



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP)</b>	Exactmobile
<b>Information Provider (IP)</b> (if any)	N/A
<b>Service Type</b>	Subscription
<b>Source of Complaints</b>	Competitor
<b>Complaint Number</b>	#0389
<b>Date received</b>	4 August 2006
<b>Code of Conduct version</b>	4.3

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### Complaint

The Complainant, an information provider affiliated to WASPA, alleges a breach of Section 6.3.13 of Version 1.6 of the WASPA Advertising Guidelines occurring on pages 2 & 3 of the SP's Exactmobile Directory #32 ("the Directory"). This section requires that, where an advertisement using a short code is presented in a content booklet, the actual words "Subscription Service" must be prominently displayed at the top section of the advertisement. The requirement encompasses "continuous, subscription-like or subscription-based Service(s)".

The Complainant avers further that the words "Subscription Service" do not appear on any page of the Directory.

A corresponding Complaint has already been adjudicated on under Complaint #0372, lodged by the same Complainant in respect of Exactmobile Directory #31.

Finally the Complainant wished it to be brought to the adjudicator's attention that, despite the lodging of the Complaint, he is aware "that these booklets are still being widely distributed even though there is an obvious breach of the Code of Conduct. I

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have enquired at several locations and new boxes of these booklets have been delivered as recent as Thursday 2006/08/17”.

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### **SP Response**

The SP’s response is identical to that quoted in full in the Adjudicator’s Report for Complaint #0372, save that it is prefaced with the following:

“This complaint is the same as complaint number 372, lodged by the same complainant. This directory was already printed and distributed before complaint number 372 was lodged. The same omission has therefore occurred in this complaint. This has however been rectified in the next directory no 34. The appropriate pages of this service have been included as part of this response at the bottom so that the adjudicator can see that this error has been corrected.”

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### **Sections of the Code considered**

#### *Code:*

Section 2.21 - A **subscription service** is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction”

Section 11.1 – Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”.

#### *Advertising Rules Version 1.6:*

Section 6.3.13 (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.

**Decision**

The statement by the SP to the effect that the Directory was already in print at the time Complaint #0372 was brought to its attention is accepted. However, as found in the relevant part of the decision under Report #0372, the SP was aware that the service being advertised was a subscription service and could not have been unaware that it was required to use the words "subscription service". For this reason it is my decision to treat the instant complaint as being distinct from that relating to Exactmobile Directory #31.

The Adjudication delivered in respect of Complaint #0372 is, with the necessary changes, directly applicable to the current matter and is, for the sake of convenience, set out below:

"The Code (section 11.1) is explicit with regard to the requirement that the words "subscription service" must appear and this is emphasised and expanded by section 6.3.13(1) of the Advertising Rules, which also makes reference to "subscription-like and subscription-based" services. The rationale for this requirement lies in the need to avoid creating confusion on the part of consumers and in the efforts of WASPA to educate consumers around subscription services.

The SP, in its Response, at first appears to try and argue that this requirement is impractical and misleading to consumers in the specific instance and further that its Club service is not really a subscription service. I do not think it is necessary to entertain these arguments at length and, indeed, the SP itself comes to the conclusion that it is required by the Code and Advertising Rules to use the actual words "subscription service" and undertakes to do so in future.

A "subscription service" is defined by the Code as "any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction". Suffice it to say that the Exactmobile Club falls squarely within this definition.

Furthermore the SP's obfuscation is somewhat ironic given its involvement in earlier Adjudications which have examined the status under the Code of

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download “clubs”. In the Adjudicator’s Report in respect of Complaint #0052<sup>1</sup>, in which matter the current SP was the Complainant, the Independent Adjudicator stated unequivocally that:

- A download “club” is a subscription service, however differentiated from
- earlier subscription services in that the subscriber selects one or more content items, rather than having content pushed to the subscriber;
- The complainant operates a similar service, using its WAP portal to allow subscribers to select content rather than relying on a subscriber SMSing a product code;
- Clarity and differentiation of service and pricing in a “hybrid” advertisement is more difficult than in an advert for one of specific content or a subscription service and needs careful evaluation in terms of the WASPA Advertising
- Guidelines; and
- Download “clubs” require careful attention to ensure that consumers are neither confused nor harmed.”

In the Adjudicator’s Report in respect of Complaint #0056<sup>2</sup> the Adjudicator had cause to consider a similar breach of the Code:

11.1.1. The Adjudicator has previously indicated his concerns regarding the marketing of a “subscription service” as a “club”. While such marketing is not prohibited in terms of the WASPA Code of Conduct, Section 11.1.1. clearly indicates that the term “subscription service” must be used in promotional material and such use must amount to a prominent and explicit identification of the service as a subscription service. The placing of the term “subscription service” in between inverted commas in Section 11.1.1 of the WASPA Code of Conduct is in the view of the Adjudicator a clear indication that this exact term must be used. This was not done. The Adjudicator specifically found that the use of the term “club” or the phrase “join the club” or similar phrases is not a substitute for the use of the term “subscription service”.

(my emphasis)

There are a number of other similar matters in which the current SP has been involved. The finding that the SP is explicitly aware that the Club service is a subscription service for the purposes of the Code is unavoidable.

The SP correctly identifies the promotion of an amendment to the Code and/or Advertising Rules as being its correct course of action. Until such time as such an amendment is effected the SP remains bound by the Code and Advertising Rules as they stand. Likewise the Independent Adjudicator is bound by the four corners of the Code, Advertising Rules and such national law as may overlap with the Code and Advertising Rules.

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<sup>1</sup> See <http://www.waspa.org.za/code/download/0052.pdf>

<sup>2</sup> see <http://www.waspa.org.za/code/download/0056.pdf>

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In the circumstances the SP has breached section 11.1 of the Code and section 6.3.13(i) of the Advertising Rules. It should be noted that this breach is at the root of many of the subsequent complaints launched against the SP's Directories.

In considering an appropriate sanction I have considered the following:

- The approach adopted by the SP and the fact that the SP has complied with the balance of the requirements of the Code and Advertising Rules in respect of this particular advertisement. In my judgement the particular advert allows consumers opportunity to determine exactly what service they will receive and how they will be charged for it;
- The ongoing problems surrounding subscription services in the industry and the apparent reluctance on the part of industry players to implement strict compliance with the Code;
- The finding that the SP was, at the time the advert was conceptualised, designed and submitted, aware of the fact that its Club service was a subscription service which had to be explicitly identified as such;
- The undertaking by the SP to comply with section 11.1.1 of the Code in future;
- The fact that a comfort message is sent to consumers who subscribe to the service as required by section 11.1.7; and
- The efforts of the industry to address these problems through consumer education largely based on easy recognition by consumers of subscription services.

In the Adjudicator's Report in respect of Complaint #0056, referred to above, a finding was reached that the SP had breached section 11.1.1 of the Code. The Adjudicator found that the fact of the breach was mitigated by the following:

- the promotional SMS message was sent to previous customers of the SP who had utilised the subscription service of the SP in the past;
- the use of the key words "SUB TONE" (where the word "TONE" may be replaced by one of the other category of subscription services offered by the
- SP) gives some indication that this is a subscription service; and
- a comfort message is sent to subscribers by the SP, in terms of Section 11.1.7. of the WASPA Code of Conduct.<sup>3</sup>

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<sup>3</sup> see <http://www.waspa.org.za/code/download/0056.pdf>

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The SP in Complaint #0056 was ordered to pay a fine of R50 000, of which payment of R45 000 was suspended in recognition of the mitigating factors outlined above.

In the instant matter it is clear that there are factors which tend towards both mitigation and aggravation of the breach. The very fact that issues such as this are still arising of itself suggests that there is a very real need for a sanction which serves to demonstrate to the industry that breaches of this nature are regarded in a very serious light.

The SP is issued with a fine of R75 000 in respect of the breach of section 11.1.1 of the Code. Given the existence of certain mitigating factors, in particular the finding that the SP had taken steps to minimise consumer confusion payment of R50 000 of this fine is suspended for 2 years and triggered by a failure by the SP to properly observe the requirements of Section 11.1.1 of the Code or section 6.3.13(i) of the Advertising Rules during that time and in addition to any sanction which may be imposed in respect of the triggering breach.”

It is further noted that the SP has indicated and shown that the breach will be rectified in the forthcoming Exactmobile Directory #33. If this is not the case the WASPA Secretariat will, no doubt, be amongst the first to know.

The SP is issued with a fine of R75 000 in respect of the breach of section 11.1.1 of the Code. Given the existence of certain mitigating factors, in particular the finding that the SP had taken steps to minimise consumer confusion payment and its demonstrated intent to comply in future, payment of R60 000 of this fine is suspended for 2 years and triggered by a failure by the SP to properly observe the requirements of Section 11.1.1 of the Code or section 6.3.13(i) of the Advertising Rules during that time and in addition to any sanction which may be imposed in respect of the triggering breach.

For the avoidance of doubt: this is in addition to the sanction imposed under Complaint #0372.

