



## REPORT OF THE ADJUDICATOR

|                                  |                  |
|----------------------------------|------------------|
| <b>WASPA Member (SP)</b>         | SMSnet           |
| <b>Information Provider (IP)</b> | Waptrick         |
| <b>Service Type</b>              | Content          |
| <b>Source of Complaints</b>      | Competitor       |
| <b>Complaint Number</b>          | 3336             |
| <b>Date received</b>             | 12 February 2008 |
| <b>Code of Conduct version</b>   | 5.7              |

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### Complaint

The Complainant alleged breaches of sections 3.1.1, 3.1.2, 3.4.1, 3.5.1, 4.1.1, 6.2.2, 11.1.1, 11.1.6, 11.1.7 and 11.2.2 of version 5.7 of the WASPA Code of Conduct:

“I accessed the URL <http://waptrick.com>. I noticed a link that said 1 Million Downloads. I was then routed to a page at hugemob where I was requested to join. On doing so I realised that this is a subscription service with no pricing. Therefore the following complaint. Screen shots of the pages have been sent to WASPA.”

The Complainant provided a number of screenshots in support of the Complaint. Certain of these are set out in Annexure A to this Report.

The SP denied that it had breached the Code in any of the respects alleged and provided a detailed Response with screenshots. Certain of these are set out in Annexure B to this Report.

As there are a number of alleged breaches I have set out separately

- The relevant clause of the Code
- The specifics of the alleged breach as raised by the Complainant, and

- The Response as provided by the SP
- Any additional information requested and received by the Adjudicator
- References to screenshots provided
- The finding in respect of the relevant clause(s) and alleged breach(es)

The alleged breaches of sections 3.1, 3.4.1 and 3.5.1 have been grouped together as they all relate to the alleged breach of third party IP rights.

### Breach of Third Party Intellectual Property (IP) Rights

#### *Code*

##### **3.1. Professional and lawful conduct**

3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

3.1.2. Members are committed to lawful conduct at all times.

##### **3.4. Intellectual property**

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

##### **3.5. Content control**

3.5.1. Members must not knowingly transmit or publish illegal content.

#### *Complaint*

"SMSNet is selling Full Tracks and True Tones where they do not have licensed agreements with the record labels. This can be confirmed with each label."

"The intellectual property of this content is held by the major record labels. SMSNet is selling this content without their permission."

"SMSNet is aware that they are selling this content illegally as they have approached the record labels for licensing. The licenses have not yet been granted."

#### *SP's Response*

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“All these three claims about the copyright issues are not reflecting the truth. We have agreements with some of the labels and we are at the process of agreement with some others. We have paid to some of the labels and we are waiting invoices from some others to make their payments.

“The strange thing about these copyright issues is that the complaint is not coming from the side of any Copyright Companies but from one of our rivals; exactmobile. We believe in fair rivalry but we are not considering this complaint in the borders of fair rivalry.

“In addition to these, due to the “Confidentiality Term”s in the agreements we have with the Copyright Companies, supplying any information related with the agreement to the third parties is forbidden. The information they claim to have is forbidden to be supplied.

Although knowing these facts, we have stopped selling and taken all the contents with copyright on hold in order to check them again and not to cause any damage.”

*Additional Information*

Given the nature of the complaint and the Response received the Adjudicator requested that the Complainant provide further evidence in support of its claims involving third party IP violations by the SP.

The following are excerpts taken from e-mails from two third party licensors as provided by the Complainant:

“Warner Music Gallo Africa Pty Limited is the exclusive licensee in Africa of the Warner content. WMGA has the sole and exclusive right to license and sell Warner music content.

It has come to our attention that SMS-Net are selling and giving away (WMGA) content in South Africa.

I can confirm that SMS-Net have no license from WMGA to sell this content and are thus unauthorized.

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Any unauthorised use of our content is copyright infringement and thus illegal.”

and

“[Universal Music] confirm that SMS Net did approach us for a licence last year and the terms and conditions of were not agreed to. We were in the process of negotiating.

They have resumed negotiations with us offering to pay for past use of our product etc.”

### *Finding*

The Adjudicator is satisfied on the basis of the information set out above that the SP has breached sections 3.1.2, 3.4.1 and 3.5.1. Section 3.1.1 does not specifically mention third party service providers which I regard as being distinct from “the public” as I believe it to be intended in this section.

It appears that the SP has partially disclosed the true position but the emails quoted from above appear to settle the crisp question of whether the SP has knowingly infringed the intellectual property rights of other parties.

The SP is indeed correct that the IP rights lie to be enforced by the third party licensors but it does not follow that an infringement of such rights should not be an infringement of the Code of Conduct and therefore properly the subject of a complaint under such Code.

Nor is the SP saved by the term and condition evident from Figure 5 in Annexure B hereto which states that “[S]ome of the contents may not be included in the subscription due to their copyrights, these will be notified and can be bought separately by ‘cost per download’ method”. Not only is it unclear how this will result in copyright being respected but it appears as if the Complainant has in any event obtained copyright material to which the SP did not have rights subsequent to subscribing to the service.

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The Adjudicator accepts in mitigation of any sanction to be imposed that the SP is making efforts to regularise the position, including offers to make back payments, and that it has removed offending content from the relevant site. The SP clearly needs to regularise its position as soon as possible as it is running a significant risk of civil action.

The Adjudicator further does not believe that it is the role of WASPA to stand in the shoes of the third party licensors so as to enforce their rights. This is more properly done through the courts – WASPA's concern is rather the protection of consumers and the promotion of fair and lawful practises.

In aggravation, however, is the fact that the SP must have known that it was in breach of the Code but continued to offer copyright material in breach of the Code and only ceased to do so upon notification of this Complaint.

This is a serious breach of the Code. I have not been able to locate any previous complaint where a WASPA member has been found to have breached the provisions of the Code in this manner.

*Sanction:*

Taking the above factors in mitigation and aggravation into account the following sanctions are imposed:

- The SP is ordered to ensure that it does not offer any material which it does not have third party copyright holder permission to offer or which is in breach of section 3.4.1 of the Code of Conduct. The SP is required to take immediate steps to remove any content which it does not have authorisation to offer and which may remain available. This sanction shall not be subject to suspension through the noting of an appeal by the SP.
- The SP is fined the sum of R50 000 with payment of R30 000 of this amount suspended for a period of one year from date of receipt of this Report by the SP subject to the SP not being found to be in breach of section 3.4.1 of the Code during this time.
- The SP is issued with a formal reprimand and requested to note that any further breach of section 3.4.1 may result in suspension from WASPA and action being taken at network level.

*Note: This sanction applies in respect of the breach of section 3.4.1 by the same SP under Report 3337.*

#### No pricing displayed

##### *Code*

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

##### *Complaint*

"No pricing is displayed for the subscription service. See attached screen shots."

The Complainant provided the screen shots set out as Figures 1 to 4 of Annexure A in support of this claim.

##### *SP's Response*

The SP's response is simply that the Complainant has not provided a full screen shot and that an examination of such a screen shot clearly shows compliance with this section of the Code.

Figure 9, which relates to Figure 2 as provided by the Complainant, is relevant in this regard.

##### *Finding*

The version of the SP is accepted. No further investigation of the compliance of the full page was entered into by the Adjudicator as it does not appear that the Complaint took such full page into account. I am not prepared to infer from the details of the Complaint that it was the Complainant's meaning that the pricing was not clearly displayed – this would need to have been done with reference to the full screen.

#### Hidden Costs

##### *Code:*

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

*Complaint:*

"No pricing is displayed for the subscription service."

*SP's Response*

The SP's response is simply that the Complainant has not provided a full screen shot and that an examination of such a screen shot clearly shows compliance with this section of the Code.

Figure 9, which relates to Figure 2 as provided by the Complainant, is relevant in this regard.

*Finding*

The version of the SP is accepted. No further investigation of the compliance of the full page was entered into by the Adjudicator as it does not appear that the Complaint took such full page into account.

Identification as subscription service*Code*

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

*Complaint*

"A link which says \"Click here to Join\" is the only indication that this is a subscription service."

The Complainant provided the screen shots set out in Figures 1 to 4 of Annexure A.

*SP's Response*

The SP's response is simply that the Complainant has not provided a full screen shot and that an examination of such a screen shot clearly shows compliance with this section of the Code.

Figure 9, which relates to Figure 2 as provided by the Complainant, is relevant in this regard.

*Finding*

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The version of the SP is accepted. No further investigation of the compliance of the full page was entered into by the Adjudicator as it does not appear that the Complaint took such full page into account.

#### Confirmation of parental consent

##### *Code:*

11.1.6. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

##### *Complaint*

"There is no indication that this service is for persons over 18 and that Children require bill payers permission."

##### *SP's Response*

The SP's response is simply that the Complainant has not provided a full screen shot and that an examination of such a screen shot clearly shows compliance with this section of the Code.

Figure 9, which relates to Figure 2 as provided by the Complainant, is relevant in this regard.

##### *Finding*

The version of the SP is accepted. No further investigation of the compliance of the full page was entered into by the Adjudicator as it does not appear that the Complaint took such full page into account.

#### Notification message

##### *Code:*

11.1.7. Once a customer has subscribed to a subscription service, a notification message must be sent to the customer containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number.

*Complaint*

" After joining, I noticed on my bill that I was billed R15.00. I have not received a SMS advising me of the cost, how to unsubscribe or any further information."

*SP's Response*

The SP advanced the graphics set out in Figures 10 and 11 in Annexure B in support of its contention that such a message was sent.

*Finding*

The Adjudicator has tested the service and received the confirmation SMS. The Adjudicator does not, however, find that there are grounds to reject the version of the Complainant.

Accordingly no finding is made in respect of this Complaint and no sanction is imposed.

Unsubscribe facility*Code:*

11.2.2. All subscription services must have a readily available unsubscribe facility which costs no more than one rand.

*Complaint*

"There is no unsubscribe facility on the WAP portal and as no SMS was sent there is no way to know how to unsubscribe."

*SP's Response*

The SP advanced the graphics set out in Figures 9,10 and 11 in Annexure B in support of its contention that such a message was sent. It also pointed to the existence of an online unsubscribe facility and the prominence of its contact details.

*Finding*

The version of the SP with regard to the presence of an online facility is accepted. No further investigation of the compliance of the full page was entered into by the Adjudicator as it does not appear that the Complaint took such full page into account.

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**Annexure A – Screenshots & information as provided by the Complainant**

Access <http://waptrick.com> from your mobile phone. You will see the following page:

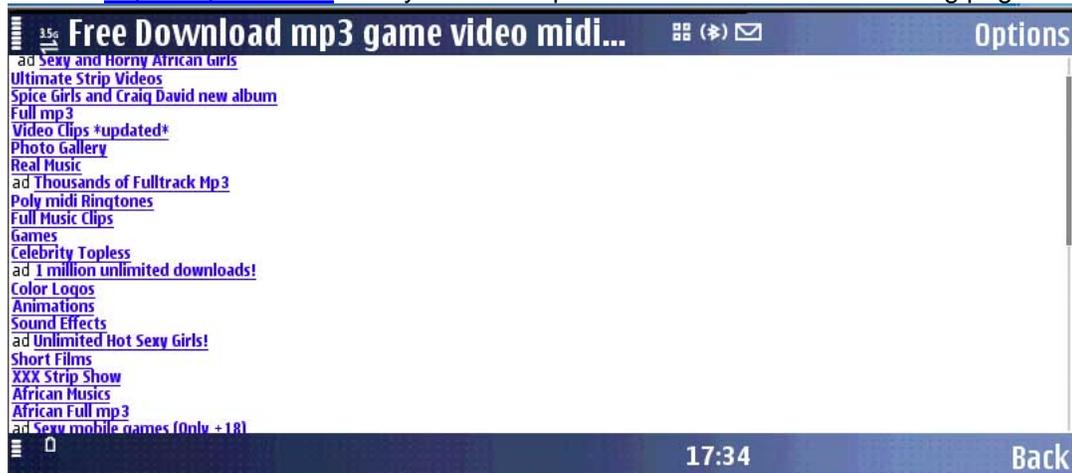


Figure 1

The ads rotate. Above is one of the screen shots with different ads. You will see on the left a number of ad signs. When you select on the link called “ 1 million unlimited downloads, you will be routed to the following page.

Selecting the first link “Full MP3” and then Top MP3 you will see the following page :

Going directly to <http://hugemob.com> will take you to the following page:

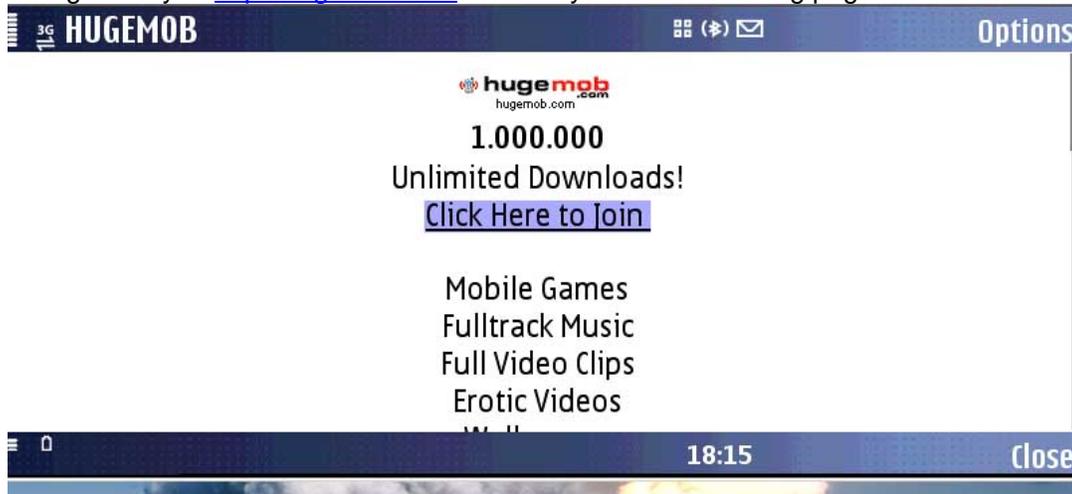


Figure 2

Selecting Click here to Join will take you to the following page:

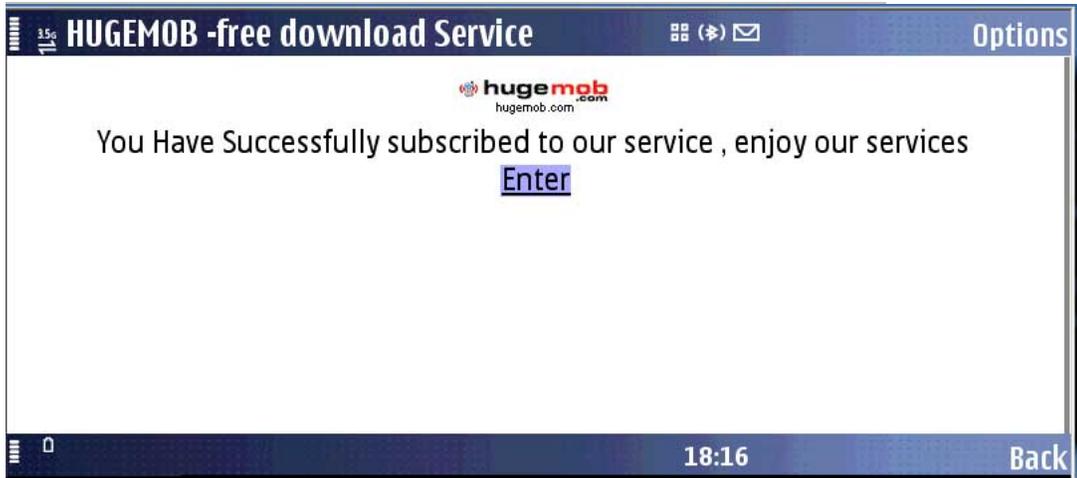


Figure 3

After this I noticed that R15.00 had been deducted from my account. I have not received any SMS.

After this I was able to download content for free.

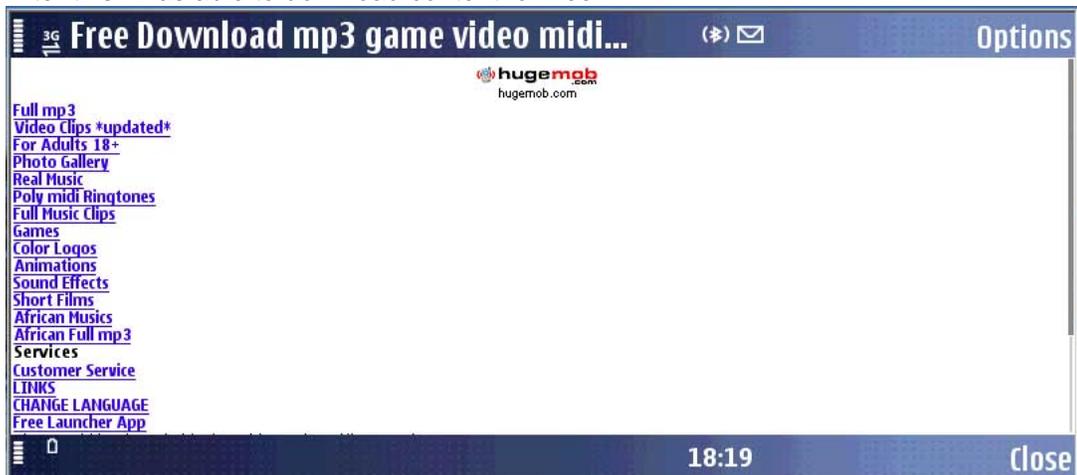


Figure 4

I found a link to customer service, which is how I found out who the WASP is.



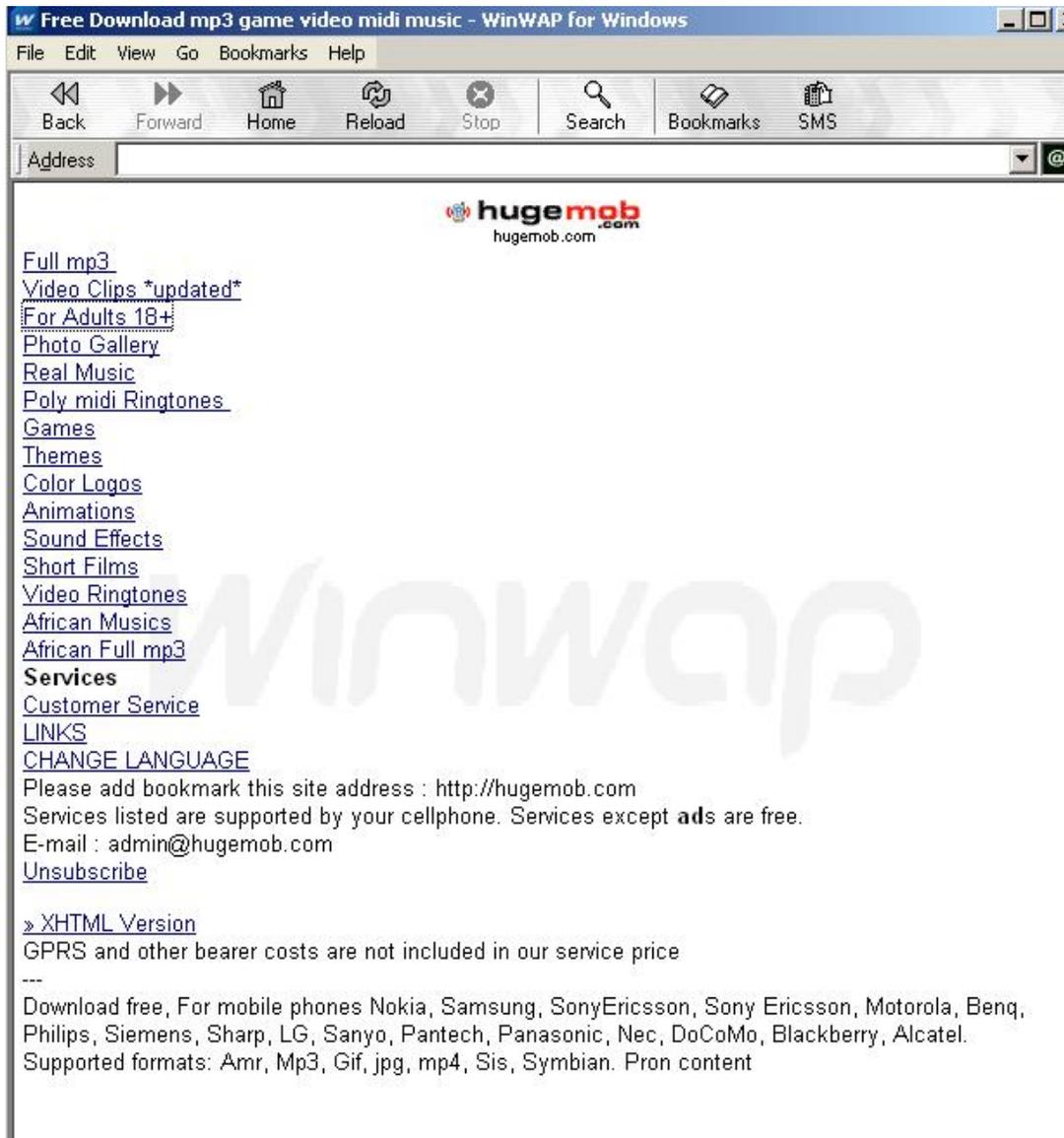
Figure 6

Other pages from the site are as follows:

This provider does not have permission from the major record labels and is therefore infringing on their rights.



Figure 7

**Annexure B – Screenshots & information as provided by the SP****By Clicking “ Enter “ , Hugemob.com is displayed.***Figure 8*

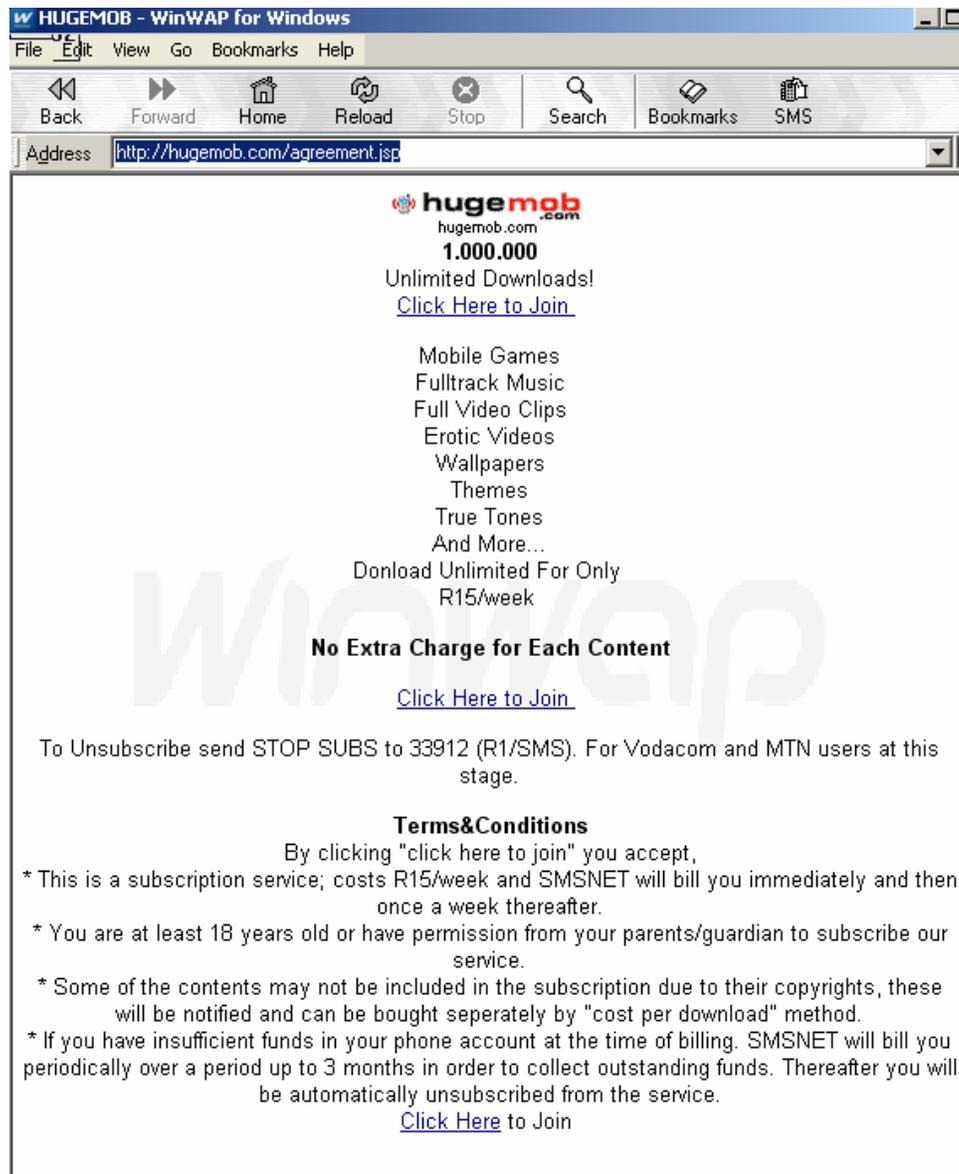


Figure 9

**SMS below is sent to Every New Subscriber After Subscription (by clicking "Click Here to Join" )**

“ Welcome to Hugemob.You can download unlimited content from hugemob.com for R15/week only.To unsubscribe send STOP to 33912. (SP:27125482793). “

Also The Photos of an SMS received at date 28/01/2008 can be seen below as an example;

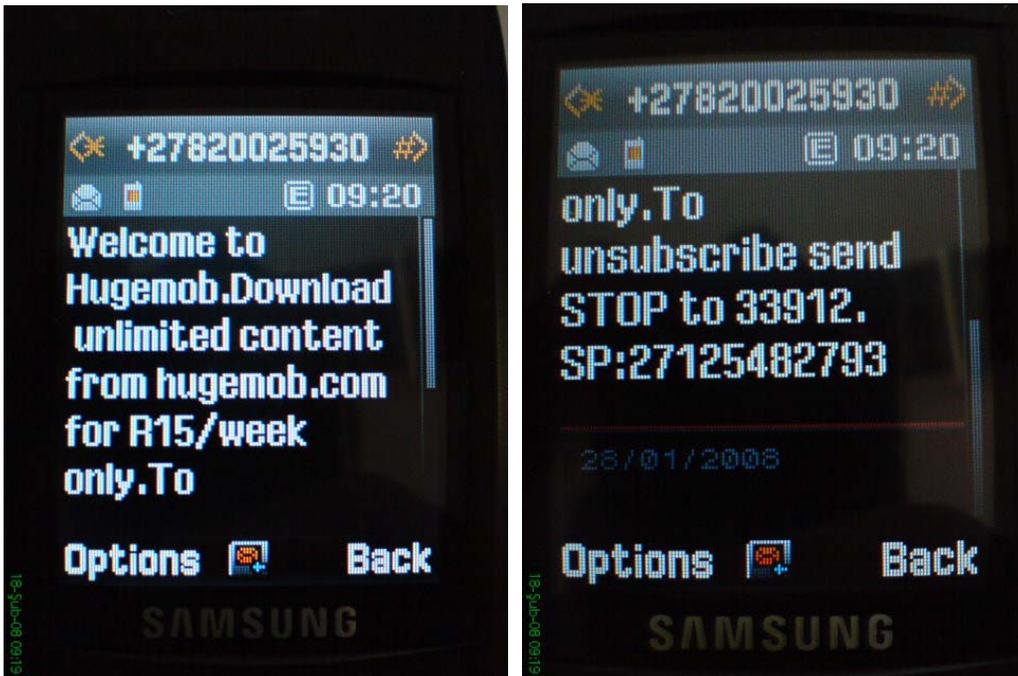


Figure 10

**In Addition to SMS, The Page Below is Displayed for Notification of Subscription;**

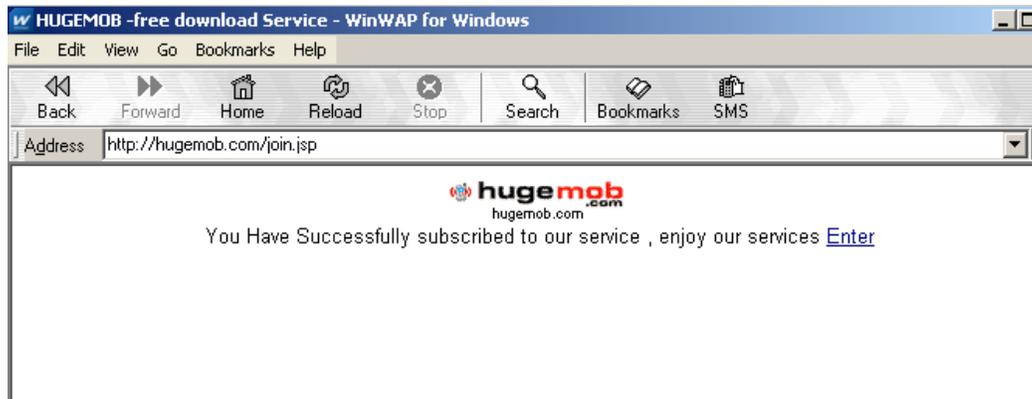


Figure 11