



REPORT OF THE ADJUDICATOR

WASPA Member (SP): eXactmobile (Pty) Ltd

Information Provider

(IP): Individual
(if applicable)

Service Type: Intellectual property infringement – not a service

Complainant: Individual IP

Complaint Number: 0332

Adjudicator: Kerron Edmunson

Code version: Code v4.3, Ad Rules 1.6

Complaint

The complainant sent an email to WASPA on 14 June 2006 in which it was alleged that the SP has contravened section 3.4 of the Code. The complainant has stated that he entered into an agreement with the SP “to distribute my mobile content. Some of the content submitted to them has been copied, the same concept/idea and then sold by them. I have many times mailing my concerns to them but they have never replied”.

SP Response

The SP has provided a response based on two grounds – first, that WASPA is not the correct vehicle for the “issue”, and second, that a lot of content is similar.

In relation to the second ground the SP avers that it “licenses content from many content providers all over the world as well as creating a lot of content in house using our own graphic artists.” It also states that the “content being provided by the complainant is generic with generic concepts. No Brand Names, no Trade Marks nor any identifying characteristics are noticeable within his content. Graphic images are subjective and a person may believe that his concepts are being copied when they are similar...” The SP makes other arguments based on how similar content is and “in the mobile space, the items that sell well are generally used by all the sellers and hence the perception of “copying” is everywhere.”

Consideration of the WASPA Code

The relevant section is 3.4.1 which states:

“Members will respect the intellectual property rights of their clients and other parties and will not knowingly infringe such rights.”

Decision

Having carefully considered WASPA's role and the information provided I am of the view that I cannot make a finding in this case for the following reasons:

1. WASPA does not adjudicate the contractual disputes of any party. The parties will no doubt have provided for their own rights of recourse in the agreement mentioned, alternatively will have to resort to the courts.
2. Even taking section 3.4.1 into account, there is too little information provided by the complainant on the exact manner of infringement for WASPA to consider that content distributed by the SP may in fact be that of the complainant, as WASPA is required to take account of the evidence provided to it in determining a complaint. There is insufficient evidence in this case either to consider that 3.4.1 may apply, or to apply other provisions of the Code.

As an aside, the SP states somewhat glibly that content is content is content, but I do not agree with this statement and do not consider it sufficiently persuasive that were I of the opinion that WASPA was obliged to make a finding in this case, I would overturn the complaint.

If the complainant wishes to take this matter further he will need to found a case based on the Code.