

WASPA appeals panel  
Complaint 7037

REPORT OF THE APPEALS PANEL

<b>Date</b>	23 October 2010
<b>Information Providers (IPs)</b>	Celldorado
<b>Service provider (SP)</b>	Blinck Mobile
<b>Complaint Number</b>	7037
<b>Code Version</b>	7.4

1 **INTRODUCTION TO THIS APPEAL**

- 1.1 This appeal concerns the adjudication of a complaint made by the WASPA Media Monitor (Monitor) against a subscription service of the Service Provider, Blinck Mobile (SP), the appellant.
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2 **BACKGROUND TO THIS APPEAL**

- 2.1 The complaint relates to an email sent by the SP to a customer database. The following screenshots illustrate the campaign.
- 2.1.1 Screenshot of the email sent to the SP's database.



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2.1.2

Screenshot of the first page directed to after clicking on the link in the email above. Note the SP's use of the word "offers" (noun).



Michael Jackson Tribute

[Click here and get your Michael Jackson songs](#)

If you don't want to receive these offers, [click here](#)

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- 2.1.3 Screenshot of the second page directed to after clicking on the link on the page above. This page includes the requirements of sections 6.2.2 and 11.1.1, for the first time.



- 2.1.4 According to the Monitor, the 'advertisement' in the email does not contain any pricing, nor does it mention subscription services as required by section is 6.2.2 and 11.1.1 of the Code.
- 2.1.5 According to the SP, the email in question is a 'newsletter' sent to its customer base and is not 'promotional' material in its own right. The SP alleges that the link provided in the email directs customers to the actual promotional material for the content referred to.
- 2.1.6 The question that arises is whether or not the section 6.2.2 and 11.1.1 provisions were to be complied with in the first instance, i.e in the email itself or whether these provisions have been complied with by including them on the landing page showing in clause 2.1.3 above? (third screenshot). The answer will determine whether or not the SP was in breach of the Code.

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**3 THE CODE**

**3.1 Sections of the Code Considered**

- 3.1.1 Relevant sections of the Code considered by the adjudicator and this panel are sections 4.1 (provision of information to customers), 6.2 (pricing of services), 11.1 (subscription services) and the relevant sections of the Advertising Guidelines, considered to be binding rules.

## **4 DECISIONS OF THE ADJUDICATOR**

### *4.1 Findings of the Adjudicator*

4.1.1 The adjudicator finds as follows (this is the adjudicator's wording):

4.1.1.1 The 'crucial issue' is whether the email sent by the SP is to be regarded as an 'advertisement' or 'promotional material' which must be compliant with the Code and Advertising Rules.

4.1.1.2 The terms, 'advertisement' and 'promotional material', are not defined in the Code or the Advertising Rules.

4.1.1.3 Section 10 of the Advertising Rules refers to 'email offers', but the scope of these rules is limited to emails where 'access channels' are displayed, which is not relevant to the email in this case.

4.1.1.4 An advert or promotion does not always constitute an offer, and section 10 does not provide a comprehensive answer to this question.

4.1.1.5 Guidance may be taken from the definition of 'commercial message' (in the Code) which includes "*any message which is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient*"

4.1.1.6 The email "*clearly includes a call to action which is designed to promote the sale of the Michael Jackson songs on offer from the SP.*"

4.1.1.7 I "*fail to see why it would be a problem for the SP to have included the required pricing and other information in this email when they allege that they have done so in a separate promotion*".

4.1.1.8 The SP has contravened section 6.2.2 and 11.1.1 of the Code.

### *4.2 Sanctions Imposed*

4.2.1 Considering the contraventions serious, the adjudicator imposed the following sanctions:

4.2.1.1 The SP must cease any further transmission of this email campaign until such time as it is compliant with the Code and Advertising Rules.

4.2.1.2 The SP must refund all subscribers in full.

4.2.1.3 The SP must notify all subscribers that they are entitled to a full refund.

4.2.1.4 The SP is fined R120 000.00.

4.2.1.5 These sanctions may not be suspended pending any appeal.

**5 GROUNDS OF APPEAL**

- 5.1 The SP's Legal Department provided grounds for appeal based on the 'disproportionate' sanctions and contends that not to suspend the sanctions pending appeal is 'unjust and contrary to fair proceedings'.
- 5.2 The SP points out that the adjudicator found a breach of sections 6.2.2 and 11.1.1 of the Code, despite not having had access to the email, including links to the related pages of the campaign, because the service had been "taken offline" in accordance with company policy that "*commercial material no longer actively used in our marketing will be taken offline*". The reason for this as given by the SP in its appeal is "*that we want to secure compliance, even though the regulatory framework in South Africa is changing rapidly*".
- 5.3 The SP contends further that:
- 5.3.1 Notification to all subscribers that they are entitled to a full refund, a full refund to all subscribers and a fine of R120,000.00 (sanctions under 2, 3 and 4 of the adjudicator's report) are disproportionate "*considering the fact that after clicking on the link in the email, he or she is directed to the landing page of the service, on which the pricing is clearly mentioned together with the fact that the service is a subscription service*";
- 5.3.2 The landing page was fully compliant with the Code and the Advertising Rules;
- 5.3.3 Given that "*promotional actions by Blinck for this campaign*" had ceased and were not accessible to the adjudicator (or this panel), the SP included a screenshot of the landing page of this campaign (third screenshot in clause 2.1.3 of this report above);
- 5.3.4 Accordingly, sanctions under 2, 3 and 4 of the adjudicator's report, are disproportionate as they do not take into account that subscribers to the service were made aware of pricing and subscription service, as required by the Code, and should be set aside and/or the fine reduced;
- 5.3.5 Finally, the SP confirms its ongoing commitment to WASPA and contends that non-suspension of sanctions pending appeal is unjust and contrary to fair proceedings as the impact cannot be reversed in the event of a successful appeal.
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**6 FINDINGS AND SANCTIONS OF APPEALS PANEL**

- 6.1 *Findings of the appeal panel*

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- 6.1.1 There is no argument in the view of the panel that compliance with the provisions of sections 6.2.2 and 11.1.1 was required in this case. We accept that “*advertising*”, “*marketing*”, “*commercial message*” and “*promotional campaign*” are all relevant and amount to the same thing in effect.
- 6.1.2 The Monitor’s complaint hinges on the failure of the SP to comply with these provisions in the email itself.
- 6.1.3 The SP’s appeal hinges on the fact that it complied with these provisions on the ‘landing page’ i.e at the time a consumer could choose to subscribe or, not to subscribe.
- 6.1.4 The adjudicator had access only to the email itself and the first linked page (second screenshot at clause 2.1.2 above), and was not therefore in a position to review the complaint by including an assessment of the information provided by the SP as part of the appeal, i.e. the landing page that includes compliance with sections to 6.2.2 and 11.1.1 of the Code (third screenshot at 2.1.3).
- 6.1.5 Given that the panel now has evidence that the SP complied with sections 6.2.2 and 11.1.1 of the Code, the focus of the appeal shifts to the question: At what point in an ‘*advertising*’, ‘*marketing*’, ‘*commercial message*’ or ‘*promotional campaign*’ does the need arise to comply with these provisions of the Code?
- 6.1.6 The panel agrees with the adjudicator that the terminology “call to action” in section 10 of the Advertising Rules, is useful. However, while the adjudicator argues that it refers to ‘email offers’, “*limited to emails where ‘access channels’ are displayed, which is not relevant to the email in this case*”, the panel is of the view that this statement is key to finding an equitable solution to the appeal, because, it makes the connection between ‘offers’, ‘access channels’ and a ‘call to action’. Logically, the result is that prior to entering a contract, the terms must be known and agreed to. In other words, ‘call to action’, while not defined, is not limited to doing something, but rather to doing something that will have the effect of committing one to enter into an agreement.
- 6.1.7 It is notable that no access channel appears on the landing page – there is no opportunity to do more at this point than ‘window shop’. When a consumer actually elects to “play” (by clicking through on the third screenshot at 2.1.3), he or she must be assumed to do so, having agreed to the terms and conditions (on the basis of section 6.2.2) agreeing to subscribe to the service and being fully aware of his or her resulting obligations.
- 6.1.8 This is an important case that will affect the mobile industry in South Africa, as it will impact on the flexibility of marketing campaigns, and as such, the panel will pay careful attention to the issue of

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interpretation and in so doing, be directed by the purpose (objective) of the Code's provision.

- 6.1.8.1 The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services.
- 6.1.8.2 Section 4.1.1 requires that 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”*.
- 6.1.8.3 Section 4.1.2 requires that members *“must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission”*.
- 6.1.8.4 Section 6.2, (pricing of services) and section 11.1.1 (subscription services) add detail as to how to achieve the above objectives of the Code.
- 6.1.8.5 The purpose of these sections of the Code should not be confused with or considered equal to a strict literal interpretation of the letter of the Code based on semantics.
- 6.1.8.6 What the Code, and these provisions in particular, seek to achieve is to ensure that consumers enter subscription agreements with full knowledge of and consensus to the terms of the agreement.
- 6.1.9 While it is not this panel's function to review appeals based on law, it would be neglectful not to be guided by the South African Electronic Communications and Transactions Act, 25 of 2002 (Act), which defines 'data messages' to include email and websites (landing pages), and which seeks to promote legal certainty and confidence in respect of electronic communications and transactions. In so doing, the Act caters for the formation and validity of agreements, providing, *inter alia*, in section 22 (2) that:
- “An agreement concluded between parties by means of data messages (email and websites) is concluded at the time when and place where the acceptance of the offer was received by the offeror”*.
- 6.1.10 The impact of this provision on the appeal, is that it could not have been possible under the Act for a consumer to enter into an agreement (to subscribe), prior to entering his details, and these in turn being received by the SP.

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- 6.1.11 In the view of the panel, this means that the so-called call to action and the point at which the section 6.2.2 and 11.1.1 requirements were met was the point at which a subscriber could actually (physically) subscribe by clicking through to “get it”<sup>1</sup>.
- 6.1.12 Regarding the suspension of sanctions, this panel is on record (see, *inter alia*, appeal 6219, 6839 and 7070) as interpreting section 13.4.2 (a) and (b) of the Code to exclude from suspension those sanctions requiring a member to amend, suspend, or terminate a service being offered in breach of the Code, and the failure of a member to comply with previous sanctions, pending appeal. As such, the panel finds that no action was required of the SP and no negative inference is drawn with regard to the non-payment of the fines or other orders of the adjudicator in this regard.
- 6.2 *Sanctions of the appeal panel*
- 6.2.1 The appeal is upheld and the sanctions imposed by the adjudicator are overturned.
- 6.2.2 The appeal fee is not to be refunded, despite the successful appeal, because of the costs involved by WASPA and appointing this panel.

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<sup>1</sup> This panel made a similar finding in appeals on 6839 and 7070.