



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP):</b>	<b>Smartcall</b>
<b>Information Provider (IP): (if applicable)</b>	<b>Mobimex Group</b>
<b>Service Type:</b>	<b>Spam; Pricing</b>
<b>Complainant:</b>	<b>Competitor</b>
<b>Complaint Number:</b>	<b>4755</b>
<b>Code version:</b>	<b>Code v6.1 and Ad Rules v1.6</b>
<b>Date of Report:</b>	<b>8 December 2008</b>

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### Complaint

1. On the 28<sup>th</sup> of August 2008 the Complainant, a director of a participant in the WASP industry, lodged a complaint via the WASPA website. The Complainant had received an unsolicited SMS, and in following a WAP link in that SMS was taken to a WAP site. After visiting the site, the Complainant received a further SMS from the SP which read as follows:

MobVC! Is your lover the right one for you? SMS LOVE name1name2 to 39215 to find out! Content on it's way! Problems? [help@mob.vc](mailto:help@mob.vc)

2. The Complainant noticed several alleged infractions of the Code of Conduct which can be summarised as follows:
  - 2.1. The initial SMS sent to the Complainant was unsolicited (spam as defined in section 5.2.1 of the Code of Conduct) in that there was no prior commercial relationship with him, nor had he consented to receipt of such messages.
  - 2.2. The initial SMS to the Complainant did not list an originating number as required by section 5.1.1 of the Code of Conduct.
  - 2.3. The initial SMS to the Complainant did not have an unsubscribe facility as required by section 5.1.2 of the Code of Conduct.
  - 2.4. The SP's WAP site did not list pricing next to the short code 39215 as required by section 6.2.5 of the Code of Conduct.

- 2.5. There are hidden costs related to use of the service, as contemplated in section 6.2.3 of the Code of Conduct:

The content is displayed at the top of the page. The page is very long and right at the bottom they give the pricing. See Screen shots. There is no indication that you will also incur GPRS costs in addition to the content cost. The cost is also right at the bottom away from the content.

- 2.6. The pricing on the WAP site was misleading, and not properly displayed, as contemplated in sections 6.2.4 and 6.2.11 respectively of the Code of Conduct:

The pricing is at the bottom of the page away from the content. The top section says Free of Charge Videos you will find at the end of the page. A few pages of content with no pricing is then shown. The price of that content is right at the bottom. This is a deliberate attempt to mislead the customer into believing (sic) that the downloads are free. This is a blatant attempt to mislead the consumer.

- 2.7. A James Blunt song offered for download was in fact not a recording of James Blunt but that of an imitator. If established, this would be an infringement of sections 3.4.1 and 6.1.1.

3. The Complainant included screenshots of the WAP site in his complaint in support of the above allegations which are attached as annexure "A".
4. The Complainant did not include the text of the original SMS that he received.
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## Response

5. It appears from the documents that Smartcall is the SP, and was in the process of setting up the service complained of on behalf of "Mobimex.com" or the "Mobimex Group", which is in the role of an IP.
6. The following text appears at the bottom of the WAP site as reproduced by the Complainant: "Provided by Quadra Mobile Media Limited". It is unclear whether this is another name for the IP, or whether the IP obtained the content from this entity; whatever the case, the IP should be more clearly identified on the WAP site.
7. In response to the complaint the SP provided a record of correspondence between it and the IP. This correspondence did not make any substantive reply to the allegations, but it is possible to glean the following from it:
- 7.1. The SP/IP were in the process of making the WAP site in question compliant with the WASPA Code of Conduct at the time the complaint was made.
- 7.2. The correspondence mentions inserting the words "stop to 39215 to unsubscribe" as well as a customer care number into marketing SMSes from which I draw the inference that these words were not included in the SMS sent to the Complainant.

8. It is unclear why the SMSes complained of were sent if the service was still being developed.
  9. I made a request to the SP via the WASPA Secretariat for it to furnish specific responses to all of the alleged infractions as set out above but no response was received. The Secretariat made a further request some weeks later which met with a response which took the matter no further. Despite several follow-ups by the Secretariat no substantive response was ever received. I am hence forced to adjudicate on the basis of somewhat scanty material.
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### **Portion of the Code Considered**

10. The following sections of the WASPA Code of Conduct are relevant to this complaint:

#### **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.

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#### **4. Customer relations**

##### **4.1. Provision of information to customers**

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.

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#### **5. Commercial communications**

##### **5.1. Sending of commercial communications**

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

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##### **5.2. Identification of spam**

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;

(b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or

(c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

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### **5.3. Prevention of spam**

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

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### **6.2. Pricing of services**

6.2.1. All advertised prices must include VAT.

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

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.

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display.

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6.2.11. For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:

(a) If the transaction is billed at R10 or more, the member initiating this transaction must obtain specific confirmation from the customer and keep a record of such confirmation.

(b) If the transaction is billed at less than R10, the price for the transaction must be clearly indicated as part of, or immediately next to, the link or option that will initiate the transaction.

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## **Decision**

### Sending of SPAM

11. The SP has provided no response to the Complainant's assertion that the SMS sent to him was unsolicited. As I can only make rulings based on the information before me, I can only conclude that there was no prior relationship between the parties or that either of the two remaining exceptions contemplated in section 5.2.1 applies in this case. I thus find that the SP has infringed section 5.3.1 of the Code of Conduct.

### No originating number

12. The Complainant did not provide the text of the offending SMS, so it is not possible to establish whether or not an originating number was included in it.

13. I also examined the second SMS received by the Complainant, which identified the message originator as "MobVC". This is inadequate. While I am satisfied that the IP does indeed trade under the name "Mob.vc", this is not reflected in the SMS – the IP is described as "MobVC" without the dot. This is confusing to consumers.

14. I thus find that section 5.1.1 of the WASPA Code of Conduct has been infringed.

### No unsubscribe facility

15. It is clear from the correspondence that the offending SMS did not contain an unsubscribe instruction. The SP has hence infringed section 5.1.2 of the Code of Conduct.

### No pricing information given next to short code

16. The Complainant makes the allegation that the SP has not included any pricing information next to the short code 39215. An examination of the second SMS as reproduced by the Complainant bears out this allegation and the SP has hence infringed section 6.2.5.

### Hidden costs

17. I can not see how listing the cost of the service at the bottom of the WAP page in and of itself constitutes an infringement of section 6.2.3 of the Code of Conduct.

18. The SP has however clearly failed to mention that GPRS costs are associated with downloading the content made available on the WAP site and has hence infringed section 6.2.3 of the Code of Conduct.

### Misleading pricing

19. The Complainant alleges that the SP's pricing is misleading because it is listed only at the bottom of a rather long WAP site page. The Complainant also finds the offer of free video misleading.

20. There is nothing in the code that specifically prevents pricing from being listed at the bottom of the page in this context: the individual items are not differently priced, which would necessitate separate pricing. Different media such as video and games are priced differently, but this does not mean that every price item must be separately priced. Accordingly there has been no infringement of the Code of Conduct here.
21. The offer of free video clips is also not misleading: the SP says that the link to video clips is to be found at the end of the page, and so it is.

#### James Blunt song

22. The Complainant makes the allegation that a song advertised on the site as a recording by James Blunt is in fact a recording of another performer imitating James Blunt singing a song by James Blunt. The Complainant makes a bare allegation in this regard and, in the absence of any further input by either party I am not in a position to reach a conclusion. If the allegation turned out to be true, then the SP would have infringed both section 3.4.1 of the Code of Conduct, in that it would have knowingly violated James Blunt's copyright in the song, and also section 4.1.1 in that it would have mislead consumers as to the true nature of the song being offered for download.
23. Unfortunately, while the sound and style of the original artist are undoubtedly rather unique, I am ill equipped to tell the original from the alleged fake, and so in the absence of further evidence I am unable to make any ruling in this regard.

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#### **Sanction**

24. It is a mitigating factor that according to WASPA's records available at the website at URL [www.waspa.org.za](http://www.waspa.org.za) this is the first complaint involving either the SP or the IP.
25. It seems from the correspondence that the WAP site and related marketing messages were in a development stage when the complaint was made. While it is not clear from the correspondence provided by the SP which party was doing the actual system development, the SP would have been the party with the power to make the service "live" to the public, and accordingly must bear the responsibility for allowing it to go "live" before it was compliant with the WASPA Code of Conduct.
26. The SP admits in its response to the complaint that it and the IP were in the process of making the service compliant with the Code of Conduct when the complaint was made – why then was the service "live" if the SP knew that it was not compliant? The SP put the service "live" before it was compliant with the Code of Conduct, so it is the SP and not the IP that is liable for resulting infringements of the Code of Conduct.
27. If the Complainant had "stumbled upon" the site I would be more inclined to be lenient, but if the service was indeed still in development, the SP had no business allowing marketing SMSs to be sent out.

28. Notwithstanding, I am prepared to give the SP the benefit of the doubt and have suspended operation of the fines raised against the SP.

29. The following sanctions are imposed:

29.1. The SP is fined an amount of R 5 000 in respect of its breach of section 5.3.1 of the Code of Conduct, which fine is suspended for a period of six (6) months from the date hereof on condition that the SP does not infringe this section during that period.

29.2. The SP is issued with a formal reprimand in respect of its breach of section 5.1.1 of the Code of Conduct. It avoids a fine due to the fact that the misidentification was due to a misspelling of its name and thus not as prejudicial to consumers as it may otherwise have been.


29.3. The SP is fined an amount of R 5 000 in respect of its breach of section 5.1.2 of the Code of Conduct, which fine is suspended for a period of six (6) months from the date hereof on condition that the SP does not infringe this section during that period.

29.4. The SP is fined an amount of R 5 000 in respect of its breach of section 6.2.5 of the Code of Conduct, which fine is suspended for a period of six (6) months from the date hereof on condition that the SP does not infringe this section during that period.


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## Annexure A


1. Wap Menu (\*) ✉ ↶ Options



Welcome to South Africa biggest Mobile Portal  
FREE of charge VIDEOS you will find at the end of the page




[Rihanna,Shaggy,the DREAM](#)



21:48 Close

1. Wap Menu (\*) ✉ ↶ Options

[Download of the Week](#)




[Download of the Week](#)

[Sexy GRILS](#)

[Cool HUNKS](#)

[Mobile GAMES](#)



[South Africa TOP20](#)

21:50 Close

1. Wap Menu (\*) ✉ ↶ Options



[South Africa TOP20](#)

- [1. The Verve - Love Is Noise](#)
- [2. Stiff Dylans - Ultraviolet \(Edit\)](#)
- [3. Katy Perry - I Kissed A Girl](#)
- [4. Kid Rock - All Summer Long](#)
- [5. Noah and the Whale - 5 Years Time](#)
- [7. The Script - The Man Who Can't Be Moved](#)
- [8. The Chemical Brothers -A Modern Midnight Conversation](#)
- [9. Coldplay - Viva La Vida](#)
- [10. The Saturdays - If This Is Love](#)

21:51 Close



Wap Menu Options

[9. Coldplay - Viva La Vida](#)  
[10. The Saturdays - If This Is Love](#)  
[11. Uninvited - Freemasons](#)  
[12. Vergiss mich - Luttenberger-Klug](#)  
[13. Papa Pinguin - Pigloo](#)  
[14. All good things - Nelly Furtado](#)  
[15. Even haven cries - Monroe](#)  
[16. Revolution - Nevada Tan](#)  
[17. Amore per sempre - Nevio](#)  
[18. Que Hiciste - Jennifer Lopez](#)

21:52 Close

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Wap Menu Options

[18. Que Hiciste - Jennifer Lopez](#)  
[19. America - Razorlight](#)  
[20. Snow \(Hey OH\) - Red Hot Chili Peppers](#)

[True Ringtone HITS](#)  
[Poly Ringtone HITS](#)  
[Movies and Popcorn](#)  
[FREE Video Selection](#)

21:52 Close

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Wap Menu Options

[True Ringtone HITS](#)  
[Poly Ringtone HITS](#)  
[Movies and Popcorn](#)  
[FREE Video Selection](#)

100% FREE to browse! For HELP write to help@mob.vc ,Wallpapers and  
 Screensavers cost just R5 each, Videos R10, Mobile Games R45. Provided by  
 Quadra Mobile Media Limited.

21:53 Close

**True tones** (⇆) ✉ ↶ Options



- [1. Falco - Maenner Des Westens](#)
- [2. Fall Out Boy - Sugar Were Goin Down \(V2\)](#)
- [3. My Chemical Romance - Famous Last Words](#)
- [4. James Blunt - Youre Beautiful](#)

[Next >](#)  
[Home](#)

0 kB 21:55 Back

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**Download** (⇆) ✉ ↶ Options

Title: **Youre Beautiful**  
Singer: **James Blunt**  
Genre: **Rock**  
orderlink [Download MP3](#)  
[Download AMR](#)  
[Home](#)

21:55 Back