



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Integrat (Pty) Ltd
Information Provider (IP)	Gozomo (Pty) Ltd
Service Type	Subscription
Source of Complaints	Competitor
Complaint Numbers	#0272, #0277, #0278, #0290 & 0310 (Part 1)

Complaint

Five complaints were received in respect of the service offered by the IP through the SP. In particular the complaints concerned the bundling of content items and a subscription service, as evidenced by two slightly different versions of a television advertisement for the service, as placed by the IP. As the five complaints (other than Part 2 of complaint #0310, which has been separated for precisely this purpose) concern essentially the same issue, were submitted by the same complainant and in respect of the same service, provided by the same IP through the same SP, these five complaints have been consolidated into a single report. This also accords with the stated preference of the IP.

The advertisements which are the subject of these complaints are for the IP's "animated fairy" or "phone fairy" subscription service. They feature an animated fairy inside a mobile phone screen talking to the viewer, responding to the phone ringing and "hitting" the phone screen with her wand. There are two versions (referred to as version 1 and version 2), which are similar but distinguishable.

Version 1 contains a notification "R4.99/week Subscription" in a triangle in the extreme right hand corner of the screen, in a contrasting colour for the entire duration of the advertisement. It further contains the wording "This is a subscription service. You will be charged R4.99 per week until you unsubscribe plus network WAP charges, WAP/GPRS required. Helpline 082 903 4994 www.gozomo.co.za" for the duration of the advertisement. This wording is in white on a grey background, which makes it very difficult to distinguish. The key words "A" and "T" and the access number "31996" appear at various times, as does the IP's logo. A voice over reads "If you want this animated fairy on your phone" and proceeds to indicate the keyword and short code.

The version 2 subscription notification (again "R4.99/week subscription") is smaller than in version 1 and does not appear for the full duration of the advertisement. Colour contrast in shades of white and grey is reasonable. It further contains the wording "This is a subscription service. You will be charged R4.99 per week until you unsubscribe. To stop SMS STOP to 31996. Helpline 082 903 4994" for a portion of the advertisement. This wording is in white on a grey background, which makes it

very difficult to distinguish. The key words "A" and "T" and the access number "31996" appear at various times. A voice over reads "If you want animations of this fairy on your phone" and proceeds to indicate the keyword and short code.

There is no perceptible difference in the format of the advertisement or the process employed for subscribing to the subscription service. The most noticeable difference between the two versions is the change from the words "this animated fairy" to animations of this fairy" in the voice over.

The basis of the complaints is set out below:

Complaint Number	Section of WASPA Code of Conduct	Detailed Description
#0272	11.1.2 and 6.2.2	Section 1.1.2 Clearly states that a request to join a subscription service must be an independant transaction, with the specific intention of subscribing to a service. It further states that to join a subscription service may not be bundled with a request for specific content The audio of the ad says" If you want this animated fairy on your phone, SMS A to 31996. Once you do this you get an SMS back saying :Welcome to Gozomo's subscription service. U will rec.1 Animation/week.2unsubscribe sms A STOP to 31996. Cost R5/msg rec. Cust Supp 082 903 4994 You are also sent a bookmark to download the animated fairy. Section 6.2.2. The advertisement advertises that the cost is R4.99 per week. The WASP is however billing the user R5.44. This is R0.55c more per transaction than the advertised price.
#0277	11.1.2 and 6.2.2	Section 1.1.2 Clearly states that a request to join a subscription service must be an independant transaction, with the specific intention of subscribing to a service. It further states that to join a subscription service may not be bundled with a request for specific content The audio of the ad says" If you want this animated fairy on your phone, SMS A to 31996. Once you do this you get an SMS back saying :Welcome to Gozomo's subscription service. U will rec.1 Animation/week.2unsubscribe sms A STOP to 31996. Cost R5/msg rec. Cust Supp 082 903 4994 You are also sent a bookmark to download the

		animated fairy. Section 6.2.2. The advertisement advertises that the cost is R4.99 per week. The WASP is however billing the user R5.44. This is R0.55c more per transaction than the advertised price.
#0278	11.1.2 and 6.2.2	Section 1.1.2 Clearly states that a request to join a subscription service must be an independant transaction, with the specific intention of subscribing to a service. It further states that to join a subscription service may not be bundled with a request for specific content The audio of the ad says" If you want this animated fairy on your phone, SMS A to 31996. Once you do this you get an SMS back saying :Welcome to Gozomo's subscription service. U will rec.1 Animation/week.2unsubscribe sms A STOP to 31996. Cost R5/msg rec. Cust Supp 082 903 4994 You are also sent a bookmark to download the animated fairy. Section 6.2.2. The advertisement advertises that the cost is R4.99 per week. The WASP is however billing the user R5.44. This is R0.55c more per transaction than the advertised price.
#0290	11.1.2	Section 1.1.2 Any request from a customer to a subscription service must be an independant transaction, with the specific intention of subscribing to a service. Section 11.1.2 Clearly states that a request to join a subscription service must be an independant transaction, with the specific intention of subscribing to a service. It further states that to join a subscription service may not be bundled with a request for specific content The audio of the ad says" If you want this animated fairy on your phone, SMS A to 31996. Once you do this you get an SMS back saying :Welcome to Gozomo's subscription service. U will rec.1 Animation/week.2unsubscribe sms A STOP to 31996. Cost R5/msg rec. Cust Supp 082 903 4994 You are also sent a bookmark to download the animated fairy.
#0310	11.1.2	Section 1.1.2 Clearly states that a request to join a subscription service must be an independant transaction, with the specific intention of subscribing to a service. It further states that to join a

		subscription service may not be bundled with a request for specific content The ad promotes a Fairy and says SMS A to get animations of the fairy. It also says to get the true Tone SMS T to 31996. When you SMS either A or T you get the advertised content and are automatically subscribed to the service.
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The following clauses of the WASPA Code of Conduct were considered:

2.11. An “**information provider**” is any person on whose behalf a wireless application service provider may provide a service, and includes message originators.

2.20. A “**subscription service**” is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

3.9. Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

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

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.

SP response

The Secretariat received a response from the SP in its own regard as well as from the IP. Certain supplementary responses and documents were thereafter received from the IP.

The SP's response indicates (with slight variation in each case) that:

- Integrat did not advertise the content or were not part in the process of producing the advertising material, but were merely the Connectivity Aggregator in this case. We also do not have any history about the process followed for producing the advertisement, and therefore cannot respond to the complaint with the required information.
- Integrat also do not host the content or initiate transmission of this transaction.
- According to our contracts with our clients, our clients need to adhere to the WASPA code, and network rules, and any sanctions or fines imposed, will be carried over to our clients.

- We reserve the right to review the sanctions imposed and will take the necessary action, in accordance with fair business practice, and South African Laws.

The IP submitted responses in respect of the complaints, which are set out comprehensively below. The IP also submitted further responses, which contain information which may be commercially sensitive and which is not entirely relevant to these complaints and accordingly is only referenced in part.

Complaint Number	IP Response
#0272, #0277,& #0278	We refer to WASPA Code of Conduct complaints # 0272, # 0277 and # 0278 and respond thereto on behalf of Gozomo (the Information Provider in respect of the advertisements that are the subject matter of the Complaints.) Due to the fact that the complaints are all made in respect of the same advertisement and in respect of the same alleged breaches we ask that this response be considered in relation to each of the complaints. These complains were all lodged against Integerat by Gavin Penkins of Exactmobile. Once more we wish to lodge our objection against a Competitor, which is represented on the Code of Conduct Committee using a disciplinary forum in respect of which we are expressly not permitted to have any vote and have in addition been prevented from even having a voice on the relevant committees. We draw to WASPA's attention once more that we continue to reserve our right to use an appropriate forum to lodge our objection to this unacceptable state of affairs and to seek appropriate relief. We view WASPA's failure to address our concerns in this regard in a serious light and once more draw their attention to the fundamentally anti-competitive nature of this situation. It is noteworthy that Mr Penkins continues to be the only source of complaints in respect of advertisements lodged by Gozomo and Services provided by Gozomo. We also question why Mr Penkins seems to be going to the lengths of testing all of our services and viewing our advertisements for the purpose of finding what he views as breaches of the Code of Conduct. We wish to point out to Mr Penkins once again that he is not the regulator of the Industry or of our Company and his role within WASPA does not require him to search out potential breaches of the Code. His conduct points specifically to him using the Complaints procedure as a competitive tool. In addition as Mr Penkins is well aware the subject matter of his complaints involving the interpretation of Section 11.1.2 of the Code of Conduct are currently subject to review under the WASPA complaints procedure. While we re-iterate our view that the provisions of Section 11.1.2 are too vague and

	general to prohibit the commencement of a subscription service through the promotion or even ordering of a specific item of content, this view is irrelevant for the purposes of Mr Penkins' complaints as he has misrepresented the audio voiceover in respect of the advertisements featuring the "phone fairy" Instead of saying to order "this animation" the voiceover mentions to order fairy animations for your phone. In other words a generic category of "the animated phone fairy" animations is described and is the subject of the subscription service. The remainder of the layout of the television advertisement makes it clear that this is a subscription service and the transaction is accordingly a separate transaction with the specific intention of subscribing as required by the WASPA code of Conduct. We accordingly reject categorically that any of the advertisements are in breach of Section 11.1.2 of the WASPA Code. The second leg of Mr Penkins' complaint concerns the cost of the Service. We cannot understand the precise reason for or the accuracy of the charges mentioned by Mr Penkins. Our charge is precisely as stated at R4,99 and not in excess of R5 as stated by Mr Penkins. The excess charge (if any) can only be an additional charge not billed by us and confused by Mr Penkins. We suggest that he take this issue up with his network or alternatively that he contact us so that we can look into the situation accurately on his behalf. Should the adjudicator wish to have additional information or clarifying evidence in respect of our charges in relation to this content we remain at his disposal. In view of the brief and unsubstantiated nature of the Complaint as well as its source we are loathe to expend further resources to address and rebut this claim without specific guidance from the adjudicator as to what may be required. For sake of clarity we confirm that we categorically reject the claim that we have misrepresented our charges in these advertisements. We trust that WASPA will agree that there is no merit to any aspect of these three complaints.
#0290	Mr Penkins addressed this complaint to GlocellWirelessServiceProvider which is not our company. Mr Penkins has recently submitted similar frivolous complaints about the same advertisement against Integrat three times. Refer to our responses to WAPSA complaints# 0272 #0227 #0278. Once more we wish to lodge our objection against a Competitor, which is represented on the Code of Conduct Committee using a disciplinary forum in respect of which we are expressly not permitted to have any vote and have in addition been prevented from even having a voice on the relevant committees. We draw to WASPA's attention once more that we continue to reserve our right to use an appropriate forum to lodge our objection to this unacceptable

	state of affairs and to seek appropriate relief. We view WASPA's failure to address our concerns in this regard in a serious light and once more draw their attention to the fundamentally anti-competitive nature of this situation. It is noteworthy that Mr Penkins continues to be the only source of complaints in respect of advertisements lodged by Gozomo and Services provided by Gozomo. We also question why Mr Penkins seems to be going to the lengths of testing all of our services and viewing our advertisements for the purpose of finding what he views as breaches of the Code of Conduct. We wish to point out to Mr Penkins once again that he is not the regulator of the Industry or of our Company and his role within WASPA does not require him to search out potential breaches of the Code. His conduct points specifically to him using the Complaints procedure as a competitive tool. In addition as Mr Penkins is well aware the subject matter of his complaints involving the interpretation of Section 11.1.2 of the Code of Conduct are currently subject to review under the WASPA complaints procedure. While we re-iterate our view that the provisions of Section 11.1.2 are too vague and general to prohibit the commencement of a subscription service through the promotion or even ordering of a specific item of content, this view is irrelevant for the purposes of Mr Penkins' complaints as he has misrepresented the audio voiceover in respect of the advertisements featuring the "phone fairy" Instead of saying to order "this animation" the voiceover mentions to order fairy animations for your phone. In other words a generic category of "the animated phone fairy" animations is described and is the subject of the subscription service. The remainder of the layout of the television advertisement makes it clear that this is a subscription service and the transaction is accordingly a separate transaction with the specific intention of subscribing as required by the WASPA code of Conduct. We accordingly reject categorically that any of the advertisements are in breach of Section 11.1.2 of the WASPA Code. For sake of clarity we confirm that we categorically reject the claim that we have misrepresented our charges in these advertisements. We trust that WASPA will agree that there is no merit to any aspect of these three (sic) complaints.
#02310	We believe this complaint to be without merit. An analysis of the "Fairy" advertisement will reveal that it is clearly illustrated that a subscription service is being offered. In each case animations of fairies and true tones are offered in the plural in no instance is the subscription linked to a specific item of content. WASPA has recognized that subscription services

	may be promoted and offered in respect of categories of content but not in respect of individual items of content. We are confident that the adjudicator will find the reference in the advertisement to fall under this acceptable category of promotion by way of category.
Further submission	We have never knowingly ignored the Code, but have made numerous efforts to work with Waspa to comply with the Code. This I will further show from our subsequent actions in response to complaints about our TV advertising. We received the same complaint (re clause 11.1.2) from the same complainant on 30 March 2006, which was followed by complaints on 4 April, 5 April and 25 April about our TV advertising. I was away attending an industry conference at the time, and as soon as I returned I amended the advert to further clarify the subscription process in the voice over. The new advert and the previous advert showed all subscription information indicated in the example from the advertising guidelines. Despite this, we felt that if there may be some confusion, we would amend our advertising to reflect our concern for our customers. Following this amendment, we received a further complaint (#0310) again submitted by the same complainant... In the advert it does state "to get the true tone_s_, but the voice over artist may have run into the next sentence. We would never knowingly spend time and money to remake the advert half compliant. Following the last complaint mentioned above, before it even went to adjudication, as of June 19th we suspended all our TV advertising (Appendix 6*). Further to the above display of our clear attempt to work with Waspa, rather than against the organization, which I feel has tremendous merit, there are a number of internal changes we have made that I feel bears mentioning. As of 1 March 2006, the structure of the company changed significantly.... The company is now a 100% South African owned. We have also subsequently joined the Waspa organization as an affiliate member, to become part of the process in building a successful and sustainable industry. The new shareholders have made a commitment to the business to ensure that it complies with the Waspa Code as well as all the requirements set out by the Networks. They new shareholders have also committed significant financial resources to a long terms education campaign, which was launched on 5 July 2006 to bring awareness to the consumer of subscription services in South Africa. This we feel is the only positive campaign attempted by any member of the mobile industry in South Africa, where a financial commitment has been made to educate the market.

	A sample of our education campaign currently appearing in this weeks People and Mense magazines is attached. We also have a website available (www.smseducation.org) as well as TV adverts in production to further the campaign. We have remade our TV and Magazine commercials and have provided a CD to the Waspa Secretariat. The TV commercial clearly states that we offer a subscription service in the text displayed on screen throughout the entire commercial and is clearly stated in the voice over. We have gone further by stating the price and the billing frequency in the voice over although this is not required by the advertising guidelines. We have done this as we feel this extra measure would provide more clarity to our customers, than just stating "subscription" in the voice over. Although there have been errors made in the past by ourselves, which we have been severely sanctioned for, none of the errors have been made with any intent to ignore the Code or mislead the public. If a customer attempts to subscribe currently they are not charged, sent an apology sms and a free item of content for their trouble. We are striving for the highest quality in consumer protection and continue to spend money on consumer education and are working together with Waspa, the networks and other members of the industry to build a sustainable future for the mobile content industry.
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WASPA Advertising Rules

The complainant did not raise the issue of a possible breach of the WASPA Advertising Rules in his complaint and as such the SP and the IP have not been given an opportunity to respond thereto.

The Adjudicator dealt extensively with this issue, as well as the relevant provisions of the WASPA Advertising Rules in the report concerning complaints #0141, #0186 and #0188 (which concerned the same SP, IP and complainant and similar advertising for the same service, namely a subscription service).

While a possible breach of the WASPA Advertising Rules cannot be considered in this report, the Adjudicator felt it appropriate to refer to certain key provisions thereof.

The Advertising Rules deal with different media types; however have a common section, namely the 'General Terms' applicable to all media types. The provisions specifically dealing with television advertising indicates:

2.2.2 COST OF ACCESS TEXT DISPLAY RULES

Trigger:

At any display of, or mention by a voice-over, of a unique access number

Display Length:

100% of the length of the advertisement

Display Text Font:

'Zurich' font

Display Text Font Size:

18 points MINIMUM

Display Text Font Position:

In a visible block or triangle in a top corner of the screen in the Title Safe Area (see diagrams)

Display Text Font Colour:

Contrasted colour superimposed on the block/triangle

Block/Triangle Colour

Contrasted colour, behind the display text

Display Text Type:

- ☐ Text must be static
- ☐ No Caps (except for the first letter of the first word) or italics may be used as the display font for the word subscription.
- ☐ No italics may be used as the display font for the price text.
- ☐ No text must be placed around the access cost text that may obscure clear reading
- ☐ The access cost text must not be positioned or formatted in a manner where it may be obscured by other text or visual information that may be displayed as part of the ad
- ☐ The access cost must not be part of a colour scheme that may obscure easy reading of complete details of the access cost
- ☐ The access cost text must not be obscured by any background flashing or other visual animations that practically and objectively obscures easy reading of complete details of the cost

Example:

R10/SMS or

R10/week

Subscription

2.2.3 T&C TEXT DISPLAY RULES

Trigger:

At any display of, or mention by a voice-over, of a unique access number

Display Length:

- ☐ Minimum 10 seconds
- ☐ If applicable, of the 10 seconds display time for T&Cs, a minimum of 5 seconds must be allocated to informing the user that they will be subscribing to a subscription service.

Display Text Font:

'Zurich' font

Display Text Font Size:

15 points MINIMUM

Display Text Position:

On bottom edge of title face of the screen

Display Text Type:

- ☐ No CAPS-only or Italics-only text is permitted for the T&C font.
- ☐ The T&C text must be static and horizontal for the requisite minimum display time, changing as is necessary to show all the T&Cs in equal time proportion
- ☐ The T&C text may not scroll on the screen, either right to left, left to right nor any other direction.
- ☐ The T&C text must not be positioned or formatted in a manner where it may be obscured by other text or visual information that may be displayed as part of the ad
- ☐ The T&C must be formatted so that each sentence is distinct. Each sentence must end with a period.
- ☐ The T&C text must not be part of a colour scheme that may obscure easy reading of complete details of the T&C
- ☐ The T&C text must not be obscured by any background flashing or other visual animations that practically and objectively obscures easy reading of complete details of the T&C text.

T&C DISPLAY TEXT TYPES (ALL, OR COMBINATION OF EXAMPLES BELOW):

- Two SMSs Required at R--- each
- WAP and GPRS access required
- Adults Only.
- Prize awarded after 1 Jan 20--.
- Free SMS/Minutes do not apply.
- VAS cell rates apply.
- Failed Requests billed.
- Updates sent until cancelled.

Minimum T&C Display Text For Subscription Services:

"This is a subscription service. You will be automatically charged R--- every 7 days until you unsubscribe."

OR: "This is a subscription service. You will be charged R-- every 7 days until you unsubscribe, plus R-- per xxxx".

(where xxxx is the type of content delivered as part of that service)

The relevant section of the 'General Terms' is set out below. To avoid uncertainty, the extract is from Section 2, which deals with television advertising:

2.3.13 **SUBSCRIPTION SERVICES:** Show Total Subscription Charge, Frequency of Charge, any bearer charges and any additional charge/s

(i) Must Use The Words "Subscription Service"

If the Content provider is providing a continuous, subscription-like or subscription-based service, then the words "Subscription Service" must be prominently displayed at the top section of the advertisement as well as at each Content or service section in the advertisement where various subscription types are displayed.

No acronym, letter (eg "S"), number, abbreviation (eg "Subs"), icon, or any other mark may be used as an alternative to the words "Subscription Service" anywhere in the advertisement when that Content is only available at all and/or at a particular cost as part of a subscription service.

(ii) Must Indicate Charge/s:

The advertisement must indicate in the font size, position and type as indicated:

- The TOTAL charge that the consumer will incur for the subscription component of their access to that subscription service.
- The frequency (and the minimum frequency, if applicable) at which they will be charged for the subscription component of access to that subscription service.
- Whether, in addition to the periodic subscription charges in (a) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement. [See (iii) below]

This indication must include the potential and cost of any (additional) bearer charges.

(iii) Must Indicate Cost Of Any (Additional) Per-Content Access

If in addition to a periodic subscription charge the consumer could additionally be charged on a per-access basis for access to any particular service, Content or class of Content on the advertisement within the subscription period and terms, then the advertiser must make it clear to the consumer that access this Content or service will, over and above the periodic subscription cost, incur additional charges per Content or service access.

The periodic subscription cost, the frequency of the periodic charge, and where applicable, the additional access cost must all be displayed clearly and TOGETHER, in a position immediately above, below, or to the side of the Content,

service, or class of Content. There must in particular be an indication whether bearer charges are included or not in the access cost.

- o [See also 'BEARER CHARGES' above)

(iv) **Must Differentiate Clearly Between Multiple Subscription Types**

If in any advertisement there may exist the possibility to subscribe to a number of individual subscription services which would ordinarily each carry a separate but additional subscription charge and associated charging frequency or additional per-Content access charge, then this possibility of the consumer being charged at multiple prices and charging frequency must be clearly indicated.

(v) **Must clearly Differentiate Between Non-subscription and subscription Types if both available in the same advertisement:**

Taking into account the provisions in section 11.1.2 in v3.2 of the WASPA Code Of Conduct on relating to an "independent transaction," if an advertisement has components to it that promote

- (a) Content that is ordinarily made available to a consumer on payment of a once-off payment for that individual Content without the need to subscribe to that service,
- AND**
- (b) Content that will be available at all, and/or at a particular price or even free only if the consumer subscribes to a subscription service,

then this distinction between the availability of non-subscription and subscription charging must be made clear by unambiguously demarcating in separate sections (and not just wording) the non-subscription portion from the subscription service portion or Content in the advertisement.

The words "Subscription Service" as well as the total charges and any additional access charges and charge frequency for that subscription service must be clearly indicated in the form specified.

ADDITIONAL BACKGROUND NOTES TO SUBSCRIPTION SERVICES:

Any request to be subscribed to a subscription service must be an **INDEPENDENT TRANSACTION** (see §11.1.2 of v3.2 of the WASPA Code of Conduct). Hence subscribers cannot be subscribed to a subscription service through having requested specific Content, or having being made to believe by a (practically) confusing ad design that they are requesting Content on a once-off (non-subscription) basis.

Confusion by consumers may arise in cases where a **single advert** may indicate the availability of Content to users (usually on a network that has not enabled subscription services) on a once-off basis, as well as on a subscription basis (to users on a network that has enabled subscription services), even though the subscription and non-subscription services may be on a different number range.

If confusing, this may create the scenario where the consumer lacks a **specific intention** of subscribing to a service (§11.1.2). To avoid this scenario, advertisers must avoid advertising material designs where subscription service access can be confused with non-subscription services for the same or same type of Content in the same ad. Unless this distinction is made clear, the non-subscription portion of an ad which has as its center the requesting of specific Content (on a once-off basis to users on a network that does not have subscription services) may have the effect of (possibly inadvertently) **breaching** the '**independent transaction**' criteria of the subscription portion of the code of conduct (See also §11.1.4 of v3.2 of the Code of Conduct)

The key issue is that the requirement of an "independent transaction" set out in Clause 11.1.2 of the WASPA Code of Conduct is considered in the Advertising Rules, which are binding on WASPA members and through them, their information providers. The Advertising Rules indicate:

- distinction between the availability of non-subscription and subscription charging must be made clear by unambiguously demarcating in separate sections (and not just wording) the non-subscription portion from the subscription service portion or **Content** in the advertisement (Section 2.3.13 (v), Adjudicator's emphasis added); and
- advertisers **must avoid** advertising material designs where subscription service access can be confused with non-subscription services for the same [or same] type of Content in the same ad. Unless this distinction is made clear, the non-subscription portion of an ad which has as its center the requesting of specific Content (on a once-off basis to users on a network that does not have subscription services) may have the effect of (possibly

inadvertently) breaching the 'independent transaction' criteria of the subscription portion of the code of conduct (Section 2.3.13 Additional Background Notes, Adjudicator's emphasis added)

A consideration of the Advertisements giving rise to these six complaints considered in this report appear, *prima facie*, to possibly give rise to multiple possible breaches of the Advertising Rules and those dealing with independent transactions in particular, which is itself a breach of Clause 6.1 of the WASPA Code of Conduct. However, as the complainant had made no reference to such Advertising Rules or Clause 6.1 of the WASPA Code of Conduct in any of the complaints being considered in this report.

Point in limine

The Adjudicator noted the IP's submission that complaint #0290 is addressed to the incorrect party by the complainant. This error was noticed by the Secretariat, who forwarded the complaint to the SP and the SP and the IP have responded thereto, thereby indicating by conduct their willingness to deal with the matter.

Based on the conduct of the SP and IP and the fact that they have had an opportunity to respond to the complaint, the Adjudicator considered this complaint further.

Decision

Liability of the SP and IP

The Adjudicator has previously noted the liability of an SP for the actions of an IP and without burdening this report overly, repeats the comment of the Panel in the Appeal Decision, which held:

Nevertheless, we believe that it is implicit in the Code that non-member IPs must comply with the rulings of the Adjudicator, where the Adjudicator finds that there has been a breach of the Code, or risk the termination of their contractual relationship with their SP. This much is clear from clause 3.9 of the Code, which states:

"Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct."

Inability to Influence WASPA Decisions

Having regard to the IP's submission regarding the making of decisions in an organisation, which it was not entitled to join, the Adjudicator noted the comment of Harms JA in *Telimatrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* [Supreme Court of Appeal, Case Number 459/04 – as yet unreported]:

The only aspect raised on the plaintiff's behalf was the fact that the plaintiff was not a member of the ASA but was nevertheless 'indirectly bound' by its rulings because its advertising agent was a member of a

constituent body of the ASA. In Matthews v Young (1922 AD 492), counsel reminded us, by joining the union Young bound himself to its process. The answer is really this. If the plaintiff was not legally bound to the ruling through those whose services it engaged, the plaintiff could have ignored the ASA's decision but, if it chose to abide by it, its loss would have been caused by its election and not by the incorrect decision. By engaging the services of someone who is a member of a professional organisation, one has to accept the consequences of that person's professional rules and standards.

In addition, the Adjudicator noted that the IP has since become an affiliate member of WASPA.

Pricing

The Adjudicator accepted the IP's submissions in respect of the pricing of its subscription service and the complaints in respect of Clause 6.2.2 of the WASPA Code of Conduct are not upheld.

Independent Transaction

The Adjudicator considered the submission of the IP.

The Adjudicator concurred that the WASPA Code of Conduct is not as clear as it could be with regard to the meaning of an "independent transaction", however, rather than proceeding with an examination of such phrase, as has been done in previous reports, the Adjudicator referred to the Appeal Decision, where the Panel held:

Clause 11.1.2 is not as clear as it should be. The interpretation of this clause is complicated by the fact that the text of clause 11.1.2 does not specifically refer to content. The ordinary grammatical meaning of words must be followed. Where the grammatical meaning of the words is unclear the words must be interpreted in light of their immediate linguistic context. The wider legal context may also be determined by referring to internal sources (the Code, especially clause 11.1) and external sources. The meaning of clause 11.1.2 becomes apparent if it is read in context with the rest of clause 11.1, especially the heading of clause 11.1 ("Manner of subscription) and clause 11.1.4. Clause 11.1.4 provides that customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. It becomes clear that clause 11.1.2 prohibits the subscription service from being dependent on the ordering of content and that the customer must be specifically intent on subscribing to a subscription service and not the ordering of content.

The second part of clause 11.1.2 also makes it clear that an offer to customers to sign up for a subscription service should not mislead customers to believe that they are subscribing to anything other than a subscription service. We are therefore of the view that clause 11.1.2 prohibits requests for subscription services from being dependent on requests for specific items of content.

The advertisements to which complaints #0002, #0011 #0026 and #0058 relate all required customers to put in a request for specific content first,

whereupon they would be subscribed to a subscription service that would deliver similar content in future. We find this practice to be in contravention of clause 11.1.2 of the Code..

The Adjudicator noted the IP's contention that its advertising amounted to an advertisement for a subscription service and the content items contained in the advertisement are indicative of a content category and not a specific item of content.

This does not appear correct in the case of version 1, as the wording of the voice over in version 1 seems to indicate a particular content item, by using the term "this animated fairy". The IP does not even reference the wording of its own advertisement in its submission but instead contends that the voice over "mentions to order fairy animations for your phone". Version 2 is a slight improvement on version 1 by referring to "animations of this fairy" rather than "this animated fairy" as in version 1.

The Adjudicator has previously held that content may be provided for illustrative purposes (inter alia in complaint #0022) where the Adjudicator held:

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.*

There accordingly must be a comparison of the indicators the IP provides to customers and potential customers to show that the service being advertised is a subscription service as against the indicators that may potentially confuse a customer or potential customer in the advertisements which are the subject of the two complaints.

There are cogent factors in both versions of the advertisement, both text and audio (only in version 2), which clearly indicate that the advertisement is for a subscription service. As against that the Adjudicator had to weigh the following:

- A content range based on a single character (such as the “phone fairy”), game or artist is potentially far more confusing than content with multiple characters, games or artists. This does not prohibit such singularly focused categories, however it increases the onus on the content provider to avoid confusion;
- The use of only one content item to illustrate a subscription service is an extremely dangerous tactic and many if not most consumers will presume that when only one content item appears, that is what is being offered, not a continual weekly supply of variations of that item. It is then the responsibility of the content provider to clearly and unambiguously disabuse them of any such notion;
- The use of the wording “this animated fairy” rather than “weekly fairy animations” in version 1, which again refers to a specific content item;
- The fact that the term “subscription” is not mentioned in the voice over and similarly no indication of pricing or frequency occurs in the voice over, in either version;
- Much emphasis is placed by the IP on the change from “this animated fairy” to “animations of this fairy”. However the subtlety of this distinction must be weighed against the visual stimulus of the animation and the volume of the real sound that had been playing immediately prior thereto, as against the voice over.

Having weighed the efforts of the IP in revising its television advertising so as to inform a customer of potential customer that a subscription service is being advertised against the advertisements themselves, the Adjudicator held that the IP’s efforts (while cogent and significant) were not sufficient so as to obviate the harm of advertising a single content item.

The Adjudicator concurs with the IP that the voice over in version 2 is an improvement on that in version 1 and acknowledges the IP’s efforts to educate consumer, however, if the IP was really serious about educating consumers and in its concern for its customers, it would have made the changes in version 2 of the advertisements far more obvious. If the voice over indicated “If you want **different weekly** animations of this fairy on your phone **at a cost of R5 per week**, SMS ...”, combined with pricing and a reference to subscription in a size that exceeds the minimum set by the WASPA Advertising Rules, then there may be a finding that the display of the content was indicative and intended to reference a content category. In the current iterations (both versions 1 and 2) the Adjudicator cannot make such a finding.

The Adjudicator also noted that the IP referred in passing to a “double-opt in” process. The Adjudicator has previously considered the IP’s so-called “double-opt in” process and held that it was not a valid double opt-in, giving rise to a related yet independent transaction. In the absence of further information from the IP, this reference is rejected.

The Adjudicator concurs with the succinct and considered view of the Panel in the Appeal Decision and the Adjudicator followed the decision of the Panel in the Appeal Decision in finding the IP, through the SP, to have breached Clause 11.1.2 of the WASPA Code of Conduct.

Conclusion

As such, the complaints in respect of alleged breaches of clause 11.1.2 of the WASPA Code of Conduct are upheld.

Sanction

In considering the sanction to be imposed arising from the breaches of the WASPA Code of Conduct raised in the complaints under consideration:

- The Adjudicator took note of previous decisions of the Adjudicator and the Appeals Panel in respect of subscription services;
- The Adjudicator considered Clause 3.9 of the WASPA Code of Conduct, which provides:

3.9. Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

- The Adjudicator had regard to the fact that subscription services remain an extremely contentious issue within WASPA. The Adjudicator is aware and welcomes the efforts to amend the WASPA Code of Conduct to clarify issues such as the nature of an independent transaction, however the Adjudicator is bound to follow the WASPA Code of Conduct as at the date of the complaint and does not enjoy the luxury of foresight into future amendments or clarifications.
- The Adjudicator noted that financial sanctions do not appear to deter the IP from its persistent breaches of the WASPA Code of Conduct.
- The Adjudicator noted further that subscription services are enabled by the Online Billing System utilised by Vodacom and the Event Based Billing utilised by MTN.
- The Adjudicator noted that sanctions were imposed on the SP in respect of complaints #0141, #0186 and #0188.

The Adjudicator accordingly imposed the following sanction:

- The SP is reprimanded for allowing the IP to breach the WASPA Code of Conduct.

- The Adjudicator requested the network operators to block the SP from obtaining any new access to the relevant network operator's Online Billing System and/or Event Based Billing for a period of 3 (three) months in respect of complaints #0141, #0186 and #0188. Such sanction shall apply against the SP in respect of these 6 (six) complaints as well, with no extension or alteration of the 3 (three) month time period.
- The IP, as a member of WASPA, is ordered to suspend the provision of any subscription service in which "animated fairy" or "phone fairy" is delivered for a period of 1 (one) calendar month. Such period shall only commence on the expiry of the suspension in the report concerning complaints #0141, #0186 and #0188.
- In order to ensure such suspension, the SP is ordered to block the number "31996" in respect of any keyword or letter previously used in respect of the "animated fairy" or "phone fairy" subscription service, for a period of 1 (one) calendar month. Such period shall only commence on the expiry of the suspension in the report concerning complaints #0141, #0186 and #0188. In particular the SP shall not process any new or existing billing transactions for the IP relating to the "animated fairy" or "phone fairy" subscription service, on either its existing short codes or any new short code.
- The Secretariat is instructed to notify the mobile operators of the above sanction and to request their assistance in monitoring and if necessary enforcing such sanction.
- The SP is instructed not to resume the IP's service unless such service (and in particular the subscription service process employed) complies with the WASPA Code of Conduct. The SP is reminded of its obligations, in terms of the WASPA Code of Conduct and the WASPA Advertising Rules, to ensure that an information provider's service as well as all advertisements for such service offered through the SP, comply with the WASPA Code of Conduct and the WASPA Advertising Rules.
- The IP, as a member of WASPA, is reprimanded for its failure to comply with the WASPA Code of Conduct and is ordered to pay a fine to WASPA in the amount of R100 000 (one hundred thousand Rand) in respect of the subscription service process it employs, which has been found to contravene the WASPA Code of Conduct. The amount of such fine has been determined having regard to the fine imposed in complaints #0141, #0186 and #0188 and is lower than that fine owing to the IP's efforts to avoid consumer confusion (which has been found to be insufficient, but which have been noted and considered as mitigating factors in determining the amount of the fine imposed).
- The Secretariat is ordered to simultaneously notify all members of WASPA of such suspension and that providing any service relating to the "animated fairy" or "phone fairy" to the IP during such period shall constitute a breach of the WASPA Code of Conduct.