



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	ExactMobile
Telephone Network(s)	All
Information Provider (IP) (if applicable)	Wireless Warriors t/a Sexy Mobile
Service Type	Content downloads of an adult nature
Source of Complaints	Public
Complaint Number	#0065

Complaint

A complaint was received from a member of the public concerning the IP's Internet web site at www.sexymobile.co.za. In particular the complainant raised the lack of pricing information supplied by the IP and the inadequate age verification processes employed by the IP.

The Secretariat conducted an investigation into the service offered by the IP through the SP.

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

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.

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult services. Explicit confirmation of a user's age must be obtained prior to the delivery of an adult service.

Investigation

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

- The number 37399 (3 SEXY) displayed at the top of our web page is only there as an illustrative tool which serves to explain what the numbers are associated to '3 SEXY' It makes no reference to the sale of an item, hence pricing has not been included.

- I understand that this may appear to be misleading but I can assure you that it most certainly was not intended as such. In response I will remove the 3 SEXY/ 37399 graphic at the top of the page.
- Pricing is shown when the user clicks on 'HOW TO DOWNLOAD' here it clearly indicated to which number the user should send his request to as well as the cost thereof.
- In response to the age verification aspect of the SexyMobile Web site:
 - There is no hardcore content available to users on the Web site.
 - The images displayed are purposefully extremely low in resolution and small in size. The only image of any significance would be the Babe of the Day Picture, which is no more explicit than what one would find on page 3 of either SON or Daily Voice Newspapers.

The Secretariat accessed the Internet web site of the IP and downloaded a content item. The secretariat noted the “home page” of such Internet web site contains an age verification statement, which reads:

To protect our site's users from viewing adult-oriented material without their consent, this site requires you to read the following statements and answer the questions below before continuing.

- *I am an adult, being at least 18/21 (depending on individual state laws regarding access to adult subject matter) years of age*
- *I warrant that it is legal to view such material in my locale and country.*
- *I will not redistribute this material to anyone, nor will I permit any minor, or any person who would find this personally offensive, to view this material.*
- *I understand that the following pages may contain movie titles, descriptions and/or photos that some may find to be obscene and/or offensive. The following pages may also contain advertising that some may find obscene and/or offensive.*
- *Furthermore I understand that neither SEXYMOBILE nor any of its affiliates, partners or subcontractors can be held responsible for the actions of any party (parties) accessing this site, or for the results of any such actions. Copyrights of all Website content are retained by the original owners. Some of this website's content is intended exclusively for mature audiences.*
- *OR*
- *I will not hold SEXYMOBILE, it's officers , internet providers, owners, creators, employees and any affiliate company, from and against any claims, liability, losses, costs, damages, or expenses(including attorney's fees) arising from my use of or participation in this service or the information contained therein.*

By entering this site you agree to the above mentioned Terms and Conditions.

The page then contains a button marked "I agree" which must be clicked in order to proceed. As far as the Secretariat was able to establish, the Internet web site sets a cookie on the browser of the person accessing the site, which allows one to freely navigate the site after agreeing to the terms and conditions. Hence, while one is still in the same browser session one will be able to jump directly to content, but someone who has not already agreed to the terms and conditions will not be able to do so.

The IP appears to have remedied the issues concerning pricing, as the price per download appears next to the premium number display in those areas of the Internet web site viewed by the Secretariat.

Once a content item was requested by sending the relevant numerical code to the premium rated short code 37399, no age verification was requested. In addition to the content item being sent via SMS messaging, a WAP link was received. Using this WAP link opened a page displaying a red triangle with the figure "18" contained therein, similar to the symbol used for indicating age restrictions in other media and content industries in South Africa. The WAP card or page also contains a question "Do you agree to the terms & conditions of use?" The words "terms & conditions" are hyperlinked, however this hyperlink does not resolve and returns an error message. Agreeing to the IP's terms and conditions, without being able to view them, opens a WAP accessible version of the IP's Internet web site. The WAP portal version of the IP's Internet web site does not appear to use cookies, however the naming structure of the IP's WAP portal appears sufficiently complex so as to make guessing of the page URLs unlikely though not impossible. As indicated by the IP, the preview material accessible via the WAP portal is of an adult nature but limited in size and clarity, however the WAP portal does act as a mechanism to access and download this content, in a larger and clearer format.

Decision

The Adjudicator considered the service offered by the SP.

Concerning Clause 6.2.5 of the WASPA Code of Conduct, the Adjudicator was concerned over the use of the word "must" in the first sentence of such Clause while the word "should" is used in the second sentence of such Clause. On the assumption that the drafters of the WASPA Code of Conduct used the different terms "must" and "should" intentionally to convey different meanings or different nuances of meaning, the Adjudicator had to consider the difference in meaning between such terms.

The Oxford English Dictionary defines the term "should" as:

"modal verb (3rd sing. should) 1 used to indicate obligation, duty, or correctness. 2 used to indicate what is probable. 3 formal expressing the conditional mood. 4 used in a clause with 'that' after a main clause describing feelings. 5 used in a clause with 'that' expressing purpose. 6 (in the first person) expressing a polite request or acceptance. 7 (in the first person) expressing a conjecture or hope."

The term “must” is defined as:

“modal verb (past had to or in reported speech must) 1 be obliged to; should. 2 expressing insistence. 3 expressing an opinion about something that is very likely.”

Having regard to Longman's Dictionary of Contemporary English, New Edition, 1991, pp 669-671, the term “should” is generally used to express desirability or probability while the term “must” is generally used to express obligation or a requirement.

The term “must” is used in indicating that it is necessary that something happens or is done, in stating formal rules and regulations, or to express strong obligation. The term “should” is generally used to state recommended or advisory procedures, a recommendation or that which is advised but not required. The term “should” does have an element of obligation, generally in the context of what is the right or correct thing to do, or the best or a good thing to do, such as the recommendations of some outside authority, to express a mild obligation or to give advice. In fact, the term “should” is regarded by some grammarians as a weak form of the term “must”.

Considering the contrast between the different modal verbs “must” and “should” and concentrating on the nuances of meaning between them, the Adjudicator was of the view that both terms indicate an obligation, however the obligatory nature of the word “must” is “stronger than that of the word “should”.

From the Internet web site and WAP site, it is clear that the IP now displays the relevant price information for the service. The admission of the IP regarding the absence of pricing information with each instance of the premium number display at the time of the complaint, is noted. The requirement regarding pricing display is comprehensively and objectively indicated in the WASPA Advertising Guidelines, however as the complaint in question pre-dates the introduction of the Advertising Guidelines, reliance cannot be placed on the Advertising Guidelines. As the Internet web site is no longer accessible in its prior iteration and use of various Internet archiving resources was not successful in viewing the Internet web site as it appeared prior to such changes being effected, the Adjudicator accepted the good faith declaration of the complainant and the partial admission of the IP. The Adjudicator accordingly found that the IP had, on its Internet web site, failed to display pricing information “with all instances of the premium number display” as required and as such was in breach of Clause 6.2.5 of the WASPA Code of Conduct.

Regarding the possible infringement of Clause 8.1.3 of the WASPA Code of Conduct, there are two distinct elements:

- Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult services.
- Explicit confirmation of a user's age must be obtained prior to the delivery of an adult service.

In this regard, an “adult service” is defined as “any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature.” The WASPA Advertising Guidelines draws clearer distinctions between material of a sexual nature and material the sale or distribution of which is restricted by law. As this complaint pre-dates the Advertising Guidelines, the Adjudicator was restricted to using the general definition contained in the WASPA Code of Conduct. The Adjudicator considered the content provided by the IP to be sexual in nature and thus an adult service for the purposes of the WASPA Code of Conduct.

As such, the IP must meet both requirements of Clause 8.1.3 of the WASPA Code of Conduct. Regarding the requirement that reasonable steps be taken to ensure that only persons over 18 years of age have access to the service, the Adjudicator noted:

- the age verification statement on the home page of the IP’s Internet web site;
- the appearance of a symbol on the IP’s WAP site indicating an age restriction of 18 but no clear statement to the effect that access is restricted to persons over the age of 18 only;
- the absence of accessible terms and conditions on the IP’s WAP site; and
- the absence of any restriction or verification when downloading content,

which led the Adjudicator to the conclusion that the IP has taken some steps to ensure access by adults only, however the steps taken are not sufficient for the purposes of the WASPA Code of Conduct.

Regarding the requirement of explicit confirmation of age, the Adjudicator was of the view that such explicit verification was obtained in respect of the IP’s Internet web site. Explicit age verification is not obtained in respect of access to the WAP site or content downloads.

The complaint was accordingly:

- upheld in respect of a breach of Clause 6.2.5 of the WASPA Code of Conduct; and
- upheld in respect of a breach of Clauses 8.1.3 of the WASPA Code of Conduct.

In determining the sanction to be imposed, the Adjudicator had regard to the fact that the:

- IP has changed its Internet web site to comply with Clause 6.2.5 of the WASPA Code of Conduct;
- obligation regarding pricing appearing with all instances of the premium number display in the second sentence of Clause 6.2.5 of the

WASPA Code of Conduct, is a weak obligation and has a common usage of an advisory rather than peremptory nature; and

- **issue has been pre-empted by the WASPA Advertising Guidelines, intended to obviate issues of this nature and in effect as at the date of this adjudication but not at the date of the complaint;**
- **the test in the first part of Clause 8.1.3 of the WASPA Code of Conduct is one of reasonableness, while the test in the second part of such clause has no such limitation and must be strictly applied,**

the Adjudicator imposed the following sanction:

- **The SP is formally reprimanded for its failure to display pricing information relating to the service with all instances of the premium number display on the IP's Internet web site; and**
- **The SP is ordered to pay a fine of:**
 - **R750,00 to WASPA in respect of the breach of Clause 6.2.5 of the WASPA Code of Conduct; and**
 - **A fine of R15 000,00 (fifteen thousand Rand) in respect of a breach of Clause 8.1.3 of the WASPA Code of Conduct; and**
- **The SP is ordered to ensure compliance by the IP with Clause 8.1.3 of the WASPA Code of Conduct within 10 (ten) working days of receipt of this report.**

Fines are payable to the WASPA within five (5) working days of notification of this sanction. Should an appeal be lodged, the fine will be suspended until the determination of the appeal. Should the fine be upheld (in whole or in part, or increased) the fine will be payable within five (5) working days of notification of the appeal finding.