



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Itouch South Africa (Pty) Ltd
Information Provider (IP):	None
Service Type:	Subscription
Source of Complaints:	Competitor
Complaint Number:	4967
Code Version (CoC and AR):	Code of Conduct 6.2 and Advertising Rules 1.6 and Advertising Rules 2.3
Date of Request:	04 December 2008
Date of Adjudication:	24 February 2009

Complaint

1. On the 08 October 2008 a complaint was lodged by a WASPA member company against the iTouch South Africa (Pty) Ltd regarding an advertisement found at http://www.youmobile-za.com/adv-mobile-contents-169_101.html?checkSplash=yes (as found in Annexure A) regarding an alleged contravention of WASPA's advertising rules in the following ways:
 - 1.1. The subscription text was not clear;
 - 1.2. There was bundling of services;
 - 1.3. The alert text was not in one of the official languages; and
 - 1.4. The pricing and billing text were very small (and presumably insufficiently legible to a user).

Response

2. In response the SP indicated that it denied all four accusations.

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3. Responding to the first accusation the SP indicated that the subscription text used the Arial font for clarity and was (it can be inferred) sufficiently large enough to be legible. It should be noted at this point that both the SP and the Complainant submitted a screenshot of the relevant web site (Annexure A and Annexure B respectively). In the complainant's screen shot (Annexure A) the text containing the subscription is obscured by images of the logos of the three South Africa cellular service providers. In the screenshot as provided by the SP (Annexure B) the text is not obscured in this fashion.
 4. The SP denied bundling was occurring even though it would appear as though the customer would choose a ringtone when subscribing to the service. The SP indicated that the customer would receive the ringtone before being subscribed and a user and then have to complete an independent transaction to activate the subscription service. The SP also indicated that the customer would be able to utilise the ring tone whether or not he was successfully billed.
 5. The SP also provided various screen shots of alert text boxes which in turn were all in the English Language (Annexures C-E).
 6. The SP indicated that the fact that this was a subscription service with a daily cost of R10/day was (allegedly) mentioned three times (Annexure B) and thus was made clear to the user. Moreover the way to unsubscribe was set out in the text below the advert as well as in the first message received by a customer.
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Portions of the Code of Conduct and Advertising Rules Considered

7. As the conduct complained about occurred in October 2008 version 6.2 of the WASPA Code of Conduct (CoC) is applicable to this dispute as well as Advertising Rules version 1.6. For reasons that will become clear later the Advertising Rules version 2.3 have also been considered.
8. The following sections of the CoC were considered:
 - 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.
 - 4.1.4. Members must make the terms and conditions of any of their services available to customers and potential customers, on request.

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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.

6.2.6. Unless otherwise specified in the advertising guidelines, the name of the WASP or the information provider providing the service must appear in all advertisements for premium rated services.

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.

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 a request for a specific content item.

9. The following sections of the Advertising Rules 1.6 ("AR 1.6") were considered:

9.2.2.1 Formatting Of Access Cost Text:

Access cost text must be of a size that is at least 80% of the largest access number on the page, or 15 point font size, whichever is the greater. The access cost text must be in a non-serif font

☐The pricing text must be clearly shown being independent of any other text or image, and not be placed or formatted in a manner where it may be obscured by other text information, graphics or marks that may be displayed around it.

☐The cost text must not be part of a colour scheme or design that could obscure (objective) easy reading of complete details of the price.

9.2.2.2 Position of Access Cost Text

☐The T&C text must be placed close as possible to the unique access number.

The consumer should thus not have to scroll down significantly on that same page or follow any links to other pages to be made aware of the full pricing and T&C associated with a unique access number.

☐No cost and/or T&C information may be placed on in-vue type pages.

☐No cost and T&C information may be placed on any Internet web page requiring a particular add-on component or facility that is not generally available to all users on the Internet. This prohibition extends to placement on pop-up and in-vue pages.

- The consumer should thus not have to scroll down significantly on that same page or follow any links to other pages to be made aware of the full pricing and T&C associated with a unique access number.

9.2.3.1 Formatting & Font Criteria For T&C Text

☐The T&C text must be in 12 point font size, or 50% of the largest access number on a Web page, whichever is the greater. The T&C must be in a non-serif font

9.2.3.2 Position of T&C display text

- For each unique access number, the full and final cost of the access must be displayed immediately below, or above, or adjacent to the unique access number in a non-serif font.
- This T&C text must be placed close as possible to the unique access number.

10. The following sections of the Advertising Rules 2.3 ("AR 2.3") were considered:

9.2.1.1 Formatting Of Access Cost Text:

☐ Access cost text must be of a size that is at least **80%** of the largest access number on the page, or 15 point font size, whichever is the greater. The access cost text must be in a nonserif font

☐ The pricing text must be clearly shown being independent of any other text or image, and not be placed or formatted in a manner where it may be obscured by other text information, graphics or marks that may be displayed around it.

☐ The cost text must not be part of a colour scheme or design that could obscure (objective) easy reading of complete details of the price.

9.2.1.2 Position of Access Cost Text

☐ The consumer should thus not have to scroll down significantly on that same page or follow any links to other pages to be made aware of the full pricing and T&C associated with a unique access number.

☐ No cost and T&C information may be placed on any Internet web page requiring a particular add-on component or facility that is not generally available to all users on the Internet. This prohibition extends to placement on pop-up and in-view pages.

9.2.2.1 Formatting & Font Criteria For T&C Text

☐ The T&C text must be in **12 point font** size, or 50% of the largest access number on a Web page, whichever is the greater. The T&C must be in a non-serif font

Decision

11. Firstly it should be pointed out that the version of the advertisement as provided by the Complainant was unable to be replicated by the adjudicator and both in December 2008 and February 2009 the text was not found to be obscured as shown in Annexure A. This advertisement was tested using the most commonly used Internet Clients namely Microsoft Internet Explorer 7.0 and Mozilla Firefox 3.06 and additionally on a mobile device running Windows Mobile 6.1. Thus for the purposes of this complaint the advertisement will be used is that as set out in Annexure B.

12. Four accusations were levelled by the complainant as set out above.

13. The first was that the subscription text was not clear. From Annexure B it can be seen that the text indicating that this is a subscription service is extremely similar to the background colour making it difficult to discern the wording of this text. Section 9.2.2.1 of AR 1.6 indicates that, "The cost text must not be part of a colour scheme or design that could obscure (objective) easy reading of complete details of the price". This section has been breached by the failure to adequately distinguish the said text from the background colour.

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14. Section 11.1.2 of the CoC indicates that a request to join a subscription service must not be “bundled” together with a specific content item. The code defines “bundling” as “automatically subscribing a consumer to a subscription service in response to a request from that consumer for a single content item. Clearly the initial request by the customer to be subscribed to the subscription services includes a request for one of the content items as set out in Annexure B and this is not denied by the SP. In order to avoid this section the SP has indicated that the request for the specific item will not cause the subscription service to initiate and the customer will receive the ringtone even if he does not correctly reply to the request to initiate the subscription service as provided to the customer in the form of Annexure C. Assuming that it is in fact correct that a customer can successfully obtain the ringtone even if declining the message as set out in Annexure C (and there is no evidence to the contrary), section 11.1.2 cannot be found to have been breached as a separate and subsequent transaction is still required to initiate the subscription services.
15. While the complainant alleged that the subsequent text messages were not provided in an official language as recognised in South Africa, the complainant did not provide any support for this allegation. The alerts as provided by the SP are clearly set out in the English language and as a result there can be no finding that the CoC has been breached in this respect.
16. Section 9.2.2.1 of the AR 1.6 indicates that the cost of the subscription service must be at least in a font size of 15. The font size as contained in the advertisement is font size 8.5. Thus this provision has been breached.
17. Section 9.2.3.1 of the AR 1.6 indicates that the terms and conditions must be at least a font size of 12 or larger. The font size in the advertisement is font size 7.5. Thus this provision has been breached.
18. It is particularly concerning that the terms and conditions of this service are not prominently displayed, but rather have to be accessed by going to (rather than clicking on) <http://www.clubmovilisto.co.za/> and thereafter accessing the terms and conditions by scrolling down the page to the Terms and Conditions link which is insufficiently large to be adequate (font size is 8.5). Bearing in mind that the SP is more than willing to provide an extremely large advertisement above this text it is not acceptable that this text is so small, nor is there any reason why the link could not hyperlink directly to the terms and conditions of the service rather than

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to the home page of the SP. Moreover the text accepting the terms and conditions should also be hyperlinked to the actual terms and conditions. While this practice swings dangerously close breaching clause 9.2.2.2 of AR 1.6 in that the terms and conditions are not generally available to all users of the Internet, it not a finding that this section has been breached. However this action does breach clause 4.1.1 of the CoC in that the practice of not providing a hyperlink to the terms and conditions does not smack of honest and fair dealings with the consumer and it is thus breaching this provision.

19. The advertisement does not specify the name of the WASP or the Information Provider as required by s6.2.6 of the CoC, and consequently this section has been breached.
20. While it was not the subject of this complaint, a second advertisement by the SP is provided at the <http://www.clubmovilisto.co.za/> URL, and this advert is itself guilty of not complying with the self-same text requirements as set out above (the equivalents of the said sections in AR1.6 can be found in s9.2.1.1 and 9.2.2.1 of AR 2.3).
21. Additionally it cannot be accepted that an ordinary user with a screen resolution of 1024 by 768 should be required to scroll down the page in order to be aware that there are terms and conditions that are applicable to this service and thus s9.2.1.2 AR 2.3 has been breached by the second advertisement.
22. The second advertisement does not specify the name of the WASP or the Information Provider as required by s6.2.6 of the CoC, and consequently this section has been breached.

Mitigation/Aggravation

In Aggravation

23. The following points were considered in aggravation of the sanction to be imposed:
 - 23.1. The same advertisement is still available to customers and the terms and conditions is not hyperlinked, but simply made available via a typed URL.

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23.2. The same breaches of the code were committed for two different advertisements.

23.3. Section 9 of the AR 1.6 were breached in terms of adjudication 0633 in January 2007, making it impossible for the SP to claim it was unaware of the provisions relating to the s9 of AR1.6. This aspect is particularly concerning and begins to smack of an intentional effort to mislead the customer.

24. In Mitigation

24.1. There has been some effort to comply with the necessary requirements as set out in the CoC and AR 1.6 although clearly insufficient.

Sanction Imposed

25. The following sanction is imposed in respect of the SP's breach of the Code of Conduct:

25.1. The SP is reprimanded for breaching the WASPA Code of Conduct and advertising rules as set out above;

25.2. The SP is directed to ensure that the advertisement at http://www.youmobile-za.com/adv-mobile-contents-169_101.html?checkSplash=yes is removed and is not reinstated until the breaches as set out in this ruling have been rectified, as certified by the WASPA secretariat.

25.3. The SP is directed to ensure that the advertisement at <http://www.clubmovilisto.co.za/> is removed and is not reinstated until the breaches as set out in this ruling have been rectified, as certified by the WASPA secretariat.

25.4. the SP is fined an amount of:

25.4.1. R4 000 for the breach of section 9.2.2.1 in AR 1.6 in that the colour of the text was insufficiently legible in the first advertisement,

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25.4.2. R6 000 for the breach of section 9.2.2.1 in AR 1.6 (and its equivalent in AR 2.3) in that the cost of service was contained in text which was and still is of an insufficient size in both advertisements,

25.4.3. R6 000 for the breach of section 9.2.3.1 in AR 1.6 (and its equivalent in AR 2.3) in that the terms and conditions are contained in text which was and still is of an insufficient size in both advertisements,

25.4.4. R4 000 for the breach of section 4.1.1 of the CoC in the first advertisement in that the terms and conditions are not easily accessible to normal Internet users,

25.4.5. R4 000 for the breach of section 6.2.6 of the CoC in that the name of the WASPA member is not present in the adverts, and

25.4.6. R2 000 for the breach of section 9.2.1.2 of AR 2.3 in that a user needs to scroll down in the second advertisement to be aware that the terms and conditions are present;

payable by the SP to the WASPA Secretariat within 5 business days of this the date of this adjudication;

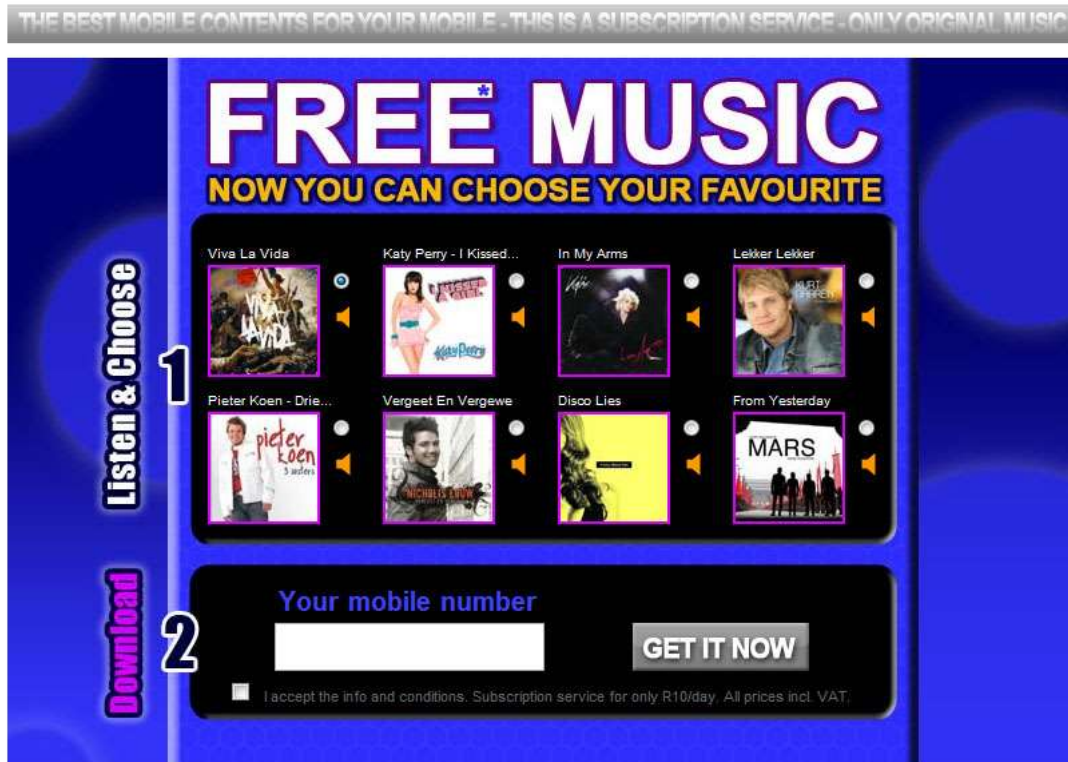
25.4.7. In addition the SP is fined an amount of R30 000 which is wholly suspended for 12 months from the date of this adjudication provided that the SP is not found guilty of breaching s9 of AV 2.3 during this period.

Appeal

Please note that should the SP or IP wish to appeal this decision it must inform the secretariat of this within five working days of this decision in terms of section 13.3.14 of the CoC.

Annexures

Annexure A



Available to all networks. WAP needed. Plus WAP charges/downloads. Bearer costs. Permission from the bill payer needs to be obtained before joining the subscription. SUBSCRIPTION SERVICE, R10/day. All prices incl. VAT. To subscribe, send SMS to 36080. Premium rates apply. Free SMSs do not apply. Errors billed. Available to compatible handsets only. Help 021 417 8001. Full terms and conditions available at www.budomovillisto.co.za, wap.36080.co.za.
 * Free items may vary from what is advertised. Subject to bearer costs and WAP charges

Annexure B

THE BEST MOBILE CONTENTS FOR YOUR MOBILE R10/DAY **THIS IS A SUBSCRIPTION SERVICE** ONLY ORIGINAL MUSIC AND COOLEST GAMES

FREE MUSIC

NOW YOU CAN CHOOSE YOUR FAVOURITE

1 Listen & Choose

Viva La Vida Katy Perry - I Kissed... In My Arms Lekker Lekker

Pieter Koen - Drie... Vergeet En Vergewe Disco Lies From Yesterday

2 Download

Your mobile number

GET IT NOW

☐ I accept the info and conditions. **Subscription service for only R10/day** All prices incl. VAT.

Available to all networks. WAP needed. Plus WAP charges/downloads. Bearer costs. Permission from the bill payer needs to be obtained before joining the subscription.

SUBSCRIPTION SERVICE, R10/day All prices incl. VAT. To unsubscribe, sms STOP FUN to 31194. Premium rates apply. Free SMSs do not apply. Errors billed.

Available to compatible handsets only. Help 021 417 8001. Full Terms and conditions available at www.gujmpvillito.co.za, wap 36060.co.za.

* Free items may vary from what is advertised. Subject to bearer costs and WAP charges

Annexure C

THE BEST MOBILE CONTENTS FOR YOUR MOBILE R10/DAY THIS IS A SUBSCRIPTION SERVICE ONLY ORIGINAL MUSIC AND COOLEST GAMES

THE CONTENT IS ALMOST YOURS!

Insert the code received by sms:

YOUR CODE →

GET IT NOW 

Available to all networks. WAP needed. Plus WAP charges/downloads. Bearer costs. Permission from the bill payer needs to be obtained before joining the subscription. SUBSCRIPTION SERVICE, R10/day. All prices incl. VAT. To unsubscribe, sms STOP FUN to 31194. Premium rates apply. Free SMSs do not apply. Errors billed. Available to compatible handsets only. Help 021 417 8001. Full Terms and conditions available at www.dubemobile.co.za. wap.30080.co.za

Annexure D

THE BEST MOBILE CONTENTS FOR YOUR MOBILE R10/DAY THIS IS A SUBSCRIPTION SERVICE ONLY ORIGINAL MUSIC AND COOLEST GAMES

THE CONTENT IS ALMOST YOURS!

Wrong code. Please, retry!

YOUR CODE →

GET IT NOW 

Available to all networks. WAP needed. Plus WAP charges/downloads. Bearer costs. Permission from the bill payer needs to be obtained before joining the subscription. SUBSCRIPTION SERVICE, R10/day. All prices incl. VAT. To unsubscribe, sms STOP FUN to 31194. Premium rates apply. Free SMSs do not apply. Errors billed. Available to compatible handsets only. Help 021 417 8001. Full Terms and conditions available at www.dubemobile.co.za. wap.30080.co.za

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Annexure E



Annexure F

K THE BEST MOBILE CONTENTS FOR YOUR MOBILE R10/DAY THIS IS A SUBSCRIPTION SERVICE ONLY ORIGINAL MUSIC AND COOLEST GAMES

FREE MUSIC
NOW YOU CAN CHOOSE YOUR FAVOURITE

Listen & Choose 1

Viva La Vida Katy Perry - I Kissed... In My Arms Lekker Lekker

3 Sisters - Pieter Koen Vergeet En Vergewe Disco Lies From Yesterday

Download 2

Your mobile

GET IT NOW

☒ I accept the info and conditions. Subscription service for only R10/day. All prices incl. VAT.

MTN Available to all networks. WAP needed. Plus WAP charges/downloads. Bearer costs. Permission from the bill payer needs to be obtained before joining the subscription. SUBSCRIPTION SERVICE, R10/day. All prices incl. VAT. To unsubscribe, sms STOP FUN to 31194. Premium rates apply. Free SMSs do not apply. Errors billed. Available to compatible handsets only. Help 021 417 8001. Full Terms and conditions available at wap.funfone.co.za.

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