

REPORT OF THE APPEALS PANEL

**Date:** 01 May 2010  
**Appellants:**  
**Information Provider (IP)** Sam Media, “Mozzi” Brand  
**Service Provider (SP)** Integrat (Pty) Ltd  
**Complaint Number:** 6802 and 6918  
**Applicable versions:** Code V7.0 and 7.4

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**1 BACKGROUND TO THE APPEAL**

- 1.1 This appeal concerns two complaints lodged by the WASPA Media Monitor against Integrat (Pty) Ltd., the Service Provider (SP) and Sam Media, the Information Provider (IP).
- 1.2 The SP is a South African company and full member of WASPA. The IP is an international organisation which operates out of Malaysia, the Netherlands, Indonesia and Vietnam. The IP became an Affiliate Member of WASPA on 01 July 2009, roughly 2 weeks after the first complaint.
- 1.3 Both complaints relate to subscription services offered by the IP, under its “Mozzi” Brand, through the services of the SP.
- 1.4 The services offered, the complaints, the findings of the Adjudicator and the Adjudicator’s sanctions are similar in all material facts relating to both complaints, all of which have been exhaustively recorded in the case files provided to this appeals panel. As such, these will not be repeated in full in this appeal report.
- 1.5 The approach taken by the appeal panel below is as follows:
- 1.5.1 Firstly, to summarise and analyse the two complaints in a consolidated format for ease of reference, being:
- 1.5.1.1 Complaint 6802: *X-Ray Scanner*, and;
- 1.5.1.2 Complaint 6918: *Radar for your cellphone*.
- 1.5.2 Secondly, to focus on the new information provided by the SP and the IP, both of whom are appealing, almost solely<sup>1</sup>, against the magnitude of the financial sanction imposed by the Adjudicator, and, to thoroughly review all the material provided in support of the appeal by the SP and the IP.

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<sup>1</sup> The IP’s appeal mentions that it finds it “hard to believe that anyone would expect a real xray or radar on their cell phone”, but proceeds that it “wanted to fully cooperate and thus changed the ads to explain they were not real”, thereby removing contention in relation to breach of sections 4.1.1 and 4.1.2 of the Code.

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- 1.5.3            The clauses of the WASPA Code of Conduct (Code), the finding and the sanctions imposed by the Adjudicator have been included in the summary.
- 1.5.4            The Adjudicator's Reports for both complaints are dated 10 July 2009<sup>2</sup>.
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**2        NOTES TO THE SUMMARY OF COMPLAINTS, NUMBER 6802 AND 6918**

- 2.1            While version 7.0 and 7.4<sup>3</sup> of the Code are applicable to complaint 6802, every clause cited is identical in both versions of the Code, except in one respect, and the difference here, which relates to competitions and quizzes, is of no relevance to the facts of complaint 6802. Only version 7.4 applies to complaint number 6918.
- 2.2            The service continued from sometime in April 2009<sup>4</sup> up until 13 July 2009, when both services were suspended by the emergency panel. The first complaint was lodged on 12 June 2009 and the second, on 29 June 2009<sup>5</sup>, the two, running almost parallel.
- 2.3            The facts relating to complaint 6802 are recorded in blue and those relating to 6918 are recorded in red in the table below. In all instances the clauses breached in both complaints have been listed next to each other so as to highlight the similarities.
- 2.4            The full quantum of the financial sanction imposed by the Adjudicator was R305 000.

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<sup>2</sup> The fact that both complaints are dated 10 July 2009 convinces the panel that there is no repeat offence. The 2 complaints run parallel in almost all aspects and will be treated by the panel, simultaneously.

<sup>3</sup> Versions 7.1, 7.2 and 7.3 of the WASPA Code of Conduct are not available on that Code archive at <http://www.waspa.org.za> . In his "Decision" for complaint number 6802, on page 8 of his Report, the Adjudicator mentions versions 7.0 and 7.1 of the Code. Under the heading "Bundling of Content...", on the same page, he quotes sections 11.1.2 of version 7.0 and another, unspecified version of the Code. The panel has identified the latter quote as being from version 7.4. As such, the panel has worked only with versions 7.0 and 7.4 of the WASPA Code of Conduct.

<sup>4</sup> This is evident from the SP's appeal document recording the service revenue.

<sup>5</sup> It will be seen from the SP's response that the SP and the IP were attempting to resolve the breaches at this time.

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| <b>Complaint Number</b>          | <b>Date of Complaint</b>                                                   | <b>Applicable Version of Code</b>                                               | <b>Section of Code Cited Breached by the Monitor<sup>6</sup></b> | <b>Provision</b>                                                                                                                                                                                      | <b>Finding</b> | <b>Sanction Imposed<sup>7</sup></b>                   |
|----------------------------------|----------------------------------------------------------------------------|---------------------------------------------------------------------------------|------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|-------------------------------------------------------|
| 6802<br>X-Ray Scanner            | 12.06.2009<br><br>No complaint by Monitor<br><br>Adjudicator finds breach  | V 7.0<br><br>25.03.2009 to 17.06.2009 and V 7.4<br><br>17.06.2009 to 13.10 2009 | 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. | Breached       | R50 000                                               |
| 6918<br>Radar for your Cellphone | 29.06.2009<br><br>No complaint by Monitor.<br><br>Adjudicator finds breach | V 7.4<br><br>17.06.2009 to 13.10 2009                                           | 4.1.1                                                            | Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.        | Breached       | R50 000                                               |
| 6802<br>X-Ray Scanner            | 12.06.2009                                                                 | V 7.0 - V 7.4                                                                   | 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.                                       | Breached       | (R50 000 above includes sanction for breach of 4.1.2) |
| 6918<br>Radar for your Cellphone | 29.06.2009 (Monitor)                                                       | V 7.4<br>17.06.2009 to 13.10 2009                                               | 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                                                 | Breached       | (R50 000 above includes sanction for breach of        |

<sup>6</sup> The Adjudicator did not consider and / or sanction the SP or the IP on the other clauses cited by the WASPA Monitor, which are included here for the sake of completeness.

<sup>7</sup> Except for clause 4 under the heading "Sanction", on page 10 of complaint 6802 and page 6 of complaint 6918, which mentions "...any other person..", the Adjudicator's sanctions are directed at the SP.

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| <b>Complaint Number</b> | <b>Date of Complaint</b> | <b>Applicable Version of Code</b> | <b>Section of Code Cited Breached by the Monitor<sup>6</sup></b> | <b>Provision</b>                                                                                                                                                                                                                                                                                                                                         | <b>Finding</b> | <b>Sanction Imposed<sup>7</sup></b> |
|-------------------------|--------------------------|-----------------------------------|------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|-------------------------------------|
|                         |                          |                                   |                                                                  | omission.                                                                                                                                                                                                                                                                                                                                                |                | 4.1.2)                              |
| 6802<br>X-Ray Scanner   | 12.06.2009               | V 7.0 - V 7.4                     | 6.1.1                                                            | In addition to the provisions listed below all members are bound by the WASPA Advertising Rules, published as a separate document.                                                                                                                                                                                                                       |                |                                     |
| 6802<br>X-Ray Scanner   | 12.06.2009               | V 7.0 - V 7.4                     | 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.                                          |                |                                     |
| 6802<br>X-Ray Scanner   | 12.06.2009               | V 7.0 - V 7.4                     | 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.                                                     |                |                                     |
| 6802<br>X-Ray Scanner   | 12.06.2009               | V 7.0 - V 7.4                     | 11.1.2                                                           | <b>V7:</b><br>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.<br><b>V7.4:</b><br>Any request from a customer to join a subscription | Breached       | R125 000                            |

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| <b>Complaint Number</b>          | <b>Date of Complaint</b> | <b>Applicable Version of Code</b>    | <b>Section of Code Cited Breached by the Monitor<sup>6</sup></b> | <b>Provision</b>                                                                                                                                                                                                                                                                                                                                                                                                                                             | <b>Finding</b> | <b>Sanction Imposed<sup>7</sup></b> |
|----------------------------------|--------------------------|--------------------------------------|------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|-------------------------------------|
|                                  |                          |                                      |                                                                  | 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 <b>and may not be an entry into a competition or quiz.</b>                                                                                                                                                                                  |                |                                     |
| 6918<br>Radar for your Cellphone | 29.06.2009<br>(Monitor)  | V 7.4<br>17.06.2009 to<br>13.10 2009 | 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 and may not be an entry into a competition or quiz.                                                                                                                                      |                | R80 000                             |
| 6802<br>X-Ray Scanner            | 12.06.2009               | V 7.0 - V 7.4                        | 11.1.5                                                           | Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.                                                                                                                                                                                                                                                                                                                |                |                                     |
| 6802<br>X-Ray Scanner            | 12.06.2009               | V 7.0 - V 7.4                        | 11.1.8                                                           | Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:<br>(a) The name of the subscription service;<br>(b) The cost of the subscription service and the frequency of the charges;<br>(c) Clear and concise instructions for unsubscribing |                |                                     |

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|-------------------------|--------------------------|-----------------------------------------------------|------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|---------------------------------------------------------------------------------|
|                         |                          |                                                     |                                                                  | from the service;<br>(d) The service provider's telephone number.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                |                                                                                 |
| 6802<br>X-Ray Scanner   | 12.06.2009               | V 7.0 - V 7.4                                       | 11.1.10                                                          | Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:<br><br>[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing]. Help? Call [call centre number + "(VAS)" if applicable]. To unsubscribe, [unsubscribe instructions]. |                |                                                                                 |
| <b>Complaint Number</b> | <b>Date of Complaint</b> | <b>Applicable Version of Advertising Guidelines</b> | <b>Section of Advertising Guidelines Cited</b>                   | <b>Provision</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <b>Finding</b> | <b>Sanction</b>                                                                 |
| 6802<br>X-Ray Scanner   | 12.06.2009               | V2.3<br><br>Chapter 9,<br>Internet<br>Websites      | 9.2.1.1                                                          | Formatting of Access Cost Text <ul style="list-style-type: none"> <li>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.</li> <li>The pricing text must be clearly shown being</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                        | Breached       | (R125 000 fine above includes sanction for breach of 9.2.1.1 of the Advertising |

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| <b>Complaint Number</b> | <b>Date of Complaint</b> | <b>Applicable Version of Code</b>              | <b>Section of Code Cited Breached by the Monitor<sup>6</sup></b> | <b>Provision</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <b>Finding</b> | <b>Sanction Imposed<sup>7</sup></b>                                                         |
|-------------------------|--------------------------|------------------------------------------------|------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|---------------------------------------------------------------------------------------------|
|                         |                          |                                                |                                                                  | <p>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.</p> <ul style="list-style-type: none"> <li>• 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.</li> <li>• All access cost information must be placed horizontally.</li> </ul> |                | Guidelines)                                                                                 |
| 6802<br>X-Ray Scanner   | 12.06.2009               | V2.3<br><br>Chapter 9,<br>Internet<br>Websites | 9.2.2.1                                                          | <p>T&amp;C Display Rules, Formatting &amp; Font Criteria for T&amp;C Text</p> <ul style="list-style-type: none"> <li>• The T&amp;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&amp;C must be in a non-serif font.</li> <li>• All T&amp;C information must be placed horizontally.</li> </ul>                                                                                            | Breached       | (R125 000 fine above includes sanction for breach of 9.2.2.1 of the Advertising Guidelines) |
| 6802<br>X-Ray Scanner   | 12.06.2009               | V2.3<br><br>Chapter 9,<br>Internet<br>Websites | 9.3.1                                                            | <p>Abbreviations</p> <p>Correct display for cost of subscription service, e.g. R7.50/week<br/>SMS or SMSs to be capitalised</p>                                                                                                                                                                                                                                                                                                                                    | Breached       | (R125 000 fine above includes sanction for breach of 9.3.1 of the Advertising Guidelines)   |

### **3 BACKGROUND TO THE SP'S APPEAL**

#### **3.1 Background to the SP's Appeal**

3.1.1 Following receipt of the Adjudicator's Reports for both complaints, the SP addressed an email dated 13 August 2009 to the WASPA Secretariat, requesting clarification regarding the date of effect of the sanctions imposed by the Adjudicator.

3.1.2 The appeals panel notes only that the Adjudicator's sanctions were unusually complex to the extent that even the Adjudicator, in hindsight, thought better of them. The panel will not dwell on this issue. Our view is merely to accept that both the SP and the IP have lodged appeals, despite delays. No negative inferences will be drawn in relation to delays or time extensions granted.

3.1.3 Furthermore, given that the services were available for a relatively short period, and given the appeals panel's own delay in reviewing the appeal, most of the sanctions' complex and vexing provisions are now irrelevant. The panel's position is that as no sanctions came into force while subject to appeal and that only the financial quantum is being appealed against, are the relevant factors at this time.

#### **3.2 The SP's Appeal**

3.2.1 The SP's appeal documentation comprises (i) an appeal document and (ii) Annexures "A" through to "L" in support of the grounds for appeal. Both are summarised hereunder.

3.2.1.1 The appeal document (the SP's numbering is retained)

*This appeal is directed specifically against penalties levied against the SP directly and does not constitute an appeal against the finding/merits or penalties levied against the IP.*

*The IP has noted its intention to also lodge an appeal relative to only the sanctions levied in a separate document.*

*1. The Adjudicator found that sections AD PAR 4.1.1; 4.1.2 and 11.2 of the Code and sections 9.2.1.1 and 9.3.1 of the Advertising Rules had been breached.*

*2. Penalties to the amounts of respectively R125 000 and R80 000 has been levied against the IP, and*

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*R50 000 plus an additional R50 000 has been against the SP directly.*

**3. Particulars of Appeal against penalties:**

**3.1** *It is submitted that the penalties levied directly against the SP are severe and excessive and should not be levied at the SP directly;*

**3.2** *It is stressed that the SP's intention has at no stage been to respond in a defensive and/or non-productive manner herein but that it has been relaying the response of the client. Clearer distinction should be made between the SP and its client's responses and the SP will note this in future responses where the IP is not an affiliate member;*

**3.3** *It is submitted that revenue generated from the services complained of was fairly limited and the impact on the market not extensive as is illustrated in the attached documents for Xray and Radar services. Please note that the IP had initially signed up with the SP as MobileFun<sup>8</sup> and subsequently was renamed to SAM Media. (See Annexure K) The IP's technical account however is still stated as MobileFun. The revenue statistics from May 2009 until current date 19-08-09 follows:*

|       |                       |
|-------|-----------------------|
| 3.2.2 | April 2009 - R4987.37 |
| 3.2.3 | May 2009 - R10263.52  |
| 3.2.4 | June 2009 - R20964.77 |
| 3.2.5 | July 2009 - R21738.41 |

**3.4** *It is submitted that the WASPA Code of Conduct does not envisage or have at its intention the levying of penalties directly against the SP in accordance with the role of aggregator of the SP in circumstances where the SP, in as far it had been possible without being in contractual breach with the IP, guided and cautioned the IP to the best of its abilities and binds the IP contractually relative to compliance. (see Annexure K);*

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<sup>8</sup> The relevance of this is not understood in light of the fact that Annexure "L" of the SP's support documentation refers to the name change from "Corelli". The panel does not consider this material to its finding.

*3.5 The aforementioned relationship between the SP and the IP further entails that the SP undertakes certain legal duties and responsibilities towards the IP and results therein that the SP is contractually bound to afford to the IP all avenues available by way of rectification and /or correction of services as well as the prescribed response procedure by way of appeal, at the IP's discretion. It is further noted that the SP has advised its clients thoroughly and distances itself from any appeal/response its client might decide upon in this matter; (Please note that any appeals/responses will however be channeled through the SP to WASPA due to the IP not being a member at the time of the complaint).*

*3.6 It is to be noted that whilst the SP is not the provider of the services and acts as a transactional gateway for the messages and content delivery of services, it does not take its duty of good faith to the Mobile Industry lightly, or try to hide behind the IP. The CEO of the SP is a proud member of the WASPA ManCom and the SP has contributed significantly towards the cleaning up of rouge clients and services in the mobile industry and appropriates considerable recourses towards the reviewing of the advising of clients. Monitoring of more than 5000 different services of various customers is not practical. The SP however is not able to nor can it be the intention that the SP take over the role of WASPA as the "watch dog" of the mobile industry;*

*3.7 The SP strives for service excellence by requiring that all services offered by its clients, adhere to all relevant law and statutory provisions especially the WASPA Code of Conduct. IP's are of late obligated to become WASPA affiliate members (enforced by SP) in order to enhance monitoring and control. Requirements in regard to compliance are further incorporated in the service agreement between the SP and its clients; (See Annexure K)*

*3.8 Concerning the complaints under reply the client became a WASPA affiliate member on the 1st of July 2009 and the steps taken in the process of*

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*attempting to guide and caution clients and conduct regarding existing regulations and legislation are illustrated by the attached documents consisting of communication between the SP and the IP relative to this matter; This process was initiated by the SP towards all its subscription service clients prior to the complaints being lodged, indicating the SP's intent of good faith (See Annexure A and J);*

*3.9 Clause 3.1.2 of the WASPA Code of Conduct commits a member of WASPA, such as the SP, to lawful conduct which envisages that the SP, specifically as this said infraction unfortunately incurred right before the IP formally became a WASPA member, contributes a positive effort in this regard. It is submitted that the SP indeed in a positive manner, as far as it has been possible, attempted to avoid non-compliance in this matter;*

*3.10 It is submitted that in the light of the aforementioned the SP had conducted due diligence regarding its responsibilities in this matter. (Refer to Annexure B, C, D, E, F, G, H, I);*

*3.11 The content hereof should not be construed in any way to be an admission of liability regarding the services or any part thereof complained of on the part of the SP;*

*3.12 It is requested that in the light of the above the adjudicator reconsiders his finding in regard to:*

*3.12.1 the levying of the penalties directly against the SP due to the diligent conduct of the SP;*

*Alternatively*

*3.12.2 the reducing of the amounts levied in penalties against the SP.*

*We have specifically attempted to expedite this appeal and suggest that it might be prudent for the emergency panel procedure to be instituted again, if possible, as we are anxious to have the matter finalised.*

*We trust that the appeal of the SP shall be considered favourably and await your reply in due course.*

**3.2.1.2 The SP's Support Annexures (Summary)**

**A: Email dated 01 July 2009, from WASPA**

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Secretariat confirms Sam Media's Affiliate Membership status.

- B: Email dated 27 May 2009, from SP to IP, alerting them of the complaint and providing details to which the IP responded.
- C: Email dated 17 June 2009, from SP to IP, advising the IP to change the T&Cs, font size and abbreviations used, following the complaint.
- D: Email dated 22 June 2009, from the SP to the IP, seeking confirmation that the changes (in C above had been made).
- E: Email dated 23 June 2009, from the SP to the IP, advising the IP that the font size had not changed
- F: Email dated 23 June 2009, from the SP to the IP, advising the IP how the breaches of the Advertising Rules should be rectified.
- G: Email dated 25 June 2009, from the SP to the IP, requesting confirmation that the website was compliant with the Code.
- H: Email dated 06 July 2009, from the SP to the IP, advising the IP how to comply with the Code and the Advertising Rules.
- I: Email dated 06 July 2009, from the SP to the IP, advising the IP that the website was not compliant with the Code, stating why and requesting changes.
- J: Email dated 25 June 2009, from the SP to the IP (and other clients) reminding them of the requirement to become an affiliate WASPA member.
- K: An example of the T&Cs of the SP's Service agreement, including a disclaimer iro actions by WASPA and an indemnification by the client (IP) in favour of the SP.
- L: Email dated 04 July 2009, from the IP to the SP confirming name change from "Corelli" to "Sam Media".

**4 THE IP'S APPEAL**

4.1 The IP's appeal is in the form of a letter from the Marketing Manager of Sam Media, dated 20 August 2009. It reads as follows:

4.1.1 *We fully admit the mistakes we made in our online ads regarding the font sizes that were too small, the failure to also show a second content a subscriber would receive, as well as the text used for welcome message.*

*Upon being notified, we immediately made all the required changes and have shown full cooperation with WASPA ever since.*

*We do however find it hard to believe that anyone would expect a real xray or radar on their cell phone. These type of wallpapers are being sold very well all over the world by many parties and explaining that they are not real is never deemed necessary by any of them in any country, hence we did not set out to do so in South Africa either. In any case, upon learning that WASPA objected, rather than explain our point of view, we wanted to fully cooperate and thus changed the ads to explain they were not real.*

*We are a new entrant to the market – with the exception of some small scale advertising on TV in the past. We do not mean to say that we should therefore be held to a different standard than other parties, but it may help explain some of the beginners' mistakes we admit we did make.*

*The sales of the 2 products under investigation have brought in a total of around R42,000 of revenues<sup>9</sup> since launching our services in South Africa in early May, representing 68% of our total revenues in those same months. Very few complaints received have come in, in both absolute and relative terms, suggesting most users were happy with the services.*

*In light of all of the above the height of the fines seems unreasonably high to us in relation to any harm, if at all, done to users.*

*We understand there is a history of unfair practices by companies similar to ours in South Africa. We would however like to state that we have never taken part of any of those practices in South Africa as can be testified by our business partner Integrat, and as WASPA, better than any other party, would also know, we are not a repeat offender in any way. In this respect, we would like to reiterate our commitment to developing a sustainable and long term business in South Africa as we do in several other countries of the world.*

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<sup>9</sup> The SP's revenue figures are in the order of R58 000.

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*To show our good will, we would be more than willing to fully refund any XRAY and RADAR subscribers that have complained and have stated to feel misled.*

*As for the fines, we would sincerely like to ask of you for them to be more in line with the gravity of our mistakes, with our revenues from these services as well as our total services, and with total harm done to users. We suggest fines as a percentage of, or even the full revenues for those services.*

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**5 FINDINGS OF APPEALS PANEL**

**5.1 Findings with regard to the SP's Appeal**

- 5.1.1 The SP contends that the Adjudicator's sanction is split, "R50 000 plus an additional R50 000" (the first fine (s)) levied against the SP for breaches of sections 4.1.1 and 4.1.2 of the Code, and "R125 000 and R80 000" (the second fines) levied against the IP, for breaches of 11.1.2 of the Code and 9.2.1.1, 9.2.2.1 and 9.3.1 of the Advertising Rules. While the panel agrees that the first fines are clearly directed against the SP alone, it does not agree with the SP's interpretation that the second fines are directed solely against the IP. The panel is of the view that all the fines levied, are levied in the first instant against the SP. Clause 3 of the Adjudicator's sanction states:

*In respect of the breaches of section 11.1.2 of the Code and sections 9.2.1.1; 9.2.2.1 and 9.3.1 of the Advertising Rules, the SP is directed to pay over to WASPA an amount of R125 000 ("the 2nd Fine") drawn from all revenue received by the SP from the date of delivery of this report from all cellular network operators (including both the SP and IP shares thereof or their respective commissions therein) in respect of any of the IP's subscription services irrespective of the date on which such services were actually rendered or the date on which the right to payment of such revenue actually accrued.*

Clause 4 states:

*The SP or any other person may also settle the 2nd Fine or any portion thereof in cash by such others means as they deem fit.*

- 5.1.2 However, rather than basing the finding of this appeal on a difference of interpretation as a result of a poorly worded sanction provision, the panel will apply its mind to an equitable solution.
- 5.1.3 The panel does not agree that no sanction should be directed towards the SP merely on the grounds that it acts as a gateway or

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aggregator. The panels' view on the relationship between SPs and IPs is well-documented, and we commonly hold SP aggregators accountable. We agree that penalties should not be directed at any party without purpose or fault. We accept and agree that the SP has provided well documented support in mitigation of fault demonstrating that it went out of its way to support and to nurture a newcomer to the South African Mobile Market. Be this, the result of contractual obligations, in compliance with the Code or, as a responsible corporate citizen, the panel commends the SP for its due diligence and its duty of care. The panel sees this relationship between the SP and the IP as the distinguishing difference between this appeal and appeal 6034. See comments below.

5.1.4 The SP's comment that it cannot take over the role of WASPA as the "watch dog" of the mobile industry, is correct. It is not expected. However, WASPA does expect every member to play a role in sustaining the industry and in raising the bar of excellence. Additionally, section 3.9.1 of the Code 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 the Code of Conduct".

5.1.5 The panel has taken into account the following:

5.1.5.1 The SP's role in relaying responses to the IP prior to it becoming an affiliate member and has easily distinguished between the SP and the IP responses and responsibilities.

5.1.5.2 The fact that revenue generated was fairly limited and the impact on the market not extensive.

5.1.5.3 The SP's effort, evidenced in the appeal documentation, to strive for service excellence by requiring that all services offered by its clients, adhere to statutory provisions and the Code.

5.1.6 The panel agrees that in the circumstances, the fines imposed are severe and excessive and will reduce and direct them accordingly.

5.2 Findings with regard to the IP's Appeal

5.2.1 The IP is a newcomer to the South African Mobile Market. In its appeal, the IP admits breaching the Advertising Guidelines cited relating to font size and abbreviations in the welcome message and also, section 11.1.2 of the Code, relating to bundling. It does not agree to breaching sections 4.1.1 and 4.1.2 of the Code in relation to misleading advertising.

5.2.2 In mitigation, the IP claims it made "beginner's" mistakes, rectified the errors and confirmed a willingness to cooperate with WASPA. Furthermore it expressed a wish to develop "sustainable and long

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term business” in South Africa as it does in several other countries. The panel accepts the IP’s reasons for its appeal and its good natured attempt to learn and to continue business in South Africa.

- 5.2.3 The panel is taking a soft approach to the breaches cited given the IP’s appeal and in the hope that its good attitude, with the on-going support of the SP might result in a better understanding of the South African market, compliance with the Code and benefit for South African consumers. The IP is cautioned to learn from this initial “wrap over the knuckles” and to respond expeditiously in future.
- 5.2.4 The panel agrees that the fines imposed are unreasonably high, in relation to revenue, lack of harm and the lack of public complaint.
- 5.2.5 The panel does not consider the IP a repeat offender. The two complaints run parallel and are a first breach for the IP.
- 5.2.6 As a reason for not admitting to the breach of sections 4.1.1 and 4.1.2 of the Code, the panel notes the IP’s contention that consumers would not expect a “real xray or radar on their cell phone”. The panel notes also that the IP did not labour the point, but rectified the confusing wording in the advertisement. In this regard, we would caution the IP against making assumptions in regard to the South African market and point it to the appeal panel’s finding in appeal number 6034<sup>10</sup>.
- 5.2.7 In summary, we wish to record that given the SP’s adherence to the Code (section 3.9.1 in particular), the unique and supportive nature of the relationship between the SP and the IP and the IP’s attitude, the panel has decided to reduce the fines substantially.
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## **6 DECISIONS AND SANCTIONS OF APPEALS PANEL**

- 6.1 Decisions and sanctions with regard to the SP
- 6.1.1 The appeal is upheld. The sanctions imposed on the SP are withdrawn.
- 6.1.2 The appeal fee is not refundable. The SP is directed to pay the R10 000 appeal fee to WASPA within 5 days of receipt of this report.
- 6.2 Decisions and sanctions with regard to the IP
- 6.2.1 The IP is ordered to pay a total fine of R30 000 for the breaches of clauses 4.1.1, 4.1.2 and 11.1.2 of the Code and clauses 9.2.1.1, 9.2.2.1 and 9.3.1 of

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<sup>10</sup> At clause 5.11 of the Report, “South Africa is a unique environment with its own culture and its own laws, many of which seek to protect previously disadvantaged peoples. Disadvantaged, often through lack of formal education, literacy and exposure to global issues”.

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the Advertising Guidelines. This must be paid to WASPA within 5 days of receipt of this finding.