



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP):</b>	<b>Integrat</b>
<b>Information Provider (IP): (if applicable)</b>	<b>Flycell</b>
<b>Service Type:</b>	<b>Subscription</b>
<b>Complainant:</b>	<b>Competitor</b>
<b>Complaint Number:</b>	<b>11037</b>
<b>Code version:</b>	<b>Code v 10.0 and Ad Rules v 2.3</b>
<b>Date of Report:</b>	<b>31 December 2010</b>

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### Complaint & Response

1. This complaint was brought on or about the 5<sup>th</sup> of November 2010 by a competitor who wishes to remain anonymous.
2. The Complainant alleged that sections 11.1.1, 11.1.2, 11.2.1 and 11.2.2 of the WASPA Code of Conduct had been breached. The substance of the complaint is as follows:

Detailed\_Description\_Complaint: The advertisement was spotted on [www.mytinyphone.com](http://www.mytinyphone.com) under the wallpapers category after refreshing a few times.

The font color is the same as other text on the page. No bold subscription wording used thus making it obscured from the users vision.

Flycell pop-up ad pages, the Subscription service, although really big font size, is obscured as it is in the middle of a lot of other text.

Then the main attraction here seems to be the Get 1 BONUS Ringtone which is like using the word FREE.

3. As the Complainant also raised the issue of use of the word "free", he should also have cited section 6.5.1.
4. The IP is a member of WASPA and the complaint was sent directly to the IP on the 5<sup>th</sup> of November. The WASPA Secretariat also sent a copy of the complaint to the

SP in terms of section 14.3.3 of the Code of Conduct on the basis that the IP used the SP's infrastructure in providing the service complained of.

5. On the 8<sup>th</sup> of November the IP requested that the WASPA Secretariat obtain screenshots of the allegedly infringing web site so that the IP could respond properly to the complaint.
6. The IP also advised that all of its "landing pages" were vetted by Integrat and that consequently the web site complained of would have been deemed compliant.
7. On the 10<sup>th</sup> of November the Complainant provided the WASPA Secretariat with two screenshots which were forwarded to the IP on the same day. They are attached as Annexures "A" and "B" respectively and are described below.
8. The IP gave a final response to the complaint on the 24<sup>th</sup> of November, the substance of which was largely irrelevant but which will be set out in the decision below where applicable.
9. While the SP was instrumental in obtaining a final response from the IP, it did not furnish any response to the complaint itself.
10. The Complainant indicated on the 29<sup>th</sup> of November that he / she was not satisfied with the IP's answer and that the matter should be referred to formal arbitration.

#### **Portion of the Code Considered**

11. As the conduct complained of occurred in November 2010, version 10.0 of the WASPA Code of Conduct applies to this complaint. The following sections of the Code of Conduct are relevant:

6.5.1. The keyword "free" or words with the same or similar meaning (in any language) may not be used for any service unless that service has no associated charges whatsoever, excluding network bearer charges.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

11.1.2. An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed, except as provided for in 11.1.3.

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

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**Decision**

12. The “landing pages” captured in the screenshots provided by the Complainant are materially similar. They both feature:
  - 12.1. a heading across the top with the words “GET 1 BONUS RINGTONE NOW!” in a font at least twice as large as any other text on the page;
  - 12.2. the words “SUBSCRIPTION SERVICE. R5.99/day + R5 Joining Fee”
  - 12.3. the words “ENTER YOUR CELL PHONE NUMBER TO SUBSCRIBE TO FLYCELL” in large font with a box provided for the purpose and a button marked “Continue” directly below.
  - 12.4. Terms and conditions starting with the words “SUBSCRIPTION SERVICE”.
13. Differences between the pages are not material.
14. The several heads of complaint will be dealt with separately.

**Use of the word “Free” (section 6.5.1)**

15. In its response, the IP stated that the word “Bonus” was prominently displayed, as was the fact of this being a subscription service. It should have been clear to subscribers that they would receive a bonus ringtone only if they subscribed, and are not getting the ringtone for free.
16. Notwithstanding the above, the Code of Conduct is quite unambiguous in respect of using the word “free” or a word with a similar meaning. You cannot use such a word unless the service in question has no associated charges whatsoever.
17. The Adjudicator is of the view that the word “bonus”, when used in this context, has a similar meaning to the word “free”. After all, if one substitutes the word “free” for “bonus” in the phrase “GET 1 BONUS RINGTONE NOW!” the meaning is unchanged.
18. As the service in question is a subscription service with the charges as set out above, use of the word in this context is an infringement of section 6.5.1 of the Code of Conduct.

**Identification as “Subscription Service” (section 11.1.1)**

19. The Adjudicator cannot see from the screenshots provided how the subscription service notification can be said to be “obscured”. The words appear quite clearly in the annexures. The Adjudicator could not visit the pages concerned, as according to the IP in its response, it took them offline shortly after receipt of the complaint, and so the Adjudicator must rely on the material submitted by the Complainant. There is no infringement of section 11.1.1.

Provision of Two Content Items (Section 11.1.2)

20. As the landing pages do not advertise any content item at all – the “bonus ringtone” is an addition to a set number of ringtones available for download – there can clearly be no infringement of section 11.1.2.

Automatic Subscription (Section 11.2.1)

21. No individual non-subscription content / service is advertised, and the advertisement is very clear that in the Adjudicator’s view that the consumer is subscribing to a subscription service. Not only do the words “Subscription Service” appear prominently, but the call to action (which admittedly is in a smaller font) enjoins the consumer to “subscribe to flycell”. A non-subscription service is clearly not on offer, nor is the impression created that one is.
22. Consequently this section has no application to the circumstances of this complaint.

Independent Transaction (Section 11.2.2)

23. As set out above, the Adjudicator has no doubt that subscribing to this service would be (and would be seen to be) an independent transaction to subscribe to the subscription service. Consequently no infringement of this section has occurred either.

The SP

24. The Adjudicator does not see any reason to make a finding in respect of the SP’s culpability or otherwise.
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**Sanction**

25. The IP joined WASPA as an affiliate member in June 2009, and this is the first complaint to be brought against it. In its response, the IP also stated that it as a rule consults with its “business partners” to ensure that its landing pages are compliant with the Code of Conduct. These and the speed with which the IP took the offending landing pages down are all factors in mitigation.
26. The only relevant factor in aggravation is the potential for harm to consumers that such practices as an infringement of section 6.5.1 can bring about. Notwithstanding, the Adjudicator is of the view that this infringement was not malicious and is thus inclined to impose a relatively light sanction:
27. The IP is fined the amount of R2 500.

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# Annexure A

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## GET 1 BONUS RINGTONE NOW!

Join today to get access to the latest mobile content. Everything from ringtones, games and more.  
**SUBSCRIPTION SERVICE. R5.99/day + R5 Joining Fee**



**ENTER YOUR CELL PHONE NUMBER  
TO SUBSCRIBE TO FLYCELL.**

+27 0

Select Carrier ▾

**FLYCELL**

SUBSCRIPTION SERVICE: You will receive ringtones and other downloadable content. R5.99/day (R6/day for Cell C customers) + R5 Joining Fee. To unsubscribe, sms STOP to 35900. Flycell. Helpline: 082 235 0490 (VAS) Errors billed. [support@flycell.co.za](mailto:support@flycell.co.za). For WASPA Code of Conduct visit [www.waspa.org.za](http://www.waspa.org.za). Terms & Conditions [click here](#).

## Annexure B

# GET 1 BONUS RINGTONE NOW!

Join today to get access to the latest mobile content. Everything from ringtones, games and more.  
SUBSCRIPTION SERVICE. R5.99/day + R5 Joining Fee



ENTER YOUR CELL PHONE NUMBER  
TO SUBSCRIBE TO FLYCELL.

+27 0

Select Carrier ▾

**CONTINUE**

SUBSCRIPTION SERVICE: You will receive ringtones and other downloadable content. R5.99/day (R6/day for Cell C customers) + R5 Joining Fee. To unsubscribe, sms STOP to 35900. Flycell. Helpline: [+27 082 235 0490](tel:+270822350490) (VAS) Errors billed. [support@flycell.co.za](mailto:support@flycell.co.za). For WASPA Code of Conduct visit [www.waspa.org.za](http://www.waspa.org.za). Terms & Conditions [click here](#).