Mantella is a WASP and does have certain links with our company, it was not the WASP member concerned as the aggregator in respect of this complaint. In fact the complainant should have been targeted against Integrat in this instance. While the incorrect identification of the WASPA member involved should render any response unnecessary at this stage – for sake of resolution of what we regard as a

#0063

complaint, which is malicious and anti-competitive, we will nonetheless turn to deal with the subject matter insofar as it relates to Peach Mobile....

On a more technical note, and even in the even that our advertisement was implicitly misleading (which we strongly deny the terms of section 4.1.2 refer to a direct obligation on members of WASPA, which does not apply to us due to our classification as an "Information Provider". Although section 3.9.1 does require its members to bind information providers to ensure that their services do not contravene the Code of Conduct, this can only apply insofar as the Code refers to Services and not general obligations of members."

2. *True tones and sound alike*

"The term True Tones is widely used within the mobile industry and has developed a corresponding meaning although this has no formal or legal validity and the term is used with some flexibility. However an analysis of its use in the industry will quickly establish that its use bears no relation to the content (whether original or otherwise) but rather to the technology used or quality of the rendition provided. The distinction in use of the term (as against other types of tones) is necessary to describe the level of quality which may be achieved in comparison with previous formats – and in particular because it is relevant to handset capability. Previous and less advanced phones were only able to offer monophonic or polyphonic sounds. These were synthesized versions of sounds rather than realistic or "hifi" quality playback of actual sounds as with RealTones typically achieved by using MP3 or ACC format. By way of example of industry usage, the Telegraph Newspaper in the United Kingdom has this to say on its FAQ pages in regard to True Tones:...."basically True Tones are the latest in sound quality. Technically, a polyphonic ringtone is a synthesised melody that plays a collection of instruments "voices" that makes a ringtone on your phone. True Tones on the other hand are not limited by voices given that they are actual sounds!"

We can offer further detailed support of this usage in the industry should it prove necessary. The complainant must be aware of this distinction. In fact on its website the complainant provides an "original artist guarantee" where it adds that it is the ONLY provider to support the ORIGINAL ARTIST for True Tones (their stress). They add "Beware of Fakes from other providers advertised as "sound-alike", "cover version", "in the style of", "made famous by" etc. we believe that the complainant is able to make its claim because it has entered into an agreement with a music label to provide original versions of various artists as True Tones. To reinforce that the complainant uses this as a competitive advantage, it may be noted that the complainant charges R15 for its True Tones as against the R10 that is more common for those providers that are not able to support Original Content.

We do not believe that our advertisement breaches the Code of Conduct in any way and section 4.1.2 in particular. The relevant section 4.1.2 provides that members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission. We do not believe that any information provided in our advertisement falls under this category. In order for this to be true, the term "True Tone" would have to have only one meaning – and that is a tone made from music taken from the original artist. As we have established above this is not the case.

#0063

We should add that due to the prohibition against bundling our advertisement explicitly does not promise the delivery of any specific tone but rather mentions a number of different songs by artists as examples of what is offered under the various categories. If we are not offering a specific item of content we do not see how we could be held to have promised an original artist version of any item of content. What we are offering under True Tones is simply a "True Tone" quality rendition of a certain category as ordered by the end user. In fact our General terms and conditions as reflected on the advertisement make it clear that "Pictures and Artists are by way of example only". Contrary to the claim made by the complainant we do not claim to [prove original artist] and thus we also reject that we provide what complainant would call "Fake" as we have made no representation of originality."

The SP has also responded in various ways, and we have also grouped those responses under headings similar to those above for consistency and ease of understanding:

1. *Identity of the respondent*

"The Information Provider is a company in its own right and although it is bound by an agreement with the Respondent it still has a free hand in its advertisements.

The Respondent acted as the Service Provider, and did not advertise the material and information provided, nor did we initiate the transaction, select the addressee, or modify the data, and the process is completely automatic, without selection of the data. According to the ECT Act the Service Provider can not be held liable for the data provided. The WASPA Code is thus in contradiction with the ECT Act [section 73 of this Act was quoted in full]."

2. *True Tones and sound alike*

"The complaint is not valid because a True Tone by definition does not mean an Original Tone. It in fact[s] means a tone representing True Sound. [A] animal sound could thus also be sold as a "True Tone" because of the nature of the sound. A mobile phone is not sold as a device supporting "True Tones", "Animal Tones", and "Sound Alike Tones". It is only sold as supporting "True Tones" and should not be confused with Original artists. Our customer has never [A]dvertised the words "Original Artists" anywhere. Further more, the Information Provider is not selling the songs as Original Songs, but as True Tones. A Polyphonic ring tone could be created from the original artist or from the Sound Alike artist, and will still be sold as a "Poly Tone"."

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### **Consideration of the WASPA Code**

The General Provisions of the Code provide at:

1. section 3.3.1 that members will not offer or promise services that they are unable to provide; and
2. section 4.1.2 that members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

I have considered the question of what industry regards as a “true tone” and a “cover tone” in complaint 0059, and found that there would appear not to be a standard in the industry. For the sake of completeness and consistency, I have repeated those issues taken into account in that matter.

It is clearly important to understand whether or not the complaint should be upheld, based on whether or not, in all the circumstances, there has been a misrepresentation. In addition to those matters raised by the IP, have considered the following:

1. A misrepresentation is generally regarded as an “intentionally or sometimes negligently false representation made verbally, by conduct, or sometimes by nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally”<sup>1</sup>.
2. “Real” is defined variously as “being or occurring in fact or actuality; true and actual not imaginary, alleged or ideal; genuine and authentic, not artificial” and “true” means “consistent with fact or reality, not erroneous or false; genuine, reliable; so as to conform to a type, pattern or standard”<sup>2</sup>.
3. “True tones” are an industry term, coined as the content industry has grown. There does not appear to be an industry manual or dictionary which defines either “true tones” or “cover tones” but I have considered what might be likely standards in South Africa and internationally in the content sector:
  - a. eXactmobile defines a true tone not by referring to the word “true tone” specifically but by stating that they offer an “original artist guarantee”. This, they say, means that “eXactmobile is the ONLY provider to support the ORIGINAL ARTIST for true tones and full track downloads. Beware of FAKES from other providers advertised as “sound-alike”, “cover version”, “made famous by” or “in the style of”<sup>3</sup>;
  - b. Vodafone uses the word “realtone” to describe music ringtones which “sound just like the real thing”<sup>4</sup>;
  - c. MTN categorises truetones separately from polyphonic and monophonic ringtones, they cost more and you must be a subscriber to access them. MTN’s terms and conditions state that unless otherwise specified MTN owns all intellectual property in its content. It is therefore not clear, other than by subscribing, what MTN regards as true tones.
4. “Covers”, whilst also not capable of definition in terms of a manual or dictionary, have come to be accepted as copies of original songs performed by other artists.

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## Decision

### *1. Identity of the respondent*

Although Peach Mobile raised several concerns in relation to the alleged abuse of the complaints mechanism by the complainant, we have repeated

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<sup>1</sup> [www.dictionary.com](http://www.dictionary.com)

<sup>2</sup> [www.dictionary.com](http://www.dictionary.com)

<sup>3</sup> [www.exactmobile.co.za](http://www.exactmobile.co.za)

<sup>4</sup> [www.vodafone.co.uk](http://www.vodafone.co.uk)

#0063

only those relevant to the present matter. As an aside, we suggest that the respondent voice concerns regarding the mechanism to WASPA directly and independently of their response to the complaint.

Although the SP continued in its response to analyse the position of WASPA members, SPs as aggregators and IPs as content providers, I do not consider it relevant to make a finding on this aspect and also suggest that the SP bring this issue to the attention of WASPA in another forum. For purposes of assessing the complaint against the response received from the IP and the SP I must apply the Code as it presently stands. To my knowledge, no other queries regarding the jurisdiction of WASPA in relation to SPs has been received. I understand that the arrangements between SPs, IPs and network operators was carefully considered when the Code of Conduct was agreed.

## 2. *True Tones or sound alike*

Taking into account the provisions of the Code relied on in the complaint, and the absence of an industry standard in relation to what a True Tone might be, I do not believe that the complaint can be upheld on the basis that it contravenes section 4.1.2 purely by use of the words "True Tone".

I want to make it clear that despite the fact that the General terms and conditions of the respondent state that "pictures and artists are by way of examples only", I believe it could be confusing to the ordinary consumer to refer to the original song and artist name, particularly given the different uses of the words "True Tones". The general terms and conditions seem to be advising the customer to choose off a list of specials which are subject to the availability of ingredients, whereas in my view, they should disclose that the restaurant has no specials at all.

I will address this in the sanction.

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## **Sanction**

Although some time has passed since the complaint was filed, in the event that Peach Mobile continues to advertise its downloadable songs as "True Tones" together with the original artists' names and song titles, I believe it could be misleading to the customer to do so, and the wording of the General terms and conditions does not adequately disclose the real facts to the customer.

Therefore Peach Mobile is required to take note of this caution, and to amend their General terms and conditions to state that the True Tones offered by them are not songs sung by original artists.