

WASPA Member (SP)	Exactmobile
Information Provider (IP)	N/A
Service Type	Various Irregularities
Source of Complaint	WASPA Monitor
Complaint Number	#3319
Code of Conduct Version	5.7
Date of Adjudication	11/03/2008

Complaint

In a television advertisement placed by the SP, the following were noted by the Complainant:

“New television commercial promoting free content:
Misleading the viewer with get it for free - BUT it is a subscription service”

SP Response

The SP in this matter has given a very detailed response addressing every section of the code considered. The response is given in full:

Clause 6.2.3 of the code of conduct states as follows:

6.2.3. Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.

Response:

This clause is present in the code to ensure that WASP ads state clearly to users if there are additional charges to retrieve the content, such as GPRS, USSD etc. then these are mentioned clearly.

The pricing for this service as advertised in the TV ad is displayed within the ad clearly in the stipulated format. The cost of the subscription is R10.00 per week,

the cost of sending an SMS to 3 28 29 costs R1 and the fact that accessing our WAP portal to retrieve the items will incur GPRS charges is also advertised.

Therefore there are no hidden costs. All the costs are clearly advertised to the user for the whole duration of the ad. The following screen shots show clearly that all the pricing is displayed at all times.

Subscription Service: R10/Week. (R1/SMS)
Free content. Additional WAP rates apply.

SMS FREE
TO 3 28 29

Errors billed. Support Tel: 0822 302 222. VAS charges. Free Minutes don't apply. www.exactmobile.co.za for Terms and Conditions. Updates sent until cancelled. Network & bearer dependant. No free minutes or SMS's. All prices include VAT. To cancel your subscription, **SMS STOP FREE to 3 28 29.** (R1/SMS)

Subscription Service: R10/Week. (R1/SMS)
Free content. Additional WAP rates apply.

FREE ME TRUETONES

By **eXactmobile**



GET IT FOR FREE

Subscription Service. You will be charged R10/week until you unsubscribe. Free content.
Premium SMS. No Free minutes or SMS's. Applicable Network. Bearer/WAP charges apply. Obtain bill payers
consent before using this service. We will bill you when we can. All prices include VAT. Exact Mobile (Pty) Limited.

Furthermore the format of this ad is exactly the same as previous Exactmobile ads (which have been flighted hundreds/thousands of times between them). We have not received a single customer query or complaint claiming that the pricing is misleading. More telling perhaps, we have not received any 'informal complaints' from competitors stipulating that the ads are misleading or breaching the Code in any way.

Indeed Exactmobile is not the first WASP to run this format of TV ads – a subscription that discounts content heavily. Two similar services, for example, from competitors include TV ads by Teljoy and Xcite Mobile. See below for explanations of these services.

In the following Teljoy Loadin' Ad, which is exclusive to Vodacom subscribers, the user is requested to SMS the word FREE to 30123. The user then gets free content but is billed R30.00 per month in arrears as a subscription.



In the second ad by Xcite Mobile, the user is advised via the voice over that the cost of the content is R1.00 per item. Indeed “R1.00 for a ringtone” is the core message. The club cost is then advertised in the top right hand corner as R5 per week. Hence, like our service, the ad is headlining the marginal cost of the content items, rather than the Club. The only difference between our ad and the Xcite ad is that we discount high value branded content to nothing for a subscription of R10 per week, whereas they discount low cost generic content to R1 in exchange for R5 per week.

In considering this complaint, the adjudicator should look at previous complaints and their rulings. These complaints were similar to this complaint and indeed the ads were similar in concept to the current Exactmobile ad. Therefore we believe that these complaints and rulings are relevant here:

- In complaint number 62, a complaint was lodged against Xcite Mobile in respect of clauses 6.2 and 6.2.4. The complainant stated that the advertisement for downloads published in the You and Huisgenoot magazines dated 3 November 2005 by Xcite Mobile contravened section 6.2 (pricing of services) and specifically section 6.2.4 (pricing must not be misleading) of the WASPA Code in that it:
 1. Prominently states only R1.00 for members;
 2. A typical user will not know what the membership is and will request an item per the codes supplied for the content;
 3. The user will expect to pay R1.00 but in the fine print it states that if you are not a member you pay R5.00”.

The adjudicator’s decision was as follows:

Having reviewed the specific terms of the complaint and the advertisement, I am of the view that the SP has not contravened section 6.2.4 of the Code in the manner alleged, and I therefore dismiss the complaint for the following reasons:

Substance of the complaint	Advertisement
The advertisement states only R1.00 for members	True, but it also states that non-members, MTN and Cell C subscribers pay R5.00, both in the area of the code (where R5.00 appears in a star), in the section headed "Join a club", and in the terms and conditions
A typical user will not know what the membership is and will request an item per the codes supplied for the content	The advertisement refers the reader to a section marked "Join a club"; and the reference to the R5.00 subscription fee appears 5 times within the advertisement with reference to the club membership, cost of subscription and entitlement
The user will expect to pay R1.00 but in the fine print it states that if you are not a member you pay R5.00	An obvious and substantial portion of the advertisement states that non-members pay R5.00 as set out in the two blocks above, this is not stated only in the terms and conditions, and this is repeated several times in the text.

In simple terms therefore the adjudicator ruled that prominently pushing a discounted price, say R1, was not misleading so long as the conditions for obtaining said discount were clearly displayed in the ad. Furthermore it was not ruled that the R1 was misleading even though the total price paid by the customer per download would exceed R1 (being the R1 per item plus the subscription fees). Indeed the adjudicator was satisfied that so long as the terms of the subscription were clearly mentioned; the dual nature of the pricing message was acceptable. Hence by the same logic, the Exactmobile ad that is the subject of this complaint is not misleading as all the terms and details of the subscription are clearly displayed.

- In complaint number 75, a complaint was filed against Xcite Mobile in respect of clauses 11.1.2 and 6.2.5. The adjudicator ruled that section

11.1.2 was not breached, i.e. that the subscription request constituted an independent transaction. For section 6.2.5, the adjudicator ruled that the pricing was not clearly visible. Xcite Mobile changed their ad to make the pricing more visible and we believe no more complaints were lodged against this ad or type of ad. Exactmobile has ensured that in our ad the pricing is clear and is displayed for the total duration of the ad in at least the same size font as previous rulings/the Code stipulate.



Clause 6.2.4 of the code of conduct states as follows:

6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.

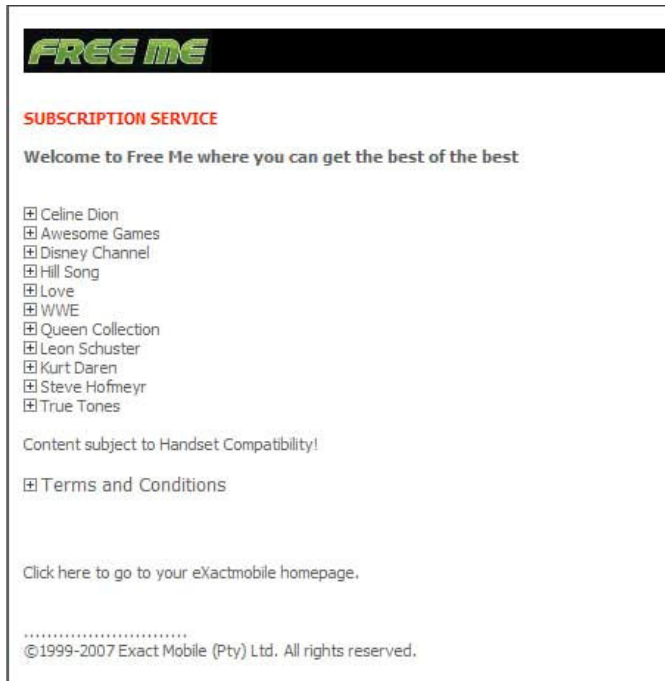
Response:

This clause was specifically implemented in the code to prevent WASP's from advertising a service which costs R6.00 as being advertised as R3.00 per SMS but 2 SMS are required.

In our ad, there are a number of independent interactions which need to take place. The user first sends us a R1 Premium Rated SMS. The subscription service cost of R10.00 and is then billed via Online Billing. GPRS is then

charged at the network rates, determined by the Data bundle of the customer. It is therefore not possible to combine all these costs into one cost as they vary per subscriber and are billed at different times and across different billing platforms. Therefore all the costs have to be mentioned separately. Please also refer to the 2 competitor ads above which use similar methods of advertising for the same reasons.

Once the user accesses our WAP site to download the content, the following shows what the user sees: The terms and conditions are also clearly displayed on the WAP Site.



The screenshot shows a mobile website interface. At the top, there is a black banner with the text "FREE ME" in a stylized, green and white font. Below the banner, the text "SUBSCRIPTION SERVICE" is displayed in red. A welcome message reads: "Welcome to Free Me where you can get the best of the best". A list of content categories follows, each preceded by a small square icon with a plus sign: Celine Dion, Awesome Games, Disney Channel, Hill Song, Love, WWE, Queen Collection, Leon Schuster, Kurt Daren, Steve Hofmeyr, and True Tones. Below the list, there is a note: "Content subject to Handset Compatibility!". A link is provided: "Terms and Conditions". At the bottom, there is a footer: "Click here to go to your eXactmobile homepage." and a copyright notice: "©1999-2007 Exact Mobile (Pty) Ltd. All rights reserved."

FREE ME

Terms and Conditions.

Free Me! is a subscription service. You will be charged R10.00 per week until you unsubscribe.
All prices include VAT. Errors are billed.
Content downloads are free, however you will have to pay GPRS charges at applicable
Operator rates for access to our WAP sites and for the download bandwidth.
No free minutes or SMS apply. If applicable, please obtain the bill payer's permission before using this service.
We will bill you periodically depending on your payment history.
If you fail to pay the subscription fees for a period of 90 days, we will automatically unsubscribe you.
The service is offered by Exact Mobile (Pty) Ltd. Helpline: 0822 302 222 (VAS rates/no free minutes).
To cancel your subscription at any time, SMS STOP FREE to 3 28 29 (R1/SMS).
For full Exact Mobile Services Terms & Conditions, please go to www.exactmobile.co.za

◀ Back
Click here to go to your eXactmobile homepage.

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FREE ME

Title: A New Day Has Come

Artist: Celine Dion

Price: R 15.00

Discount: - Free item

You pay: R0 + WAP charges

Proceed

Also available in:

Polyphonic Ringtones (R 3.75)

◀ Back
◀ Ringtones



Terms and Conditions.

.....
©1999-2007 Exact Mobile (Pty) Ltd. All rights reserved.

The 3 screen shots above clearly show:

- a) That this is a subscription service,
- b) The terms & conditions of the service,
- c) That content that normally costs R15, for example, is discounted to zero as a result of the user being a member of Free Me. There is also no limit to the number of downloads that users can download for nothing.

Clause 11.1.2 of the code of conduct states as follows:

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. A request from a subscriber to join a subscription service may not be bundled with a request for a specific content item.

Response:

In the advertisement in question, the service being promoted to the user is a Subscription Service to get Celine Dion True Tones. The Voice over clearly states “Capture the magical voice of Celine Dion on your phone with True tones of all of her greatest hits for FREE! ..”

There are 3 different Celine Dion tracks which are played in the background and multiple images are shown to the user.

As there is not one specific content item being advertised, the user is not being enticed to download that specific item. The keyword “Free” also does not relate to a specific item. Had the ad promoted just 1 track from Celine Dion and prompted the user to download that specific track and as a consequence of the request/download the user was subscribed, the complaint would be valid but this is not how the service works.

Also, the ad in question is one of 10 or more different ads, all using the same keyword and the same PSMS. There is for example a Queen ad, 2 games ads, a WWE ad, a Leon Schuster ad, etc. Hence not only is the ad in question advertising several items but the set of ads cumulatively advertises hundreds of items.

Indeed when a client subscribes, they are given a link to a WAP portal that currently has 133 items available for download. More content is added daily. Whether a client reacts to a Celine ad or to a WWE one, the selection of content and the way it is offered is identical. Hence our service is the opposite of bundling, namely it is a large variety of content on the same keyword/PRS combination.

Furthermore, all of Exactmobile’s TV ads follow the same format. Our ads always push a strong sub-brand: Massive Saver Pass, Unreal, Free Me to name a few. We do not just push ‘ringtones’ or ‘Lotto results’ but rather we push content in conjunction with a strong sub-brand and a specific value proposition. The Massive Saver Pass ads used ‘Saver’ as the keyword. Unreal used ‘Unreal’ as the keyword and Free Me – a play on words – uses ‘Free’ as the keyword. By following this consistent approach, users are able to reasonably remember the keyword long after an ad is run. We specifically try to avoid using ‘Tone’ or ‘Lotto’

or 'Game' for example as we do not want our branded content services being confused with the multitude of generic TV ads that are out there.

I further wish to bring the following information to the adjudicator. Once the user sends a request to this service, the user is sent an SMS as follows:

Welcome to Free Me! To access all the specials, go to www.exactmobile.mobi/freeme (on WAP). Cost is R10.00 per week (R7.50/week for NOW! Club members). Enjoy!

A second SMS follows stating:

See full Free Me! Terms and Conditions at www.exactmobile.co.za. To unsubscribe, send STOP FREE to 32829 (R1/SMS). Helpline: 0822302222. VAS Rates/No free mins.

Monthly reminders are also sent to the consumer reminding them that they are subscribed and what the cost of the subscription is.

Sections of the Code considered

The following sections of version 5.7 of the Code of Conduct were considered:

6.2.3. Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content;

6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required;

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. A request from a subscriber to join a subscription service may not be bundled with a request for a specific content item.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The SP in this matter has to be commended for its detailed response in providing clarity.

Three questionable breaches of the Code were considered:

- Whether there were any hidden costs;
- Whether there were any misleading costs; and
- Whether there was any bundling.

After reviewing the clip that was screened it is the opinion of the Adjudicator that there was no breach of section 6.2.3 of the Code and the Adjudicator is in fact satisfied that the costs were clearly displayed.

In adjudicating whether there were any misleading costs the Adjudicator took note of the response after reviewing the clip. The display of the terms and conditions, its content, the costs and its placement are very clear and definitive. It seems clear from reviewing this that the content delivered will be made available for free, although a user would still be liable for costs of subscription, WAP etc. It is also indicative by listening to the voice over that the services offered for free are the true tones and therefore not the subscription service costs. Any reasonable user would in the opinion of the Adjudicator be able to distinguish between aspects of the services that are for free and those that aren't. In the top right hand corner mention is also made that the "content" is free, although clear cost displays are added to the subscription and per sms billing. The Adjudicator is therefore of the opinion that the costs are not misleading and that all the costs were displayed.

The display of the subscription services read with the terms and conditions makes it clear that this is a subscription service. The SP in its response stated that as there is not one specific content item being advertised and the user is not being enticed to download that specific item. It further contended that the keyword "Free" also does not relate to a specific item. After reviewing the clip, the Adjudicator has to agree that the mentioned subscription service is indeed not bundled with a request for a specific content item and therefore there is no breach of section 11.1.2 of the WASPA Code.

Further, pre-cautionary messages are sent to the user to provide further clarity. The Adjudicator feels that the SP has done everything to indicate to a user which steps to follow and where to attain details of the service and its terms and conditions. The Adjudicator does not feel that the SP is out to mislead users.

The Complaint is dismissed.
