

REPORT OF THE APPEALS PANEL

Date: 3 March 2010
Appellants: Integrat (Pty) Ltd (SP) and Glomobi (IP)
Complaint Number: 4784
Applicable versions: Code 6.1 and 6.2, Ad Rules 1.6

1 BACKGROUND TO THE APPEAL

- 1.1 The initial complaint was filed by the WASPA Media Monitor about 7 television advertisements broadcast during August 2008. The complaint alleged that the advertisements were illegible, and specifically that using white type on a pastel turquoise background did not accord with the WASPA Code of Conduct (Code) and Advertising Guidelines or Rules (Rules).
- 1.2 The SP's response was very detailed, a point which found favour with the adjudicator. However the adjudicator nonetheless found the SP in breach of the Code and Rules.
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2 RELATIONSHIP BETWEEN IP AND SP

- 2.1 The relationship between SP and IP is not new in relation to wireless application services. An SP who has the primary contracting relationship with a mobile network operator, will frequently engage an IP to provide content for transmission over the network.
- 2.2 The definition of *information provider* in the Code states that this is 'any person on whose behalf a wireless application service provider may provide a service, and includes message originators'. A *wireless application service provider* is 'any person engaged in the provision of a mobile service, including premium-rated services, who signs a WASP contract with a network operator for bearer services enabling the provision of such services'.
- 2.3 Section 3.9.1 of the Code (*information providers, general provisions*) states that 'members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene this Code of Conduct'. Section 3.9.2 provides that 'the member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct'.
- 2.4 The SP is a member of WASPA. The obligation to comply with the Code and to ensure that the IP complies, rests with the SP and it is against the

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SP that the finding of the adjudicator was made and the SP lodged the appeal. The finding of the panel therefore concerns the SP alone, and our further reasons for this are set out below. The SP is at liberty to pursue its IP for compensation, or redress, as the case may be.

3 THE APPLICATION OF THE CODE AND AD RULES

The Code, v6.1 and 6.2

3.1 The Code at section 6 (*advertising and pricing*) states that all members are in addition to the provisions of that section, also bound by the Advertising Rules.

3.2 The point of departure in considering whether or not there has been a breach, is therefore the provisions of section 6 itself. The relevant provisions are:

3.2.1 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.

3.2.2 6.4.2. Where a short code is used as a brand and there is an associated call to action, the standard requirements for the display of pricing information are required, as set out in the Advertising Rules.

3.3 The provisions are the same in both versions of the Code.

The Ad Rules, v1.6

3.4 Only 1 set of Rules was in force from 1 January 2006 until 1 November 2008. The SP contended in its response to the complaint that *we get the feeling that the WASPA Monitor is trying to enforce the new advertising guidelines while they haven't been published and implemented yet.* The panel does not get the same feeling, and the adjudicator's report relies fairly and squarely on the provisions of v1.6 of the Ad Rules, only.

3.5 The complaint, the SP's response and the adjudicator's report quote the rules relating to television advertising in full so we will not repeat these here. We note that the SP has marked its compliance with all the provisions but that the adjudicator has focussed the finding narrowly on the display of the access costs. Specifically the adjudicator has relied on:

3.5.1 2.2.3 the T&C text must not be part of a colour scheme that may obscure easy reading of complete details of the T&C; and

3.5.2 1.2.2 (*display rules for cost and T&C information/broad overview*):

Display Text Font:

Žurichöfont

Display text Font Size & Type:

18 points MINIMUM.

Display text Font position:

In a visible block or triangle in any top corner of the screen

Display text Font Colour:

Contrasted colour superimposed on the block/triangle

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Block/Triangle Colour
Contrasted colour behind the display text

4 DECISION OF THE ADJUDICATOR

- 4.1 The adjudicator remarked that the font used by the SP could be called a 'stencil' font because the text appears as broken lines, making it difficult to read, and at odds with the font chosen for the other information and the aesthetic quality of the advertisement.
- 4.2 The adjudicator notes also that the white lettering on a transparent or 'safe' turquoise background with additional images underneath the transparent background make the T&C information difficult to read. The actual pricing information specifically is positioned over a silver/grey cellphone image and behind the turquoise coloured background.
- 4.3 The adjudicator noted that the SP and IP had previously been found to have breached the Code and Ad Rules in relation to the display of access costs in television advertisements, in that they had failed to position the cost of access text prominently and clearly (in complaint 2048).
- 4.4 Having regard to the fact that television advertising is considered to have the potential to reach substantial numbers of unsuspecting potential subscribers and so to cause prejudice if pricing information is not appropriately displayed, the adjudicator imposed a fine of R150,000.

5 GROUNDS OF APPEAL

- 5.1 The adjudicator's fine was imposed without specifying whether it should be paid by both the IP and SP jointly, or by either one of them. However this point has not been addressed by the appellant, so we consider the sanction to apply to the SP in light of the fact that it is the SP that has appealed. We discuss the relationship between IP and SP at 2.4 above, and consider the SP to have primary responsibility for enforcement of the Code.
- 5.2 *The font*
- 5.2.1 The appellant includes with its appeal an illustration of the text that it used in the advertisement, admitting that it was not Zurich font but stating that it was indeed 18 points. The illustration is copied below:

Zurich Font	Stencil Font
Glomobi	GLOMOBI

- 5.2.2 The SP contends that the font seems stencilled in the ad is because a light version is used for email purposes [sic]. The panel does not

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unfortunately know what this means, but assumed it was the reference to the font chosen for the illustration sent to the adjudicator, rather than the font used on the actual advertisement that they are referring to.

5.3 *The safe and transparent background*

5.3.1 The SP states that its client (IP) has not since nor will they ever again use a 'safe' or transparent background in a television ad as per the new advertising guidelines.

5.3.2 New guidelines were about to be released and their client was waiting for them in order to amend all their ads, but in the SP's view, the clarity of the text is a matter of opinion. The SP states 'we truly believe that it was not fair penalising our client for rules breached which did not exist at the time'

5.4 *Sanctions*

5.4.1 The SP asked for several factors to be taken into account in mitigation of the findings on the background to the advertisements specifically. These were:

5.4.1.1 The terms and conditions were available 100% of the advert;

5.4.1.2 The cost and the nature of the service was clear and NOT displayed in a stencilled font;

5.4.1.3 The font size was also large enough to be clearly visible;

5.4.1.4 Attention was drawn to the terms and conditions by the coloured box;

5.4.1.5 There was very little movement behind the transparent box - there was no movement for at least the last 10 seconds of the ad.

5.4.2 In summary the SP reiterates that its client had no 'malicious intent' and that 'no subscriber could possibly have claimed that he or she was unaware of the cost or nature of this service.'

6 FINDINGS OF APPEALS PANEL

6.1 On viewing the video clip provided by the SP we also found that while one can read the R4,99 in the turquoise box containing T&Cs, the phone behind it in silver, as described by the adjudicator, could distract the eye. Similarly, although the box at the top of the screen is in white and the text is in black, the font used for this text (only) is very much at odds with the other text in the advertisement, and is 'to our eye' much like a stencil font, although large in size. We must note that the font is entirely different from that used in the illustration submitted to WASPA by the SP in its appeal. Apart from anything else, the illustration used CAPS and **BOLD**, but the text in the advertisement is not in bold or caps.

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- 6.2 Studying the advertisement does make it clear what the service costs, but if the advertisement were to pass by in the midst of a television programme, which is more commonly the case than for it to appear on a computer screen in front of a person looking specifically for the price, we have our doubts that the T&Cs (and particularly the price) would be legible, set as it is against a coloured background.
- 6.3 Since the ordinary person is going to be drawn to the content of the advertisement and the smiling baby rather than to the actual cost and terms, it is, in our considered view, quite likely that the ordinary person would not know or would find it difficult to establish, the price for the service. Arguably the ordinary person will only ever be drawn to the content of any advertisement, but the point here is that were that person to want to find out more, it must be easy or relatively easy for them to do so.
- 6.4 Having regard to the grounds of appeal and mitigation:
- 6.4.1 Although we have noted the static nature of the pricing, the Rules and the Code are clear about more than just the requirement to keep pricing static, the other rules are equally applicable and must be complied with;
- 6.4.2 The cost and nature of services is clear only if one is able to scrutinise the screen, because the colour and background of the advertisement does tend to obscure the text or to distract the eye. To us the font does appear ñ at least in the block containing the price ñ to be in a stencil font and at best, it is not in Zurich, as required by the Rules;
- 6.4.3 The font size is large, but that doesn't unfortunately compensate for the difficulty in reading the actual words and numbers;
- 6.4.4 We agree the coloured box is useful and could be said to draw attention (even if the colour is not the best in our view, to draw attention to the text) but the same cannot be said for the actual terms and conditions within the box, particularly as they are partly obscured by fixed pictures and by the moving baby image (and the SP itself refers to the terms and conditions as only being 'reasonably clear'); and
- 6.4.5 We found that the movement was sufficient to distract the eye from the T&Cs and to make it that much more difficult to concentrate on the pricing.
- 6.5 Whilst we do not wish to make a finding of malicious intent in the face of the SP's express statement to the contrary, the fact of the breaches of the Code and Rules remains. As to whether a subscriber could have claimed that he or she was not aware of the costs of the service, this may be true, but it also does not detract from the fact of the breaches of the Rules and

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Code. We agree with the adjudicator in this regard, and it was therefore appropriate in our view, to apply a sanction against the SP.

- 6.6 As an aside, the panel notes that the SP managed to comply with most of the nitty gritty of the Rules regarding size, time frames, positioning etc (apart from the font) without ultimately complying with the overarching and crucial principle that the costs and T & C must be easily and clearly visible
- 6.7 The panel has considered the quantum of the sanction in the light of the previous finding against the same SP and IP in relation to much the same issue. We wish to issue a stern warning to all WASPs in relation to repeat offences and of course in relation to offences of any kind ñ particularly in relation to the pricing rules.
- 6.8 In the circumstances, the panel has decided that it is appropriate to reduce the fine to R75,000, R25,000 of which will be suspended for a period of 12 months and payable only if and when the SP commits a further breach of any kind, and R50,000 of which is payable immediately to WASPA. The reduction in no way signifies agreement with the arguments raised by the SP nor does it in any way condone the SP's conduct. The reduction is purely the panel's attempt to standardise fines for similar conduct.
- 6.9 The appeal fee is not refundable.