



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP)</b>	MiraNetworks
<b>Information Provider (IP)</b> (if any)	SamClick
<b>Service Type</b>	Content Booklet
<b>Source of Complaints</b>	Competitor
<b>Complaint Number</b>	1269
<b>Date received</b>	10 April 2007
<b>Code of Conduct version</b>	4.92

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### Complaint

The Complaint concerns a content booklet distributed by the SP through cellular stores and contains a series of allegations regarding non-compliance with the WASPA Code of Conduct and Advertising Rules.

The history of the matter is that the Complainant initially lodged an informal complaint with WASPA on 28 March 2007 in response to which the IP advised by e-mail that the printing and distribution of the content booklet "has been placed on hold until we can rectify or qualify the nature of the errors". The IP further stated that it would be addressing the Complaint "with immediate effect to come to some resolution".

Notwithstanding this e-mail the Complainant alleges that it thereafter came to his attention that the IP was continuing to distribute the content booklet as at 5 April 2007.

At the request of the Complainant, this Complaint was initially dealt with under the WASPA emergency panel procedure, which found that "no immediate remedy was required for this matter, but that the complaint should instead be referred to an adjudicator for expedited review".

**SP Response**

A comprehensive Response, canvassing each allegation, was received. Responses to the detailed complaints have been set out in a consolidated fashion in the next section of this Report.

In a general introductory section the IP emphasised its excellent record as regards complaints being made against under the Code of Conduct and/or Advertising Rules.

The IP continues:

“There is a general negative perception in the market that International providers are here to rape and pillage the market and then move on to new markets. I must categorically state that our intent is to build a long lasting successful local business in South Africa. It is noted that our offering is there to benefit the clients and I think it is of the utmost importance that the adjudicator reviews our content offering in light of this complaint. I would strongly recommend that the booklet is used as it explains our product offering in detail.

We offer 2 different opportunities for our customers’, namely single downloads or an unlimited subscription services. In the subscription service offerings the enduser is entitled to additional content than the offering for the single content. A consumer can join any one of our subscription services, download all of the content and leave the same day if they want. Instead of giving one content item for a fixed price, we give the customer the freedom to download hundreds of content items for the same price without any extra cost except network costs.

We would also like to state that we have consulted with WASPA regarding our booklet when it was first launched; all though it was not review in great detail we were told that the booklet looked ok. We have also consulted with WASPA on making sure all our print media meets and exceeded the requirements set by the code of conduct.”

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**Consolidated Complaint, Response & Decision**

There are nine separate heads of alleged non-compliance raised in the Complaint. Each has been dealt with separately in the Response.

For ease of reading the components of the Complaint and the detailed responses to such components, as well as the applicable provision of the Code of Conduct and/or Advertising Rules, are set out together below. The Adjudicator's decision in respect of each alleged breach is also set out together with the details of such alleged breach.

A summation of findings and sanctions is contained in a separate section concluding this Report.

**Pricing of a premium-rated service***Detailed complaint*

On page 3, the short code 31240 is used numerous times as a call to action. No pricing is mentioned near the short code. On page 13, the short code 39306 is used with no pricing.

*Section of the Code raised:*

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display.

*Response:*

Looking at page three you can clearly see that we are not offering any services here instead we are advising the consumer on how to join a service, our terms and conditions, short codes and pricing for Cell C customers.

Page 13, Gavin is 100% that we did not indicate the pricing when the shortcode 39306 was mentioned and we will make sure that this is corrected before we print any more booklets, as mentioned previously we do give the pricing on page 3 for the shortcode 39306 charges R15 but this was not mentioned on page 13 at all and we will make sure that this does not happen again as we know that each mention of a shortcode should also call the pricing.

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*Decision*

Section 6.2.5 of the Code is explicit in its requirement that the price must appear with all instances of the premium number display but the Adjudicator considers it implicit in the section that the premium number display must constitute a call to action.

The Complainant characterises the displays on page 3 as calls to action but the Adjudicator cannot agree. The page is clearly marked "How to download" and the word "example" features prominently.

This aspect of the Complaint is not upheld.

The balance of the Complaint regarding page 13 is upheld and it is accordingly found that there has been a breach of section 6.2.5, as recognised by the IP.

Display of words "subscription service"*Detailed complaint*

On page 3 instructions are given to SMS package name for example UPIC to 31240. There is no mention that this is a subscription service.

*Section of the Advertising Rules raised:*

## 6.3.13 (i) Must Use The Words "Subscription Service"

If the Content provider is providing a continuous, subscription-like or subscription-based service, then the words "Subscription Service" must be prominently displayed at the top section of the advertisement as well as at each Content or service section in the advertisement where various subscription types are displayed.

No acronym, letter (eg "S"), number, abbreviation (eg "Subs"), icon, or any other mark may be used as an alternative to the words "Subscription Service" anywhere in the advertisement when that Content is only available at all and/or at a particular cost as part of a subscription service.

*Response:*

Firstly I would like to state the obvious and that is if a consumer asks to join one of our subscription services we immediately send them back a welcome note and in addition when the consumer connects to the WAP site to receive their content we reiterate the fact that the client has joined our subscription services and the process for cancellation.

Secondly this was an example of how a consumer would join a service that is all; the example does not explain what the offer entails it's purely used to explain the process of registration.

On the front cover of the booklet it says "SUBSCRIPTION SERVICE" quiet clear. If we where trying to hide the fact that these are subscription services, we would not state this very clear on the front page as well.

#### *Decision*

The Complainant was clearly not able to find any other instances where the required words were not present. The premium number display on page 3 does not constitute a call to action and page 3 itself does not advertise any content or service as required by section 6.3.13 (i).

This component of the Complaint is not upheld.

#### Cost of access display rules

##### *Detailed complaint*

On pages 4, 5, 10, 11, 12, 16, 18, 19 and 20 the size of the text is approx 5 point font.

##### *Section of the Advertising Rules raised:*

###### 6.2.2.1 Formatting of Access Cost Text:

The size of the text showing the cost of access must be in 11 point font size

This is 11 point Arial Font

The access cost text must be in a non-serif font, preferably 'Arial' font.

##### *Response:*

I have attached a copy of our booklet to this response and I would also like to give the adjudicator a copy of our booklet since seeing the booklet on email and seeing the actual booklet are two very different things.

As this was our first attempt at booklets in the country we thought we had covered all the points as stated in the WASPA advertising guidelines and if we have breached any guidelines we will admit to this and make sure it does not occur again.

On page 4 under the single download section we agree that the font size for the pricing may be too small, but it is very clear and should not be misleading from our point of view. We have however taken notice of this and will off course make the adjustments on this in the next issue of our booklet.

#### *Decision*

The admission by the IP in respect of page 4 is noted.

The access cost text must be at least 11 point font size. The Adjudicator measured the text of the access cost text using an A5 folded print-out and assuming 1 point = 0.357 mm. The text complained about measures approximately 3.5 mm implying the font size is between 9 & 10 point.

The Adjudicator has been requested to hear this matter, originally submitted as an emergency matter, on an "expedited basis", implying that it takes precedence over others. The Adjudicator, mindful of the above and the relatively narrow margin of approximated non-compliance, does not feel it necessary to delay the matter by requesting a copy of the printed booklet.

The single admitted breach is upheld. No finding is made in respect of the other elements raised.

#### Honest dealings / Pricing information

##### *Detailed complaint:*

The pricing is specifically printed in a small font as the pricing for services is high in comparison to similar services in the market. There is therefore an intention to mislead the consumer not to see the real pricing.

##### *Section of the Code of Conduct raised:*

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.

*Response:*

As mentioned previously we have no intention to rip people off and Gavin is correct in saying that we are not priced like the rest of the industry, we are better priced, we offer a buffet while other providers like exact offer a crunchy. We on the other hand offer a full course meal that will more than satisfy any user. Our packages range from R3 to R 30 and entitles the user on the subscription packages up to 400 downloads per 5 days at no additional cost besides WAP charges from their service provider.

Thus we are not misleading any consumers, it's to our benefit that they see our pricing and our offer since it benefits their own pocket. We are not charging a person a fee to get a discount on future content purchase like exact mobile; we offer the consumer a weekly package that the consumer does not need to pay additional fees to receive the content for that 5 day period.

*Decision*

The Complainant's assertion that the SP set out to intentionally mislead cannot be sustained on an examination of the booklet.

This aspect of the Complaint is not upheld.

Adult services – indication that an adult service:*Detailed complaint:*

On page 23, adult services are advertised. Especially SEX Tips. No indication is made that this service is for adults only.

*Section of the Code of Conduct raised:*

8.1.1. Any adult service must be clearly indicated as such in any promotional material and advertisements.

*Response:*

On the second page of our booklet we clearly state in the terms and conditions that users must be over 18 or get permission from the bill payer before they utilize and services in the book. This is also stated on the bottom of the 2 last pages of the booklet relating to the service 18+ only.

*Decision*

Although not specifically raised in the Complaint, the provisions of section 6.3.1 of the WASPA Advertising Rules assist in properly assessing compliance required by section 8.1.1 of the Code with regard to content booklets. This section reads, in part:

“Any advertisement that has reference to Content or services that are legally restricted to use only by Adults must indicate that it is for Adults only and/or that verification of the user’s age may be required.

This indication must be placed both in the T&C and in the body of advertisement where the service or Content is advertised.”

The SP has placed “18+” with other terms and conditions at the foot of the page, but section 6.3.2 of the Advertising Rules states, with regard to age-restricted services:

“No abbreviations to indicate the Age Restriction are allowed (eg ‘18’ or ‘18+’ only may not be used).

Rather, text indicating the Age Restriction should use the following terminology:

“Adults Only. Verification of your age may be required.” or

“You must be over 18 to view images or hear sounds. Verification of your age may be required.” or

“You must be over 18 to enter this competition. Verification of your age may be required.”

Furthermore section 6.2.3.1 of the Advertising Rules requires that a term or condition appears in 9 point font size while section 6.2.3.2 reads, in part:

“If the T&C associated with all access numbers in a Content booklet are generally consistent and applicable to all the Content and services within a Content booklet, then it is sufficient that these consistent T&Cs be placed in a reference page or section at the front of the booklet.

However where there is any deviation from these general T&Cs, these deviations must be explicitly indicated immediately close to the access number/s, or Content/services to which this deviation in general T&Cs is applicable.”

The font size used at the foot of these two pages is approximately 5-6 point.

It is the Adjudicator’s opinion that section 8.1.1 has been breached by the SP in that it cannot be reasonably said that it is “clearly indicated” that the service is an adult one on either of the pages.



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Adult services – indication that an adult service:*Detailed complaint:*

Adult content is advertised in a publication which will typically be picked up by children. These booklets are distributed by Cellular Stores which are frequented by children.

*Section of the Code of Conduct raised:*

8.1.2. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

*Response:*

On the second page of our booklet we clearly state in the terms and conditions that users must be over 18 or get permission from the bill payer before they utilize and services in the book. This is also stated on the bottom of the 2 last pages of the booklet relating to the service 18+ only.

Our distribution partner was giving a detailed spec of our required target market being 18 to 32 and the booklets were only to be handed out at Universities on the assumption that the University students are over 18. We did not arrange for our booklets to be distributed in shops especially in cellular shops.

We do not understand how our booklet has ended up in cell phone stores and we are waiting for a report from our distribution company. Even though this is our responsibility, this is something we have to get a clear idea from our distribution company because our intend was not too distributed through these cell phone point of sales.

We have been to the sites for distribution of this booklet at the various Universities, and we felt confident that the distribution was done properly in terms of our requirements.

I would also like to state that a Cellular Shop is not the kind of place you would expect young kids to be.

*Decision*

The version of the IP is accepted insofar as its instructions for distribution were not followed (although there is no explanation of why distribution recommenced after the filing of the initial informal complaint). The IP also acknowledges that it remains responsible despite the actions of the third party distributor.

The statement that “young kids” do not frequent cellular shops does not withstand interrogation. The Code of Conduct does not refer to “young kids”, but rather to minors, being persons under the age of 18, and it cannot be said that it would be unexpected to find an under 18 year old in a cellular shop.

Notwithstanding the above it cannot be said that the SP has breached section 8.1.2 of the Code of Conduct. If the section is broken down into its component sentences the following appears:

- Promotions for adult services must be in context with the publication or other media in which they appear. The promotion appeared in the SP content booklet – it cannot be said to be out of character with the balance of the booklet. A cellular store is a distribution point and not a “publication or other media”.
- Services should be in context with the advertising material promoting them. This is again a separate enquiry from the physical distribution of the booklet.
- The content of a service should not be contrary to the reasonable expectation of those responding to the promotion. As above – this refers to the relationship between the advertisement and the service advertised, not to physical distribution.

In the circumstances this element of the Complaint is not upheld.

Adult services – access by minors*Detailed complaint:*

No attempt is made to ensure that children do not access these services. There is very small text at the bottom of the page stating 18+. This is hardly visible.

*Section of the Code of Conduct raised:*

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8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Explicit confirmation of a user's age must be obtained prior to the delivery of an adult content service.

*Response:*

On the second page of our booklet we clearly state in the terms and conditions that users must be over 18 or get permission from the bill payer before they utilize and services in the book. This is also stated on the bottom of the 2 last pages of the booklet relating to the service 18+ only.

In addition to this we are also adding a confirmation on the message that goes out confirming details of the services and that the user must be over 18 to utilize the service.

Our distribution partner was giving a detailed spec of our required target market being 18 to 32 and the booklets were only to be handed out at Universities on the assumption that the University students are over 18. We did not arrange for our booklets to be distributed in shops especially in cellular shops.

*Decision*

The evaluation of this aspect of the Complaint revolves around the interpretation to be placed on the first sentence of section 8.1.3. viz. "Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services".

The Adjudicator is satisfied, in this regard, that the content to be ascribed to this sentence includes the imposition of a duty on members to restrict distribution of material advertising adult content services to locations where it is at least unlikely that minors will be able to access the advertising itself.

In the Adjudication in respect of Complaint #0017 the Adjudicator considered this aspect of section 8.1.3 in the following terms:

"The SP's directory is available by physical post and is available for collection from a large number of physical outlets, including mobile phone shops, fast food chains and the like, thus making them easily accessible to children, even if not specifically targeted at children."

The enquiry then becomes whether the IP took “reasonable steps” to ensure the content would not be accessed by minors. Here the IP go so far as to state that it specified cellular shops as being undesirable locations for distribution of the booklet.

Quite why this is so given that the IP also believes that “a Cellular Shop is not the kind of place you would expect young kids to be” remains unclear to the Adjudicator. Nevertheless there is no real basis for disputing the IP’s response in this regard.

In the circumstances the Adjudicator is prepared to accept that there was effort on the part of the IP with regard to distribution but is not convinced that the degree of care taken was sufficient given the importance of access to adult content matters to the industry.

The Complaint is upheld in this regard.

#### Unsubscribe facility

##### *Detailed complaint:*

On page 3 and page 23, mention is made of the unsubscribe facility, yet no pricing is mentioned. On page 23 a user would read the ad to state that to unsubscribe will cost R5.

##### *Section of the Code of Conduct raised:*

11.3.2. All subscription services must have a readily available unsubscribe facility which costs no more than one rand.

##### *Response:*

On page three in the terms and conditions we do state that the cost to unsubscribe will be R1, “To cancel, SMS STOP followed by your clubs name 31240 (R1)”.

I do agree however that the information provided on page three does not indicate that the cost to stop the service will cost R 1 and this will be clearly advertised in future services.

#### *Decision*

Section 11.3.2 requires simply the existence of the required facility at the required cost. It does not impose any obligation in respect of advertising this cost. The

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contention that a user would become confused on page 23 into thinking the unsubscribe costs R5 is stretching and cannot be sustained.

This aspect of the Complaint is not upheld.

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### **Summation & Sanction**

It has been found that the following breaches have occurred:

- Section 6.2.5 of the Code of Conduct
- Section 8.1.1 of the Code of Conduct
- Section 8.1.3 of the Code of Conduct
- Section 6.2.2.1 of the Advertising Rules read with section 6.2.5 of the Code of Conduct

The following has been taken into account in mitigation of sanction:

- The excellent record of the IP in respect of complaints – there being only one complaint lodged against the IP and that complaint was dismissed
- The finding that there was no intent on the part of the IP to mislead consumers
- The generally candid and comprehensive Response received
- The general level of compliance with the Code of Conduct and the Advertising Rules exhibited in the booklet

In the circumstances the IP is issued with a fine of R5 000 in respect of the breach of section 6.2.5; a fine of R15 000 in respect of the breach of section 8.1.1; a formal reprimand in respect of the breach of section 8.1.3; and a fine of R5 000 in respect of the breach of Section 6.2.2.1 of the Advertising Rules read with section 6.2.5 of the Code of Conduct

Payment of all three fines is suspended for a period of one year from date of effecting of this Adjudication, subject to the IP not breaching any of these sections during this time period in any media in which it advertises.