



## REPORT OF THE ADJUDICATOR

**WASPA Member (SP):** Mira Networks

**Information Provider**

**(IP):** 2waytraffic.com  
(if applicable)

**Service Type:** Subscription service

**Complainant:** eXactmobile (Pty) Ltd

**Complaint Number:** 0591

**Adjudicator:** Kerron Edmunson

**Code version:** 4.6  
**Ad Rules:** 1.6

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### Complaint

The complaint was submitted to WASPA by email on 16 October 2006, in relation to a TV advert flighted on the weekend of 13/14 October 2006. The complaint concerned the audio part of the advert which did not, according to the complainant, adequately inform the viewer that they would be subscribed to a service if they sent a text to the number advertised, and in consequence, the viewer might respond without realising they would receive and be charged for a joke a day.

Specifically, the complainant stated “the ad states SMS Joke 3 to 31303. The only place in the audio where you are told that you will get something each day is when they say: Surprise yourself with an hilarious joke each day. As there is talking for 30 sec of the ad, this is easily not picked up by the user. When the user sends an SMS with the word Joke 3 to get a joke, the user is subscribed to the service to receive a joke every day.”

The complainant cites section 11.1.2 of the Code.

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### SP Response

A response was received from each of the SP and IP.

#### SP response

1. The SP gives a fairly detailed background of the company and its operations in 20 countries, stating that it has been in operation in South Africa since September 2006, and referring WASPA to its website, [www.2waytraffic.com](http://www.2waytraffic.com).
2. They then respond specifically to the complaint, saying “we think this complaint is ridiculous. In ALL our communications (website, welcome messages, legal statement in the commercial and voiceover of the

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commercial) we mention that people will receive jokes daily on their cell phones. As you can see above: a joke each day! Since we want to be active in South Africa for a long period of time, we do not want to jeopardize our business in any way. We are doing everything according to all the rules and regulations and everything we do is in a clear and honest way... I hope you agree that mobile companies should not try to attack each other with irrelevant complaints. This is not in the interest of all companies active in the mobile industry in South Africa (incl. Exact Mobile)."

3. The SP includes a copy of the screenshot of the advertisement which indicates in the top left hand corner in a square "R7.5/daily Subscription". Underneath these words is a picture and the words "JOKE 1 to 31303" and underneath that the wording of the advert states "Subscription service. Jokes R7,5/daily message (incl.vat). Other charges may apply, charged to your bill. Children below 18 years please seek permission from the legal owner and bill payer and/or parental approval. More info: [www.mobilefun4you.com/Helpline0800-980431](http://www.mobilefun4you.com/Helpline0800-980431). VAS Rates. Free Minutes Do Not Apply. Unsub:stop joke. This service is powered by Emexus."

4. I have looked at both the 2waytraffic and the mobilefun4you sites. I was not able to find terms and conditions on the first site but on the second (which is the one referred to in the advert complained of) the site says:

*RECURRING*

When you subscribe to the joke service, you will be subscribed to a SUBSCRIPTION SERVICE. This means that you will receive a joke daily, until you unsubscribe yourself. The service is applicable for all ages. You must be the legal owner and bill payer of the mobile phone to subscribe to the above service. If you are not, you must ask the legal owner and bill payer of the phone to subscribe. Children below 18 years must seek parental approval before subscribing to the above service.

*COST*

7,5 rand per received message + standard messaging fees.

**IP response:**

1. Mira has also replied, as it puts it "from a Mira perspective", by saying "this advert clearly states that the service is a subscription service and that this is also stated in the terms and conditions. The welcome message states the following: "welcome to our joke service! A new hilarious joke each day 7.5 R/sms. The latest hits? Reply RING. Horoscopes? Reply ASTRO. Info: 0800-980431. Unsub.stop joke."
2. The IP gives 2 examples of what it interprets to be subscription services and bundling, which I think are useful:
 

"a request from a subscriber to join a subscription service may not be bundled with a request for specific content. It must be an independent transaction. For example, "this picture is an example funny picture. To subscribe to the daily funny picture, SMS FUNPICS to 12345," does not bundle any particular content with a subscription service. However, "to get this picture, SMS FUNPICS to 12345. You will also be subscribed to the daily funny picture," is an offer bundling a subscription service with a specific item of content (the picture in the advert) and is thus not allowed."
3. The IP continues to say that "the advert does not depict any specific content other than saying get a joke on a daily basis? I don't see how this can be classified as bundling?"

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**Consideration of the WASPA Code**

The complainant refers specifically to section 11.1.2:

**Section 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 bundled with a request for a specific content item.

On its ordinary interpretation, an offer to a customer to sign up for a subscription service should not mislead that customer so that they believe they are subscribing to anything other than a subscription service. In this case, subscription entitles the user to a daily joke, but presumably even if no SMS is sent then after the very first one, the R7,50 is deducted from the subscriber regardless.

In the circumstances, it is also relevant to consider section 11.1.4:

**11.1.4:** customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

The complainant does not refer to the Ad Rules but I have also looked at section 1.4 of the Ad Rules in relation to mandatory information for disclosure on television advertisements, and point 3 provides as follows:

“indicate if subscription service and nature thereof including price and (minimum) frequency e.g. “this is a subscription service. You will be automatically charged R—every week until you unsubscribe.”

Section 2.2.1 deals with display rules for cost and t&c information and in relation to subscription services provides as follows:

“any advertisement for a subscription service component must include:

- (a) the periodic subscription charge; AND
- (b) the charging frequency; AND
- (c) any additional premium-rated charges that might be applicable to access particular content”.

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**Decision**

I assume that although the complaint requires “JOKE 3” the fact that the picture included says “JOKE 1” is not material.

For the following reasons, I do not uphold the complaint:

1. The advertisement states in the top right-hand corner of the screen that the service is a subscription service;
2. The advertisement states in the text below the picture that the service is a subscription service;
3. The terms and conditions of the service state that the service is a subscription service;
4. The SP’s website states that the service is a subscription service;
5. I cannot see what other sort of service a subscriber might mistakenly subscribe to, or request a download of, other than the service described as “subscription”;
6. The SP has, in my view, complied with the letter of the Code and the Ad Rules.

Having said this, and I do appreciate that since 2waytraffic is a Netherlands-based company so understand that there may be some translation difficulties, I do think it is

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important to get the precise wording of the advertisement correct. In all cases other than the website terms and conditions, the SP refers to R7.5/SMS. This implies that the subscriber will be charged per sent SMS. Only the website clarifies that it is per received SMS – which is more typical of a subscription service. This should be changed.

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### **Sanction**

The complaint is not upheld. The SP is, however, directed to amend all terms and conditions and all advertisements to clarify the issue set out above.