



## ADJUDICATOR'S REPORT

<b>WASPA Member (SP):</b>	Buongiorno SA
<b>Information Provider (IP):</b>	Not applicable
<b>Service Type:</b>	Subscription service
<b>Complainant:</b>	WASPA Monitor
<b>Complaint Number:</b>	#11258
<b>Code Version:</b>	10.0
<b>Advertising Rules Version:</b>	2.3

### Complaint

This complaint ("this Complaint") was filed by the WASPA Monitor and concerns a subscription service ("the Service") operated by the SP. The Monitor highlighted two banners located at <http://www.elyrics.net/read/w/wallflowers-lyrics/up-from-under-lyrics.html> and alleged that these two banners violate sections 6.2.2 and 11.2.2 of the Code in that they made use of a competition as a device for enticing consumers to subscribe to the Service (the "bundling" issue) and failed to disclose the Service's subscription cost, respectively. These aspects of the complaint are illustrated in the Monitor's attachment to her complaint which is annexed to this report, marked Annexure "A".

The Monitor advised that the following remedial action would be acceptable:

*If this advert or marketing message is altered immediately and a copy of the amended advert provided to the WASPA Secretariat, it is likely that this complaint can be resolved informally, this remedy might prevent fines from being imposed for breaches of the WASPA Code.*

*The WASPA Monitor requests that the service provider provide a clear plan of action for dealing with this advert, for example:*

- This advert has been withdrawn and will not be flighted from [date].*
- The following changes have been made to the advert: ...*
- The revised advert is scheduled to appear again on [date].*

## Service provider's response

In response to the bundling issue, the SP advised the Secretariat that the iPhone offer was intended as a loyalty award for consumers who are already consumers and the specific formatting of the ad indicated this to be the case. A copy of the ad in question was included in the SP's submissions which are annexed to this report and marked "B" and includes the following submissions:

*In no way were we using the iPhone competition as a "hook" into subscription services.*

*The asterix following the "S" in the statement "Now you can get an iPhone 3G S\*" refers customers and/or potential customers to the last line of our terms and conditions which follow on the landing page.*

*The potential to win an iPhone forms part of our loyalty programme, and is only available to customers who have already been subscribed to us for three months or more. Therefore this is not a subscription lure – only existing subscribers are eligible to receive the potential benefit.*

Regarding the allegation that the other banner did not disclose subscription pricing, the SP conceded its banner was not compliant with the Code's requirements, apologised and submitted a mockup of an amended banner with pricing information.

The Monitor responded with a number of further concerns relating to both the SP's explanations and its proposed banners and ads as follows:

*Buongiorno comment in their response:*

*"The potential to win an iPhone forms part of our loyalty programme, and is only available to customers who have already been subscribed to us for three months or more."*

*Why is this promo then promoted along with in initial subscription service sign up process?. Perhaps this promotion should be marketing via commercial sms, or alike, to their CURRENT database, but it is attached to joining their subscription service.*

*This is in breach of Code. 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.*

*Webusers are not entering this loyalty program competition for anything other than entering a competition. Their specific intention is NOT to subscribe to a 35050 service.*

*The new links that have been provided are of NLB approval. Can buongiorno please forward*

*The new links however have further problems:*

*the nature that they require me their NLB approval.*

*Link no1: subscription service and pricing information to the user. It is displayed in such a way that the information does not look like part of the webpage. This is misleading.*

*Link no2: Firstly, there is NO subscription service / pricing information. Copy in the T&C's state: "Subscription service. 35050 Vip. By entering the PIN that was sent to your cellphone you will be entered into 35050 VIP subscription service" Again, the competition is attached to the signing up process of a sub service. This is in breach of Code.*

*Neither of the two new links communicate that you should be a member for three months before you can be in line for any of those prizes.*

The Holiday Season intervened and the SP requested an extension of time to enable it to respond to the Monitor's feedback. The Monitor advised the SP that she required the banners in question to be taken down in return for an extension until 14 January 2011 to reply. The SP did not respond to the Monitor's proposal and she requested that the Secretariat escalate the complaint to a formal complaint. The SP was advised accordingly on 14 January 2011 and wrote back to WASPA on the same day. A copy of the reply is annexed to this report and marked Annexure "C". In response to the bundling issue, the SP essentially argues that the ad is clear that the iPhone in question is a potential reward to an existing subscriber and not an enticement to subscribe, per se. The SP is merely promoting one of the benefits of being a subscriber which it feels it is entitled to do:

*We confirm that references to the rewards are not used for the purpose of luring potential customers into subscribing to the service. It is however used to encourage existing customers to remain loyal to the service it is at all times made clear to the customers that such rewards are only available to those loyal customers whom remain who remain so for an extended period of time. This approach is common industry practice and does not offend the Code.*

The SP stated further, inter alia, that the two banners located at [http://www.blinko.co.za/za\\_35050\\_sp\\_web/site/pages/Summer.bsp?service=club](http://www.blinko.co.za/za_35050_sp_web/site/pages/Summer.bsp?service=club) and [http://www.blinko.co.za/za\\_35050\\_sp\\_web/site/pages/Polo.bsp?service=club](http://www.blinko.co.za/za_35050_sp_web/site/pages/Polo.bsp?service=club) which the Monitor took issue with in her further feedback were not part of the original complaint and should be the subject matter of a further complaint.

The SP raised a further procedural point on 20 January 2011 regarding this complaint and two further complaints, 11528 and 11626, which the SP felt are substantially similar and should be combined into a single complaint. I don't believe this suggestion was agreed to

and, instead, these three complaints were referred to me for review and determination. I will deal with the overlapping issues pertaining to complaints 11528 and 11626 in my reports on those complaints and modify my determinations appropriately and where necessary.

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

Version 10.0 of the Code applies to this complaint. I have considered the following provisions of the Code:

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

*6.2.8. Pricing on any promotional material must use one of the following generally accepted formats for prices in Rands: "Rx" or "Rx.xx".*

*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.*

*11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.*

*11.6.5. The cost of service and frequency of billing must use the format "RX/day", "RX/week" or "RX/month" (or RX.XX if the price includes cents). No abbreviations of "day", "week" or "month" may be used.*

The Monitor highlighted sections 6.2.2 and 11.2.2 specifically.

### **Sections of the Advertising Rules considered**

Not considered.

### **Decision**

The SP has conceded that its one banner did not comply with section 6.2.2's requirements

and there is no need for me to deal with that aspect of this Complaint further.

I will, instead, focus on the bundling issue. In this regard I have confined my comments to the banners which were the cause for this Complaint in the first place, namely the ballerina banners which are clearly reproduced in Annexure "B". The most prominent feature of these banners is the quiz about which direction the ballerina is turning (in the first banner) and the declaration of the correct answer and large text stating "NOW YOU CAN GET AN IPHONE 3G S\*". There are two lines of text at the very bottom of each banner mentioning the shortcode (represented as an image) as follows:

*35050 + 3D images, RudeBoy & more*

The bottom line of text states the following:

*R3/day - Subscription Service. Not subscribed 4 answer T&C's apply\**

If I understand the SP's submissions correctly, the asterisk at the end of "IPHONE 3G S" is supposed to reference the text on the bottom of the banner and indicate to a prospective subscriber that the iPhone is a loyalty reward which could be awarded to subscribers who have been with the service for a period of at least three months.

The next page a prospective subscriber sees, presumably after selecting a network provider option below the large iPhone offer text, is the page reproduced on page two of Annexure "B". The terms and conditions do not appear to make any reference to the loyalty reward for existing subscribers. The text associated with the checkbox on this page states the following, however:

*I accept the full loyalty program just for three rands per day don't miss this fantastic opportunity*

This checkbox is part of the SP's opt-in mechanism and immediately above it are fields for the prospective subscriber's mobile phone number and network selection. This confirmation makes no reference to the Service as a subscription service. It either implies that the consumer is submitting his or her phone number in order to obtain an iPhone 3G S or that the loyalty program is the same as the subscription service. References to subscription pricing in the banners suggest that the first impression is not correct but the iPhone offer confuses the subscription offering. In addition the checkbox text uses the unusual currency format "three rands per day" instead of the pricing format required by the Code as

represented in section 6.2.8, 11.6.5 and elsewhere in the Code and Advertising Rules. In short, this text is misleading and unnecessarily so. The text on the banners simply does not convey what the SP contends it conveys and the prospective subscriber's likely impression from the banners is that answer the question about the ballerina's turning direction (and, possibly, subscribing) correctly entitles the would-be subscriber to an iPhone 3G S.

A subscriber to this service would probably become a subscriber as a result of this iPhone offer and not solely with the specific intention of becoming a subscriber.

The SP is not a stranger to these specific allegations about its services. In preparing this report I searched the WASPA database for the SP's name and section 11.2.2 and found more than 25 results. One report which I selected at random was a report concerning two complaints, 10479 and 10489, published in October 2010. This report concerned a quiz which the adjudicator found was a means to secure a subscription to the SP's content service and a violation of section 11.2.2 of version 9.0 of the Code which was substantially similar to the present section 11.2.2. There were other complaints which had been upheld and which concerned similar promotional devices including a report which I filed concerning complaint 9508 in roughly July 2010 in which I analysed the dominant impression a Web page gives a prospective subscriber. That complaint dealt with another quiz, a "Tarot of Love" quiz, where participating in the quiz resulted in a subscription to the SP's content service. Yet another report I selected concerned complaint 6105 and goes back to 2009.

The similarities between these various promotions and quizzes is striking. The SP has been advised a number of times that its promotions, quizzes and competitions which preface its subscription services are in contravention of the Code, section 11.2.2 and its predecessors have been cited over and over again. These devices distract from the subscription nature of the SP's underlying services and give prospective subscribers the impression that they are participating in a quiz, entering a competition or, in this case, responding to a quiz in the hope of receiving an iPhone 3G S for a correct answer. The SP's contention that the iPhone is mentioned as a possible loyalty award available to existing subscribers is disingenuous. In this regard, the Monitor's question is a fair one:

*Why is this promo then promoted along with in initial subscription service sign up process?  
Perhaps this promotion should be marketing via commercial sms, or alike, to their CURRENT database, but it is attached to joining their subscription service.*

I find the SP's banners to be in contravention of sections 11.2.1, 11.2.2 and 11.6.5 of the

Code.

### **Sanctions**

Flowing from my finding above, the SP is ordered to -

1. Desist from publishing the banners which form the subject matter of this complaint and any derivatives of those banners which fail to address the cause of this Complaint as described above;
2. Send a reminder message to all subscribers to the Service in the format specified by section 11.6.2 of the Code within 48 hours of being notified of these findings;
3. Pay a fine of R250 000 to WASPA on demand by the Secretariat.

Service Provider: Buongiorno

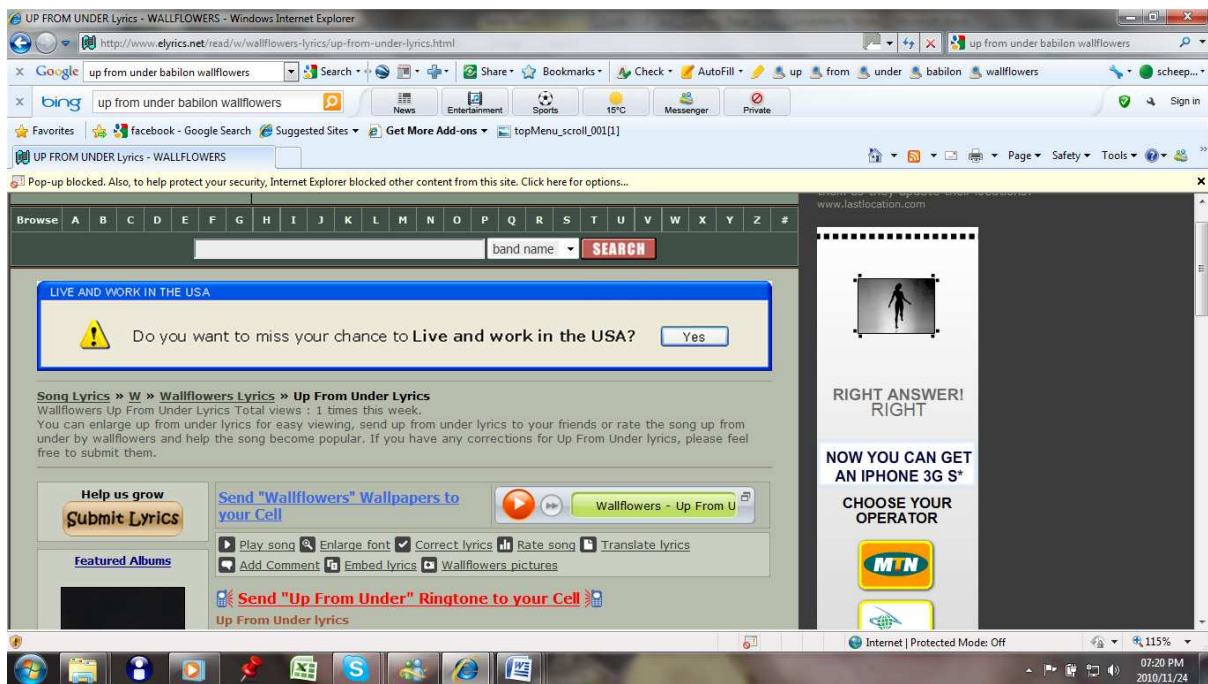
30 November 2010

<http://www.elyrics.net/read/w/wallflowers-lyrics/up-from-under-lyrics.html>

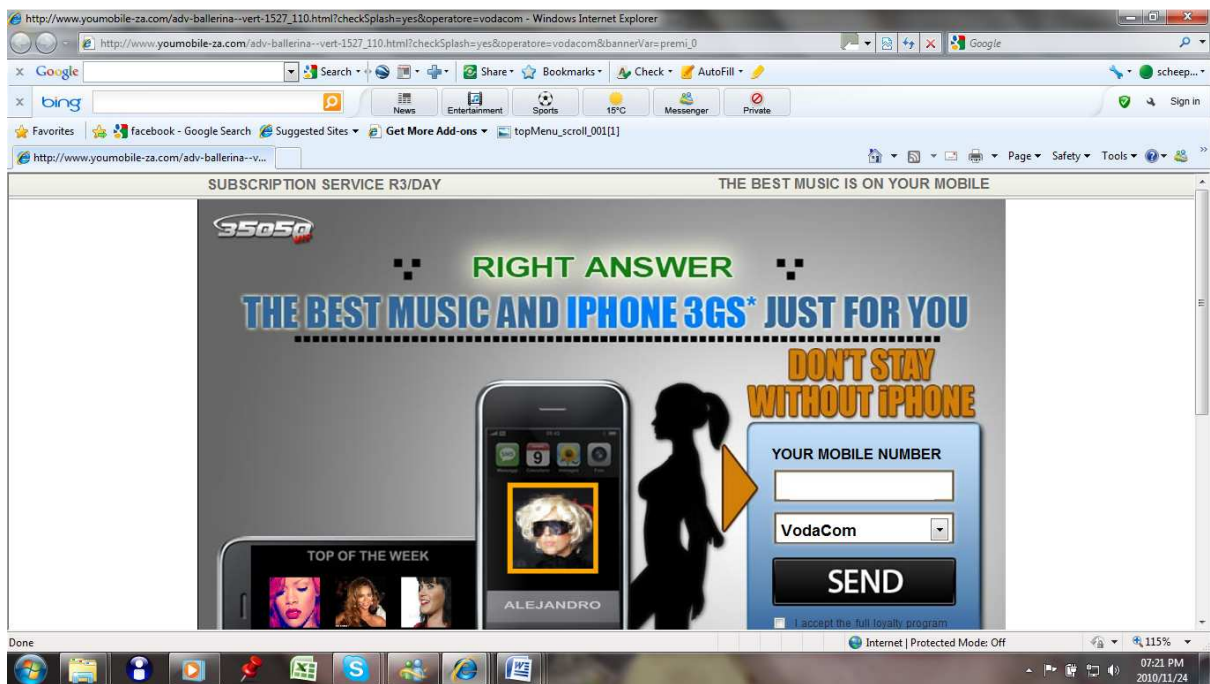
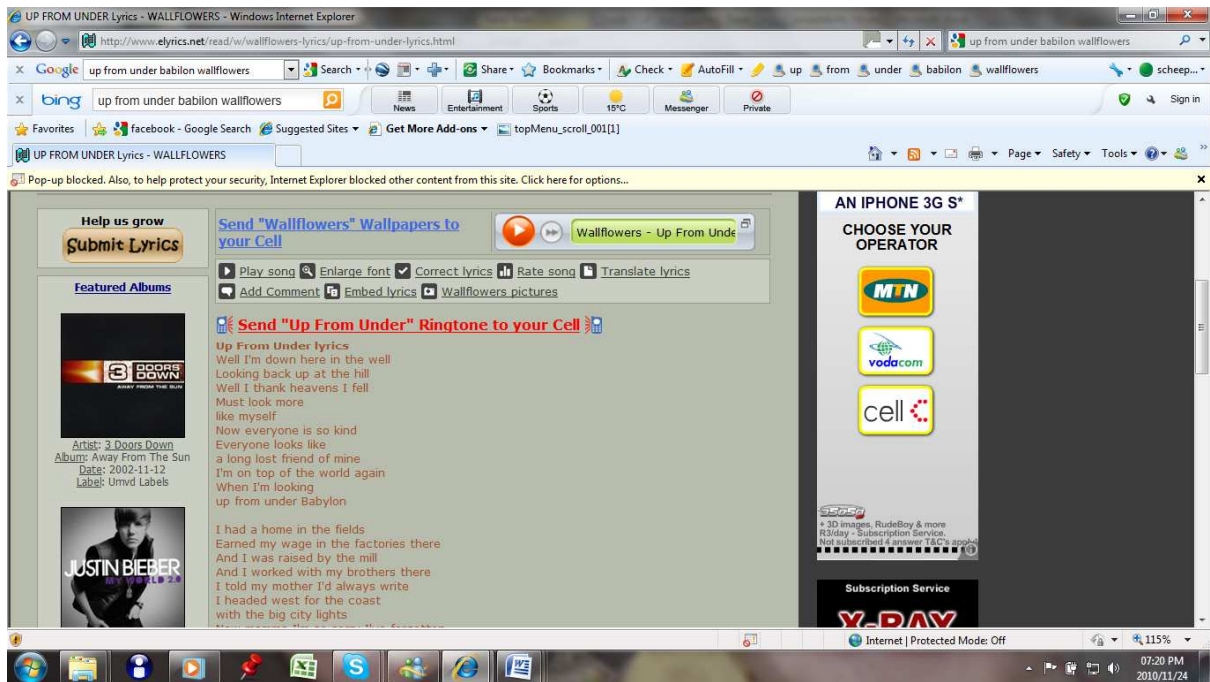
**Making use of a competition as a hook into a subscription service:**

**Breach:**

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.







**NO cost of the subscription service on the banner ad.**

**Breach:**

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

UP FROM UNDER Lyrics - WALLFLOWERS - Mozilla Firefox

File Edit View History Bookmarks Tools Help

http://www.elyrics.net/read/w/wallflowers-lyrics/up-from-under-lyrics.html

Most Visited Getting Started Latest Headlines http://www.facebook.com Google

Welcome to Facebook Netbank - Home sms c.o.d.e.s UP FROM UNDER Lyrics - WALLFL...

Firefox prevented this site from opening a popup window. Options x

**James Blunt**  
 Artist: James Blunt  
 Album: Some Kind of Trouble  
 Date: 2010-11-16  
 Label: 101 DISTRIBUTION

I sense my presence in a summer breeze  
 I headed west for the coast  
 with the big city lights  
 Now mamma I'm so sorry I've forgotten  
 But now I'm looking  
 up from under Babylon  
 { From: http://www.elyrics.net/read/w/wallflowers-lyrics/up-from-under-lyrics.html }

**Selena Gomez**  
 Artist: Selena Gomez  
 Album: A Year Without Rain  
 [Deluxe Edition]  
 Date: 2010-09-21  
 Label: Hollywood Records

Now tell me how far I've been  
 And how deep was I in  
 Tell me how I conceived  
 The vanity to believe  
 That I would not be outnumbered  
 By the thumbs I have been under

**Pink**  
 Artist: Pink  
 Album: Joy to The World  
 Date: 2010-11-16  
 Label: Heinz Records

Now stray dogs in the street  
 Learn how to beg, steal, borrow and cheat  
 And in the dead summer heat  
 I fell asleep with blood on my teeth

But those days before I met you girl  
 Were just ice cream falling down  
 on the shoes of my world  
 I'm so happy that you're my friend  
 When we're looking  
 up from under Babylon

When we're looking  
 up from under Babylon

[Send "Up From Under" Ringtone to your Cell](#)


Browse Other **Wallflowers Lyrics**  
 Rate this song [1](#) [2](#) [3](#) [4](#) [5](#) [6](#) [7](#) [8](#) [9](#) [10](#)  
**Who'd "I love2know" You?**  
 100,000s Waiting to Hear From You. Subscribe Today. Why Wait?  
[www.Love2KnowU.co.za](http://www.Love2KnowU.co.za)

Ads by Google

**COMMENTS**  
 no comments yet  
 Name:

Subscription Service

**X-RAY  
SCAN  
FOR  
YOUR  
MOBILE**



**XRAY  
SCANNER**

Done

On the 1<sup>st</sup> of December 2010 we received complaint # 11258.  
The complaint is in relation to banner creatives.

Alleged breaches on the complaint are as follows:

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.

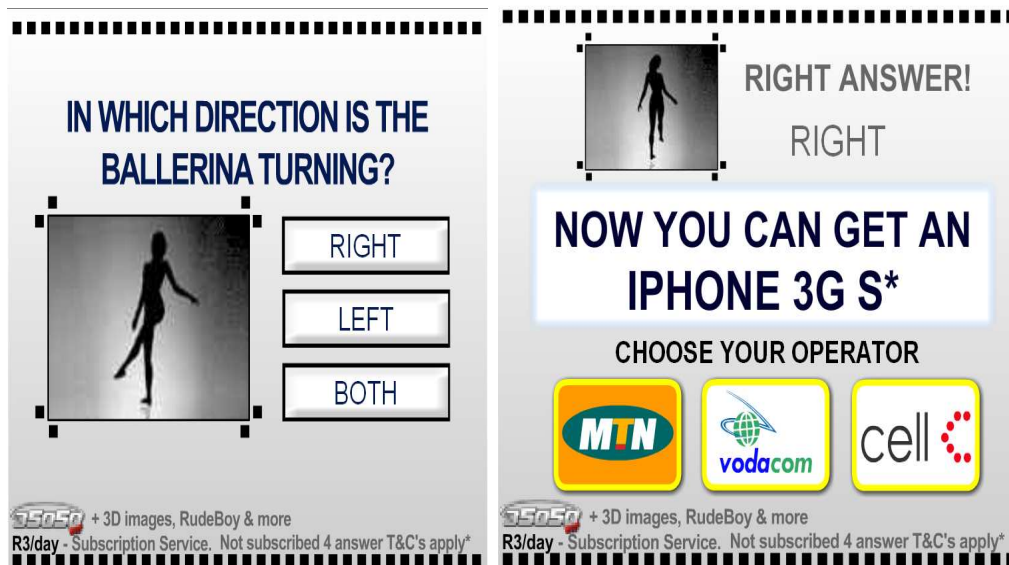
In no way were we using the iPhone competition as a "hook" into subscription services.

The asterix following the "S" in the statement "Now you can get an iPhone 3G S\*" refers customers and/or potential customers to the last line of our terms and conditions which follow on the landing page.

The potential to win an iPhone forms part of our loyalty programme, and is only available to customers who have already been subscribed to us for three months or more. Therefore this is not a subscription lure – only existing subscribers are eligible to receive the potential benefit.

We suggest that the wording could be amended to reflect the fact that this is a loyalty reward e.g. by using words such as :” available through the 35050 loyalty program” or similar at an appropriate spot on the landing page. You will know that one of the issues that all wasps face is to try to put information into a very small area. Please advise if our proposed approach commends itself to you so that the suggested change can be made.

We trust that this clarifies the position. If it does not, please revert to us with your further concerns or suggestions –this matter ought to be resolved on an informal basis.



**35050**

**RIGHT ANSWER**

**THE BEST MUSIC AND IPHONE 3GS™ JUST FOR YOU**

**DON'T STAY WITHOUT IPHONE**

TOP OF THE WEEK

ALEJANDRO

YOUR MOBILE NUMBER

VodaCom

**SEND**

I accept the full loyalty program just for you for three rands per day don't miss this fantastic opportunity.

Subscription service: 35050 Vip. By entering the PIN that was sent to your cellphone you will be entered into 35050 VIP subscription service, and you acknowledge that you are subscribing to the service. This subscription service is available to MTN, Vodacom and Cell C users. You will be billed R3 every day. You will receive a WAP link in your welcome messages. By clicking on the WAP link you will be able to download unlimited items for your phone. These items are not charged for separately from your daily subscription fee. Download charges apply and standard text messaging rates may apply. The shown item(s) form(s) part of the subscription service and is/are indicative of the content items that will be received. You may stop this subscription service at any time by sending a text message with the words STOP VIP to 35050. You must be the owner of the device or you need to acquire the bill payer's permission to join this subscription service. For help call 0214179001. Your cellphone handset must be WAP enabled to download the products. You will have the option to download as many items as you like from the wap.35050.co.za wap site, this includes but is not limited to ringtones, animations, videos, wallpapers and games. Content downloads are subject to handset compatibility. You are also agreeing to receive occasional promotional messages. Member of the 35050 service will be added into the VIP loyalty program. Random draws are done to allocate members. Members must have been successfully billed for 30 days and must have downloaded at least 3 items of content during that period. Please visit wap.35050.co.za for full competition terms and conditions. \*Loyalty program T&Cs apply. [T&Cs FAQ](#)

Whilst we do not believe that we were in breach of the Code we do understand that the format of the offered loyalty reward is not all that clear and we are in the process of updating all our services to make this more discernable to customers and potential customers.

Please see the following for example:

[http://www.blinko.co.za/za\\_35050\\_sp\\_web/site/pages/Summer.bsp?service=club](http://www.blinko.co.za/za_35050_sp_web/site/pages/Summer.bsp?service=club)

**Awesome rewards**  
added to loyalty program

**35050**

**The countdown to a new car for summer has begun!**

**THE NEW POLO VIVO**

**PLUS EVERYDAY SOMEONE WILL RECEIVE A IPOD.**

That's right, just by being a member you could be the next person to receive a loyalty reward. Keep checking this link out. Loyalty Rewards change often and they become more and more exciting! \*T&Cs Apply

[http://www.blinko.co.za/za\\_35050\\_sp\\_web/site/pages/Polo.bsp?service=club](http://www.blinko.co.za/za_35050_sp_web/site/pages/Polo.bsp?service=club)





Please confirm that you are in agreement that these pages are now in compliance.

We will confirm once all our services have been updated.

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

We apologise for this breach of the Code, it was wholly unintentional. We have now amended the infringing banner and trust now that it is in full compliance.

R3/day Subscription Service

# X-RAY SCAN FOR YOUR MOBILE



## XRAY SCANNER

[CLICK HERE](#)

Plus: Happy Hippo,  
RudeBoy & more

Should the Monitor and/or Secretariat have any further comments on the above please feel free to address same to us. If they should be on the view that we are still not in compliance we request that they provide the reasons therefore, a possible solution and we will consider such. We are certain that this matter can continue to be resolved in an informal manner.



4.5 Because we do not address the monitor's complaints in respect of these specific links at this stage, we should not be viewed as admitting the validity of the complaints, and we reserve our rights to address the issues raised against the advertisements contained in links

[http://www.blinko.co.za/za\\_35050\\_sp\\_web/site/pages/Summer.bsp?service=club](http://www.blinko.co.za/za_35050_sp_web/site/pages/Summer.bsp?service=club)  
and [http://www.blinko.co.za/za\\_35050\\_sp\\_web/site/pages/Polo.bsp?service=club](http://www.blinko.co.za/za_35050_sp_web/site/pages/Polo.bsp?service=club)

if and when we receive, as requested, an official, albeit informal, more detailed complaint on regarding these specific advertisements.

5. We are confident that we will be able to resolve the specific complaint (as regards the original allegedly infringing advertisement) by the continued use of the informal complaint process, and will continue to work with WASPA monitor in order to ensure a positive outcome. We therefore look forward to receiving her response to our proposals and views as set out in 3 above.

6. We reserve our rights to address the issues raised against us in the formal complaint dated 14 01 2011.

Kind regards

Hans

-----Original Message-----

From: WASPA Complaints (Lorraine Hartzler) [<mailto:complaints@waspa.org.za>]  
Sent: 20 December 2010 09:50 AM  
To: Sharief Holt; Hans Mol; 'Rosalinda van Rooyen'  
Cc: WASPA Monitor  
Subject: Fwd: Re: [WASPA.complaints] WASPA Code of Conduct complaint  
Ref:#11258

Dear WASPA member,

In reference to the below email, the banner are still up.

Please advise if immediate change are going to be made or if the banner will be taken down until 14 Jan 2011, so we may grant the extension.

Regards

Lorraine Hartzler  
WASPA

----- Original Message -----

Subject: Re: [WASPA.complaints] WASPA Code of Conduct complaint Ref:#11258  
Date: Wed, 15 Dec 2010 16:40:19 +0200  
From: WASPA Complaints (Lorraine Hartzler) <[complaints@waspa.org.za](mailto:complaints@waspa.org.za)>  
Reply-To: [complaints@waspa.org.za](mailto:complaints@waspa.org.za)  
Organization: Wireless Access Providers' Association  
To: [complaints@waspa.org.za](mailto:complaints@waspa.org.za) <[complaints@waspa.org.za](mailto:complaints@waspa.org.za)>, Sharief Holt <[sharief.holt@buongiorno.com](mailto:sharief.holt@buongiorno.com)>  
CC: Hans Mol <[hans.mol@buongiorno.com](mailto:hans.mol@buongiorno.com)>, 'Rosalinda van Rooyen' <[rosalinda.vanrooyen@buongiorno.com](mailto:rosalinda.vanrooyen@buongiorno.com)>

Dear WASA member,

I have just spoken to the Media Monitor telephonically (as she is in hospital) and she has advised that if these banner are taken down until 14 Jan 2010 - extension can be granted. If not, changes need to be made immediately, as we can not allow the continuation of non-compliant