

REPORT OF THE APPEALS PANEL

Date: November 2010
Appellants: Mira Networks (SP), Mobimex (IP)
Complaint Numbers: 6671
Applicable versions: Code of Conduct v6.2 & 7.0

1 BACKGROUND TO THE APPEAL

- 1.1 The SP and the IP have independently appealed the adjudication in complaint 6671, in terms of which various sanctions were imposed upon them as a result of a breach of sections 11.1.2, 3.1.1, 4.1.1 and 4.1.2 of Version 7.0 of the WASPA Code of Conduct (“the Code”) by the IP. The SP was found to have breached sections 3.1.1 and 4.1.1 and sanctioned through the operation of section 3.9.1 of the Code which relates to the relationship between SPs and IPs as regards compliance with the Code.
- 1.2 Both parties have appealed against both the decision and the sanctions imposed. Both parties submitted detailed appeal notices.
- 1.3 The appeals must be seen in the context of a number of appeals which have been raised against the IP in respect of its subscription services. This matter and complaint 6759 involve the IP in conjunction with the abovementioned SP, although complaint 6759 relates to a different subscription service offered by the IP.
- 1.4 In this matter the complaint relates to the IP’s South African Music Portal service, also referred to as to the SA Jukebox service.
- 1.5 As will become evident from the below, the appeals are essentially unrelated: whereas the IP is appealing against the breaches and sanctions relating to the underlying subscription service, the SP is appealing the correctness of the adjudicator finding that it was responsible for the breaches of the IP as also the sanctions applied to it.
- 1.6 The Panel will first turn to the appeal of the IP on the basis that – should this be upheld through an overturning of the finding or an amendment of the sanction imposed – this will impact on the extent to which the submissions made in the SP’s notice of appeal and the SP’s appeal itself remains relevant. In the event that the finding of the adjudicator against the IP is confirmed the Panel will turn to a consideration of the SP’s appeal.

2 THE APPLICATION OF THE CODE AND AD RULES

The Code, v6.2

2.1 The following provisions were considered:

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.

3.9. Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

3.9.3. The member must act in accordance with the WASPA complaints and appeal process and if appropriate, suspend or terminate the services of any information provider.

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.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

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. Manner of subscription

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

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.

The Code, v7.0

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11.1. Manner of subscription

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

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.

3 COMPLAINT AND DECISION OF THE ADJUDICATOR

- 3.1 The original complaint was an unsubscribe request lodged on 18 May 2009 and escalated into a formal complaint due to a dispute as to how the consumer had been subscribed to the subscription service offered by the IP. The complainant denied subscribing to any premium-rated service and requested a refund in full.
- 3.2 The IP noted in its initial response to the unsubscribe request that the complainant had subscribed to the service on 14 March 2009 and had downloaded content. The IP provided a table purporting to be evidence of the foregoing and refused to provide a refund due to the alleged use of the service by the complainant.
- 3.3 In attempting to discover the facts of the matter the adjudicator made a number of requests for further information, including that the IP provide copies of all advertisements and pages accessed by the consumer and terms and conditions applicable thereto.
- 3.4 A copy of the landing page allegedly accessed by the user in this matter is reproduced as Annexure A to this document.

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- 3.5 The IP asserted that the complainant had clicked on an advertisement on a third party WAP site ("New EROTIC FANTASY Videos here") as a result of which he or she had landed on the terms and conditions page for the service (i.e. Annexure A).
- 3.6 The SP in this matter also responded to the adjudicator's response for further information, furnishing full logs relating to the interaction between the consumer and the IP. The SP also indicated that – given the nature of the complaints against the IP – it had suspended all service provision to the IP. The logs provided indicated that a total of R225 had been debited from the complainant's account between 14 March 2009 and 9 May 2009.
- 3.7 The adjudicator made the following findings:
- 3.7.1 The subscription process employed by the IP was such that a consumer would not necessarily have the requisite intention to subscribe when subscribing to the service. This was a breach of section 11.1.2 of the Code.
- "The Code is clear: for a consumer to become subscribed to a service the consumer must have the specific intention of subscribing to a service and must not be intending to do anything else other than subscribe to a service at the time he or she is so subscribed.
- In response to the complaint by a consumer that he had not subscribed to the SP's (sic) services, the SP stated that the consumer had *"clicked on the following advertisement published in a third-party WAP site, which has lead to the terms and conditions page"*. This sentence can be reduced to the following steps that the SP alleges the consumer to have taken:
1. the consumer clicked on an advertisement in a third-party site; and
 2. the consumer arrived at a terms and conditions page.
- Having reviewed the subscription process described by the member, it is difficult to establish where in the above process the consumer would have expressly transacted to become a subscriber to the services.
- It would be very strange if a subscription service for music should have been advertised by a link in a third party site saying *"New EROTIC FANTASY Videos Here!"* as has been alleged by the Member, however a succession of complaints very similar to the present matter have been lodged against the Member and it is quite possible that the wrong link description has been added by the member to its reply as it has dealt with all of these complaints in a fairly offhanded manner.

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The advertisement produced for the services by the Member does not have the appearance of a transaction page. The only button available to the consumer is a button headed “*Enter here*”. Unless there are other indications of an intention to transact, an invitation to enter a site is considerably different from an invitation to transact on a site. Furthermore, it appears from the process description and the evidence put up by the Member that the subscription transaction mechanism must have been activated by clicking on a button that appears to be a navigation button rather than a transaction button. A reasonable consumer would not be intending to transact by clicking on that button and the method by which consumers were subscribed to the Member’s service breaches section 11.1.2 of the Code of Conduct.”

- 3.7.2 That the breach of section 11.1.2 was such that a finding that the IP had further breached section 3.1.1, 4.1.1 and 4.1.2 was warranted.
- 3.7.3 The adjudicator then stipulated a set of sanctions applicable to the IP as also a set of sanctions intended to apply to the SP in the event that the IP did not comply with the sanctions applied to it within five days of date of delivery of the report.

“The breaches by the member go to the heart of the Code and undermine the reputation of the wireless application services industry as a whole. In considering an appropriate sanction to be applied in this matter I have also had regard for previous breaches of the Code upheld against the Member including in complaints 6303, 6678, 6759, 6928 and 7081 where identical or near-identical breaches were upheld against the Member. I have noted that the date on which the adjudication reports in the aforementioned matters was delivered is after the date on which the present complaint arose, however the facts of those complaints indicate that the member has repeatedly breached the Code in a very serious manner.

For the purposes of paragraphs 1.3 and 2 below, a “related entity” shall be any entity in which any of the beneficial ownership of such entity is held directly or indirectly by any of the owners of the member or which has one or more directors, members or senior executives in common with the member.

1. The Member is directed to:

- 1.1 immediately suspend all of its subscription services offered in South Africa and all billing for any such services;
- 1.2 pay over to WASPA a fine of R350 000 within 5 days of the delivery of this report; and
- 1.3 pay to the consumer compensation in the amount of R225 plus interest thereon at the rate of 15,5% per annum calculated

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daily and compounded monthly in arrears from 9 May 2009 until date of payment, such payment to be made into a bank account within 5 days of the consumer furnishing the Member with details of its nominated bank account;

failing which the Member's and any related entity's memberships of WASPA shall be suspended and all relevant cellular network operators shall be requested to bar the Member's and any related entity's access to its billing platforms and services as contemplated by the provisions of section 13.4.3(d) of the Code for a period of 180 days or until such time as the fines imposed in paragraphs 1.2 and 1.3 above have been paid in full, whichever period is the longer.

2. The SP, Mira, is directed that in the event that the Member does not pay the fines and compensation provided for in paragraphs 1.2 and 1.3 above within 5 days, or cause such fines and compensation to be paid, then the SP shall:

2.1 immediately compensate the consumer as provided for in paragraph 1.3 above and make all necessary arrangements with the consumer to comply with the provisions of this sub-paragraph;

2.2 within 10 days furnish WASPA with a historical statement of account detailing all revenue received by it in respect of all subscription services provided to Mobimex prior to 12 March 2009 and specifying the SP's service fees in respect of such services and the SP's share of any revenue generated by such services;

2.3 permit WASPA to appoint an independent person to audit the accuracy of the statements to be furnished in terms of paragraph 2.2 above including by having reference to the SP's message records, transaction records and bank statements;

2.4 provide WASPA and the auditor with all requested written consents that may be required to facilitate the conduct of the audit referred to in paragraph 2.3, including a consent to permit any network operator to furnish WASPA and the auditor with copies of all relevant records reasonably required for the purposes of such audit including relevant message and transaction records held by any such network operator;

2.5 withhold any payments currently or at any time becoming due by it to Mobimex or any related entity as contemplated by the provisions of section 13.4.1(i) of the Code;

2.6 pay over to WASPA the SP's service fees and the SP's revenue share paid to it by any cellular network operator in respect of all subscription services provided to Mobimex prior to 12 March 2009 until such time as WASPA has received payment in full of the penalty specified in paragraph 1.2.

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3. In terms of section 13.4.2 of the Code, the sanctions contained in paragraphs 1.1, 1.2 and 2.2 to 2.6 above may not be suspended pending any appeal that may be instituted in this matter but shall become effective immediately on the publication of this report.

4. In the event that any appeal is lodged [is] then interest on the compensation to be paid to the consumer in terms of paragraph 1.3 and 2.1 shall not be interrupted pending such appeal but shall continue to run.

5. In the event that any appeal is substantially successful, then any fine paid by the Member in terms of paragraph 1.2 or by the SP in terms of paragraph 2.6 shall be refunded to the relevant party concerned subject to any remaining sanctions or revised fine that the Appeals Panel may determine appropriate.”

4 GROUNDS OF APPEAL - IP

4.1 The IP’s attorneys raised a large number of submissions in the appeal notice.

4.2 The IP noted that the decision of the adjudicator in complaint 6671 was substantially similar to that delivered in respect of adjudications 6303, 6678, 6759, 6928 and 7081.

4.3 An independent transaction:

4.3.1 The IP asserted that its subscription service was indeed compliant with section 11.1.2, arguing that:

4.3.1.1 All required terms and conditions for subscription services are provided to the consumer prior to subscription taking place;

4.3.1.2 The IP had inadvertently failed to provide the adjudicator with an additional confirmation page which was placed between the confirmation page and the WAP site and which was active at the time at which the complainant was subscribed to the subscription service. The IP indicated that this was due to the actions of its Marketing Director at the time and that they had taken steps to address this. The failure was therefore “beyond [the IP’s] control” and, it is argued, it is “now incumbent of [sic] WASPA to take the correct information, which has now been submitted and which materially changes the basis on which the Adjudicator reached his initial decision”.

4.3.1.3 As a result there was a specific confirmation request which “is not bundled with any other request (such as the purchasing of content) and constitutes a separate and distinct transaction.

4.3.1.4 Further, the finding by the adjudicator that the “subscription transaction mechanism is activated by clicking on a button that appears to be a navigation button rather than a transaction

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button” is “unfounded”. This is because a consumer would thereafter be forwarded to the additional confirmation page “which would have made it absolutely clear and explicit that a transaction for a subscription service was being undertaken”.

4.3.2 The IP also noted that the landing page (Annexure A) provided as part of the appeal notice was different from that originally provided to the adjudicator by the IP only insofar as a different graphic had been used. Although it does not appear that anything material turns on this, the Panel notes that the advert supplied in the appeal notice appears to be for a different service and that the subscription pricing is different.

4.3.3 The IP then provided its subscription activation process and concluded that “the subscription activation process in respect of the [subscription service] conforms, and has conformed at all relevant times”, with the provisions of the Code. The subscription activation process ensures that the customer is aware that the [subscription service] is a subscription service and that the customer concludes a clearly independent transaction when joining the [subscription service]. As such, it is submitted that the Adjudicator erred in finding that the provisions of the Code had been breached and the decision should be reversed”.

4.4 The Panel cannot agree.

4.5 The Panel does not believe that it is correct to state that the adjudicator erred in making a finding based on the material placed before him or her on the basis that there is certain material which the IP failed to submit and the contentions by the IP in this regard are risible.

4.6 The Panel cannot automatically entertain the introduction of new material at the appeals stage. In this regard we refer to the Appeal in respect of complaint 350 at paragraph 5.6.1 ff:

“5.6.1 The SP failed to respond adequately to the complaint at the relevant time which was the time which is most important from the point of view of putting all relevant facts before the Board, ensuring the adjudicator has all the right information, and arguing for the least (if any) sanction in the result. The failure of the SP to take adequate action at the appropriate time leaves WASPA in the position where it must make the best of the information to hand, and must make a finding accordingly.

The SP fails to take account of the key issues arising as a result of the complaint. In the panel’s view, these are:

- The fact that the Code applies to all WASPS with the blessing of the mobile networks, and WASPs are obliged, in turn to ensure that their

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IPs are familiar with and compliant with the Code (we have quoted the relevant sections of the Code in full above)

- Complainants, whoever they might be, are fully entitled to put the facts as they see them before WASPA and to request an investigation – that is the purpose of forwarding the complaint to an SP and/or IP as was the case here. At that point the SP and/or IP is offered the opportunity to respond in full. The entire matter is then passed to an adjudicator for a finding. There is no onus on a complainant (many of whom are members of the public and quite uninformed about legal matters or the working of technology) to substantiate or prove anything other than receipt of an offending message

- An appeal is not a forum to air grievances with the world at large – it is a formal opportunity to list in detail, what it is about the adjudication that is not appropriate or that is incorrect. It is not an opportunity to set the record straight when this could and should have been done at the complaint stage. It is also not an opportunity to raise new facts.”

(our emphasis)

4.7 Nevertheless the Panel is also mindful of the adjudication in Appeal 610 where, at paragraph 1.2, the Panel indicated that it has a discretion based on equity with regard to the admission of new material at the appeal stage:

“For the sake of the participants in this matter and readers in general, we record that the WASPA complaints procedure is a combination of review and appeal procedures. While it is not the role of the appeals panel to start the enquiry anew, but rather to review the facts which are brought before it by the WASPA Secretariat, the panel may request ancillary information to support substantive issues and / or look wider than the original adjudication in the interests of equity.”

4.8 Furthermore, section 13.6.5 of the Code enjoins an appeals panel to “consider the evidence provided to the adjudicator, the adjudicator’s decision and any additional information provided by the service provider”.

4.9 In exercising this discretion the Panel should be aware of the fact that no further right of review or appeal lies against its decision.

4.10 Thus stated the exercise of this discretion will generally, but not always, favour the inclusion of the new material presented.

4.11 The Panel also believes that it should consider whether allowing the introduction of the new material would prejudice any other party. In this matter and given the findings made below, this does not appear to be the case.

4.12 The Panel has therefore considered the additional material presented in the form of the additional confirmation page and makes the following findings:

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- 4.12.1 It is accepted that the insertion of the additional confirmation page into the subscription activation process should make it clearer to consumers that by clicking on the confirm button they will be subscribing to a service.
- 4.12.2 As set out in paragraph 5.2 of the appeal notice it appears that the real intention behind the additional confirmation page was to ensure compliance with section 6.2.12 of the Code which requires that transactions billed at R10 or more must include specific confirmation from the customer and keep a record of such confirmation. It is therefore not correct to position the page as being a subscription confirmation page and it appears more to be a consequence of compliance with section 6.2.12 than a conscious effort to comply with section 11.1.2.
- 4.13 The Panel is of the view that it would be appropriate to review the subscription activation process and subscription services generally as against the requirements of the Code in its entirety. This is a factual enquiry undertaken by the Panel on the basis of the material supplied by the IP on appeal as enjoined by section 13.6.5 of the Code. The Panel is aware that ideally the matter should be referred back to the adjudicator for reconsideration but there is no allowance for such a process in the Code and the Panel, by accepting the new material which the IP has submitted, is perforce required to act in this regard as a body of first instance.
- 4.13.1 Section 11.1 of the Code requires that promotional material for subscription services must “prominently and explicitly identify” the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material”.
- 4.13.2 The Panel is of the view that Annexure B as provided in the appeal notice is promotional material within the meaning of section 11.1.1 and that it does not prominently and explicitly identify the services offered as subscription services.
- 4.13.2.1 The advertisement would be viewed on a mobile phone. The first thing a viewer would see would be the word “Welcome” under which is a graphic intimation of the content on offer and the name of the service. Immediately under this appears “SA MUSIC”.
- 4.13.2.2 Immediately thereunder is the “Enter here” button.
- 4.13.2.3 Thereafter there is an amount of white space under which appear the terms and conditions. The term “Subscription services” is a part of these on the second line down. Depending on the handset on which the advertisement is

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being viewed a user is likely to have to scroll down to view this.

- 4.13.2.4 The Panel is satisfied that the identification of the service as being of a subscription nature is neither prominent nor explicit. The IP's contention that the service is "clearly" identified as a subscription service is rejected.
- 4.13.3 Notwithstanding the fact that it has not been touched upon by the adjudicator in the adjudication under appeal, the Panel believes that the crux of this matter relates to the pricing information available on the landing page and additional confirmation page (and repeated in the detailed terms and conditions page).
- 4.13.4 Bearing in mind the finding made above that the subscription nature of the service is neither prominent or explicit the Panel is of the view that a reasonable user would not, on the basis of the landing page, be clear as to whether they were purchasing individual content items or entering into a subscription service. Why are individual content item prices listed if these are not available? Surely it cannot be intended that these per item prices would be in addition to the subscription charge?
- 4.13.5 This confusion is compounded by the additional confirmation page which, while stating that the service is a subscription service, nevertheless is, by the IP's own admission, intended to be a page indicating confirmation in respect of a specific transaction.
- 4.13.6 One particular observation reinforces the Panel's view that the heart of the problem with the IP's service lay with the combination of two different models – subscription and pay-per-view – both available through the same landing page:
- 4.13.6.1 It is evident from the logs provided that the user in this matter only viewed or downloaded content on 14 March 2009, the date on which the subscription was affected. This is entirely consistent with a user who believes he or she is transacting on a per item basis and not on a subscription basis.
- 4.13.7 The Panel is accordingly of the view that the pricing for the service is misleading and that this in conjunction with the breach of section 11.1.1 noted above will prejudice consumers and lead to confusion and complaints to WASPA.
- 4.13.8 The Panel therefore finds that the service provided by the IP is in breach of sections 4.1.1 and 6.2.4 of the Code.
- 4.13.9 It is implicit in the findings made immediately above that consumers accessing the services provided by the IP did not necessarily enter the SA Music Portal with the intention of subscribing to a service.

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This is notwithstanding the additional confirmation page upon which the IP has placed so much reliance in this appeal.

- 4.13.9.1 While the Panel accepts, as noted above, that the wording of the additional confirmation page indicates that the service is a subscription service, the Panel takes the view that this of itself is not sufficient to counter the confusion engendered by the breaches of section 4.1.1, 6.2.4 and 11.1.1.
- 4.13.9.2 The IP in its appeal has at all times positioned the service as a subscription service only, but this simply does not reflect the reality that both a subscription and a pay-per-view model were being employed and the IP has singularly failed to deal with this aspect in its appeal.
- 4.13.9.3 In paragraph 5.8 of the appeal notice the IP states, with regard to the additional confirmation page, that “[T]he specific confirmation request (Annexure B) is not bundled with any other request (such as the purchasing of other content) and constitutes a separate and distinct independent transaction”. This is manifestly not true and seems to indicate that the IP’s attorneys have not been fully briefed.
- 4.14 On its own version the IP acknowledges that a consumer could be entering the portal so as either download or view certain items or to subscribe to a service. Nevertheless it appears that the practise of the IP was to treat all users who entered the portal as having subscribed to the service.
- 4.15 It is the view of the Panel that such conduct falls below the standards set out in section 3.1.1 and 4.1.2 of the Code and the adjudicator’s findings that the IP had breached these sections is accordingly confirmed.
- 4.16 Given the finding made above with regard to the breaches of the Code it is the intention of the Panel to substitute in its entirety the decision and sanction imposed by the Adjudicator. It is accordingly not necessary to consider the arguments raised by the IP relating to the legitimacy of the sanction (those relating to mitigation will be separately considered below).
- 4.17 The Panel nevertheless wishes to confirm that
- 4.17.1 The imposition by the adjudicator of substantially the same sanctions in respect of a number of complaints involving the IP is not correct.
- 4.17.2 The adjudicator’s use of other complaints which had not been finalised at the time that complaint 6671 was lodged in aggravation of sanction is not correct.
- The Panel is accordingly in substantial agreement with the submissions raised in sections 6 and 9 of the appeal notice.

5 GROUND OF APPEAL - SP

5.1 The SP in this matter has submitted a comprehensive document setting out its own grounds of appeal in respect of this complaint and complaint 6759. Other than in respect of the multiplicity of sanctions imposed these grounds are distinct from those raised by the IP in that they do not relate to the underlying subscription service but rather to the nature of the involvement of the SP as a supplier of services to the IP and the extent of its responsibilities vis-à-vis the IP under section 3.9.1 of the Code.

5.2 Section 3.9. of the relevant version Code reads as follows:

“3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

3.9.3. The member must act in accordance with the WASPA complaints and appeal process and if appropriate, suspend or terminate the services of any information provider.”

5.3 The Adjudicator in the original complaint, after finding that the IP had breached the Code, argued as follows with regard to the responsibility of the SP:

“The SP, being a member itself, is also obliged in terms of section 3.9.1 to bind information providers with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct. In terms of section 2.13 an *“information provider”* is *“any person on whose behalf a wireless application service provider may provide a service, and includes message originators.”*

I have had regard for the findings of the Appeals Panel in complaint 411 in which the Panel found (in paragraphs 24 and 25 of its decision) that an SP was responsible for an IP’s adherence to the Code of Conduct. I have also had regard for the finding of the adjudicator in complaint 5981 that this should remain the case even where the information provider in question is also a member of WASPA.

As the service in question has been shown to have been operated in breach of the Code, the SP should also not be in a position to benefit commercially from the service. Benefitting as the SP has in this matter from a service provided in breach of the Code amounts to a breach of sections 3.1.1 (referenced above) and, in the circumstances of this matter - where no binding contract appears to have been concluded

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between the complainant and the Member - section 3.1.2 of the Code which requires members to be committed to lawful conduct at all times.

I have accordingly imposed sanctions against both the Member and the SP as set forth below.”

- 5.4 The Panel makes the following observations with regard to this argument:
 - 5.4.1 The Panel agrees that the clear meaning of section 3.9.1 is that members of WASPA are required to take steps to ensure that information providers that they deal with observe the requirements of the Code.
 - 5.4.2 WASPA initially began as an association of service providers and the practise of service providers requiring the information providers utilising their services to join WASPA has grown over the past three years. It appears, to the Panel, that the act of requiring an information provider to itself join WASPA and thereby contractually bind itself to observance of the Code is regarded and should be regarded as the taking of a step to ensure that such information providers are bound to observe the requirements of the Code.
 - 5.4.3 The Panel had regard to the decision of the Appeals Panel in complaint 411 which was heard when the practice of IPs being required to join WASPA was not prevalent and, as has been noted by the Adjudicator, this matter is distinguishable from the instant one in that the IP was not a member of WASPA. Much of the relevant determination of the Appeals Panel in this matter involves a specific examination of the liability of members for the infringements of non-members.
 - 5.4.4 The Panel has also had regard to the decision of the Adjudicator in complaint 5981, cited by the Adjudicator in complaint 6671 as being authority for the extension of the ruling of the Appeals Panel in complaint 411. This complaint involves the same SP and IP as the instant matter and which also relates to an improper subscription activation process employed by the IP.
 - 5.4.4.1 The Adjudicator in this matter referred to complaint 213, 326, 330 and 4781 as well as the above cited 411 as authority for the potential liability of WASPA members in respect of the transgressions of non-members.
 - 5.4.4.2 The Adjudicator then opines that these principles can be “easily and logically expounded to include IP’s who are WASPA members” and cites the following underlying reasons for this position:

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- 5.4.4.2.1 The SP derives a not inconsiderable revenue share from the services of IP to which it provides aggregation services.
- 5.4.4.2.2 The SP functions as “gatekeeper” without which the IP would not be able to offer its services to consumers.
- 5.4.4.2.3 The SP “is required to contractually bind the IP to abide by the WASPA Code of Conduct in terms of clause 3.9.1 of the WASPA Code of Conduct Version 7.4. This requirement has been retained through the various versions of the WASPA Code of Conduct”.
- 5.4.4.2.4 Should the IP cease business or be declared insolvent it would unjust for an aggrieved consumer to have no recourse against any person or body for money lost “due to the illegal practises (both in terms of the WASPA Code of Conduct and South African Criminal Law) by the IP. Indeed the failure to allow for the liability of the SP for the IP’s conduct (whether or not the IP is a member of WASPA) has the result of allowing South Africa to become known as a jurisdiction where a foreign IP could enter the market, become a WASPA member, pillage the market by using unsavoury practices and then leave with the revenue it collected with no or little recourse available to the consumer involved. Rather it should be the SP involved who would pursue the IP in this example as the SP is a natural consolidator of all of the breaches of the WASPA Code of Conduct, and in addition, has a formal contractual relationship with the IP which is typically drafted by attorneys, rather than the often scanty and often one-sided contract between the consumer and the IP”.
- 5.4.4.3 The Adjudicator argues further that this reasoning is supported by the provisions of the Consumer Protection Act 68 of 2008 (“the CPA”) “which takes pains to hold all the parties responsible for the damage suffered by the consumer. See for example section 29 of the CPA which names the “producer, importer, distributor, retailer or service provider” to be responsible for any marketing which is deceptive or fraudulent (see clause 4.12 of the WASPA Code of Conduct). While the CPA is not in force in South Africa and is only likely to be implemented in full in October 2010, the symbiotic relationship between the IP and the SP within the space of mobile telecommunications makes it clear that it is appropriate that while the SP should be “assessed separately” as pointed out above, I believe it would not be inappropriate for the SP to be

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liable for any sanctions directed at the IP, in the event that the IP fails to comply with the sanctions imposed by an adjudicator”.

5.4.4.4 Finally the Adjudicator considers the liability of the SP in the light of the provisions of Chapter XI of the Electronic Communications and Transactions Act 25 of 2002 (“the ECT Act”). The Adjudicator finds, in essence, that such provisions are irrelevant given that WASPA is not a recognised Industry Representative Body (“IRB”) as contemplated in that Chapter.

5.4.5 The Adjudicator accordingly found that the SP “is liable for the actions of an IP who is a member of WASPA in the event that the IP does not honour its obligations in terms of the WASPA Code of Conduct”.

5.5 The Panel cannot agree.

5.5.1 The Panel does not believe that section 3.9.1 should be interpreted as providing a form of strict liability on SP’s but that fault in the form of intention or negligence is required before this section can be invoked.

5.5.2 In this regard section 18.2 of the WASPA Constitution is also relevant:

“18.2. No member of WASPA shall be answerable or deemed to be in any way responsible for any act or default of any other member or for any deficiency or insufficiency of any title or security whatsoever taken by WASPA, save to the extent that such member acted negligently or fraudulently.”

(our emphasis)

5.5.3 Where there is a question as to whether an SP has been at fault in the non-compliance of another WASPA member it would, the Panel believes, be incumbent upon WASPA to make such SP a direct party to the proceedings so that it can be properly heard in this regard.

5.6 There is no evidence before the Panel that the SP was negligent in respect of or contributed to the breach on the part of IP. On the contrary the SP appears to have acted reasonably to prevent its role in any continuing harm being occasioned by terminating its service provision to the IP. This was entirely of its own volition. The SP also provided information and co-operated with the WASPA process.

5.7 The SP was not afforded the opportunity to make representations in this regard. In effect the adjudicator has found the SP to have breached sections 3.1.1 and 3.1.2 of the Code through the operation of section 3.9.1 without the SP being aware that it was charged with such breaches.

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- 5.8 The Panel accordingly overturns the decision of the adjudicator in this matter as also the decision of the adjudicator in complaint 5981 to the extent that the decision stood as authority for the view that a WASPA member can be held liable for the breaches of another member on a no-fault basis.
- 5.9 It should be noted that the question under consideration has since been rendered moot due to the insertions of sections 14.4.5 and 14.4.6 into Code version 9.0 – the current version. These clauses make the correct position explicit:
- "14.4.5. Where a service is provided by one WASPA member using the facilities of another member, if the member providing these facilities has taken reasonable steps in response to any alleged breach of the Code by the member providing the service, this must be considered as a significant mitigating factor when considering any sanctions against the member providing the facilities.
- 14.4.6. For the avoidance of doubt, no sanction may be applied to a member who has not been given an opportunity to respond to a complaint."
- 5.10 In addition a new section 3.9.3 has also been inserted:
- "3.9.3. A WASPA member shall, by obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider."
- 5.11 The position going forward accordingly appears to be clear.

6 FINDINGS OF APPEALS PANEL

- 6.1 The Panel has noted that the adjudicator elected to decide the matter according to version 7.0 of the Code based, apparently, on the fact that it was this version of the Code which was in force at the time that the initial unsubscribe request and complaint were received by WASPA. The Panel, however, is of the view that the applicable version of the Code should be based on the date on which the conduct underlying the complaint took place. In this matter this was 14 March 2009 – the date on which the alleged subscription took place. The version of the Code in force at that time was version 6.2. The Panel has compared the relevant clauses of the two versions as set out in section 2 of this Appeal document and notes that the clauses are identical other than where an additional sentence has been added to clause 11.1.1 and that this additional sentence is not relevant to the appeal. The Panel accordingly

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does not find that either the IP or the SP has been prejudiced by the application of version 7.0 as opposed to version 6.2 of the Code. The same result would have been achieved through the application of either version.

- 6.2 The Panel has decided to exercise its discretion to consider new material introduced at the appeals stage in favour of the IP and has accordingly considered the impact of the additional confirmation page on the extent to which the IP's subscription activation process complies with the Code.
- 6.3 The Panel has considered this material in its entirety and holds that:
 - 6.3.1 There is no basis for contending that the adjudicator erred in certain respects where the IP failed (and the fault is entirely its own) to provide sufficient or accurate material to WASPA in respect of the complaint.
 - 6.3.2 At the heart of the series of complaints lodged against the IP is the confusion created by its combination of a subscription model and a pay-per-view model in contravention of section 4.1.1 and 6.2.4 of the Code.
 - 6.3.3 The promotional material for the subscription service provided by the IP is not compliant with section 11.1.1 in that it does not prominently and explicitly identify the service as having a subscription character.
 - 6.3.4 The cumulative effect of the above is that a consumer accessing the site would not necessarily have the requisite intention to subscribe. Given the dual service offering there is no room for any other finding. The contention by the IP that its "subscription service model has been set up to ensure that consumers enter into an independent transaction with the specific intention of subscribing to a service" is not borne out by the facts and is rejected.
 - 6.3.5 The conduct of the IP in offering the service does not comply with the requirements of sections 3.1.1 and 4.1.2.
- 6.4 The Panel is aware that the IP has not made any specific representations in respect of its compliance with sections 6.2.4 and 11.1.1 but is of the view that:
 - 6.4.1.1 The IP has made representations regarding its entire subscription process which has included representations that clearly lay out its position as regards sections 6.2.4 and 11.1.1.
 - 6.4.1.2 The IP has explicitly averred that its subscription process is compliant with the Code.
 - 6.4.1.3 The breaches are clearly evident from the material supplied by the IP both in response to the original complaint and the notice of appeal.

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- 6.4.1.4 The Panel is unable to envisage any argument which the IP could bring to bear which would alter the evidence reflected in the material it has provided.
- 6.4.1.5 The Panel is not empowered by the Code to seek further information or representations from the Appellant, notwithstanding this Panel's finding that it is obliged to accept new material submitted as part of an appeal. The Panel is rather enjoined by the Code to decide whether, on the basis of the evidence presented, there has, in fact, been a breach of the Code.
- 6.5 As regards the sanction imposed by the adjudicator the Panel has already noted its agreement with the submissions made by the IP in this regard. It appears therefore that the Panel should vary the decision and the sanction imposed by the adjudicator to reflect its findings above.
- 6.6 In considering a more appropriate sanction to impose, the Panel had regard to:
- 6.6.1 The lengthy period of suspension endured by the IP and the financial consequences thereof;
- 6.6.2 The errors committed by the adjudicator in having regard to complaints not yet finalised in aggravation of sentence;
- 6.6.3 The errors committed by the adjudicator in not consolidating substantially similar complaints relating to substantially similar services and breaches;
- 6.6.4 The prior record of the IP;
- 6.6.5 The undoubted seriousness of the offence and the apparent disingenuousness of the IP in positioning the service solely as a subscription service in its dealings with WASPA; and
- 6.6.6 The steps taken by the IP to remedy deficiencies in its compliance and in its internal processes and the lengths which it has gone to to engage with WASPA.
- 6.7 The decision of the Adjudicator is substituted with the following:
- 6.7.1 The IP is found to have breached sections 3.1.1, 4.1.1, 4.1.2, 6.2.4 and 11.1.1 of the Code. The following sanctions are imposed:
- 6.7.1.1 The IP is required to compensate the complainant in full in respect of all charges arriving from the interaction of the complainant with the IP.
- 6.7.1.2 Payment of a fine of R30 000 in respect of the breaches of section 4.1.1, 6.2.4 and 11.1.1. This sanction is consolidated with the sanction imposed for the same breaches in respect of complaints 5696, 6303, 6678, 6719, 6759, 6928 and 7081.

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- 6.8 The Adjudicator had ordered the immediate suspension of all subscription services offered by the IP in South Africa, thereby confirming the suspension which had been put in place on 3 December 2009 by a WASPA Emergency Panel. For the avoidance of doubt the Panel wishes to clarify that this suspension is now lifted.
- 6.9 The IP has asserted that the appeal fee paid by it should be returned due to the “strong merits” of the appeal. The failure of the IP to present all relevant material during the adjudication process is its own, as are its internal difficulties with its staff. Further the Panel has noted above the incorrect positioning of the service by the IP as being exclusively a subscription service.
- 6.10 On this basis the Panel holds that the appeal fee of the IP is not refundable.
- 6.11 The SP’s appeal is allowed and the Panel holds that the sanction imposed on the SP and the finding that it had breached the Code should be regarded as *pro non scripto* (never written).
- 6.12 The appeal fee of the SP is refundable.

Annexure A

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