

**WASPA appeals panel
Complaint 5558**

REPORT OF THE APPEALS PANEL

Date: 29 October 2009
Appellants (SP): SMSNET-SA
Complaint Number: 5558
Code Version: V6.2

1 INTRODUCTION TO THIS APPEAL

- 1.1 Complaint number 5558 was lodged by the WASPA Media Monitor (Monitor) on the 14th of January 2009, and relates to the automatic initiation of subscription services as the result of a visit by the Monitor to a WAP site, Hugemob.com.
- 1.2 An emergency panel convened on the 16th of January 2009, and the WASP/Service Provider, SMSNET, notified of the ruling to suspend the service on 20th January 2009.
- 1.3 The adjudicator found that while the SP's website complied fully with the WASPA Code of Conduct (Code), the SP had failed to ensure that the WAP site complied, with the result that the SP was found guilty of breaching sections 3.1.1, 4.1.1, 6.2.2, 11.1.1 and 11.1.4 of the Code.
- 1.4 The SP is appellant in this matter.

2 RELEVANT INFORMATION

- 2.1 *WASPA and the public interest*
 - 2.1.1 We often mention the public interest in our findings. This is because we consider this to be an overriding and significant factor when applying the Code. WASPA is required to take the public interest into account when considering any complaint.
 - 2.1.2 The General provisions of the Code have application in all cases in relation to matters dealt with by WASPA. Section 3.1.1 provides that: "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." Section 3.1.2 provides that "Members are committed to lawful conduct at all times.". Additionally, section 4.1.1 provides "Members are committed to honest and fair dealings with their customers. In particular, pricing

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information for services must be clearly and accurately conveyed to customers and potential customers.”

- 2.1.3 These general rules should always be uppermost in the minds of members when checking that a service complies with the Code.

3 BASIS OF THE COMPLAINTS

3.1 *The service complained of*

3.1.1 The service complained of was as a result of a test undertaken by the Monitor to ascertain if he would be subscribed to the service by simply clicking on a banner without downloading any content.

3.1.2 The Monitor used a WAP-enabled phone to visit Waptrick.com, clicked on a banner titled “erotic girls and photos”, and was taken to a page with a picture and a banner underneath it. The banner said “click here to see more”.

3.1.3 The Monitor noted that when scrolling down to the bottom of the page there were terms and conditions, but considered that the average user would not do this, but would rather click on the banner to see more.

3.1.4 After the Monitor clicked on the banner, he received a sms welcoming him to the subscription service of Hugemob.com at a cost of R15.00 per week.

3.1.5 On checking his bank balance the Monitor found that a total of R15.10 had been charged.

3.2 *The Code*

3.2.1 In the complaint the Monitor cited breach of the following sections of the Code:

3.2.1.1 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.

3.2.1.2 3.1.2. Members are committed to lawful contact at all times.

3.2.1.3 4.1.1. Members are committed to honest and fair dealings with their customers. In particular pricing information of services must be clearly and accurately conveyed to customers and potential customers.

3.2.1.4 6.2.2 All advertisements for services must include a full retail price of that service.

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- 3.2.1.5 11.1.1 Promotional material for subscription services must prominently and explicitly identify services as “subscription services”.
- 3.2.1.6 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.
- 3.2.2 The Monitor considered the breach of the Code serious enough to invoke the emergency procedure outlined in section 13.7 of the WASPA Code.
- 3.2.3 An emergency panel was convened which made the following orders, namely (i) that the SP immediately suspend the service, and (ii) that the SP immediately suspend any advertising of the service on the Waptrick.com site or any other forum, until fully compliant with the Code and the Advertising Rules.
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4 THE SP’S RESPONSE

- 4.1 The SP confirmed that Hugemob.com was their weekly subscription model service site and claimed that it was fully compliant with the Code. Despite this, they confirmed that they had suspended all of Hugemob’s services and advertising as ordered by the emergency panel.
- 4.2 Additionally, the SP responded to the alleged breaches, in summary stating, that its intentions were good, it was committed to complying with the WASPA Code and, recording its efforts to rectify any breach.
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5 DECISIONS OF THE ADJUDICATOR

5.1 *Findings on Complaints*

- 5.1.1 The adjudicator, in relying on the information provided to him held that the terms and conditions, the pricing and reference to the service on the Hugemob.com website as a subscription service complied with the Code, and concluded that the Code had not been breached in respect to the website.
- 5.1.2 The adjudicator noted however, that the SP had failed to address the issue surrounding the banner advertisement on Waptrick.com to which the Hugemob.com site linked. He found that the banner advertisement did not specify that it was a subscription site. No price was indicated and automatic subscription followed a click on the banner without proper notice being given.

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- 5.1.3 In summary, the adjudicator found that the SP was accountable for the Waptrick advertising which did breach the Code. Additionally, the adjudicator made reference to complaint numbers 2430 and 3548 in which the SP had previously been made aware of its accountability in respect of advertising on or linking to third party sites.
- 5.1.4 The adjudicator found the SP guilty of breaching sections 3.1.1, 4.1.1, 6.2.2, 11.1.1 and 11.1.4 of the Code.
- 5.2 *Sanctions*
- 5.2.1 After taking into account the prior record of the SP, its subsequent conduct in eradicating breaches and its failure to take remediation actions with regard to Waptrick, the adjudicator imposed a fine of R20 000 on the SP.
- 5.2.2 The SP was ordered to amend its advertising to comply with the WASPA Advertising Rules as well as the Code, to withdraw any current advertisements and to suspend any advertising which mentioned Waptrick or similar services, until fully compliant.
- 5.2.3 The WASPA Secretariat was ordered to instruct the Monitor to ensure the SP's compliance with the order.

6 GROUNDS OF APPEAL

- 6.1 The SP's appeal takes the form of a "request to review" the adjudicator's decision, set out in an email dated the 02 April 2009, for the following reasons:
- 6.1.1 The SP offers its services through two websites, Hugemob.com (a weekly subscription service model) and Piwap.com (an "a la carte" or "single purchase" model). Both have clear agreement pages with pricing, terms and conditions, and options to subscribe or to opt out. Visitors are advised that they can also opt out through the call centre.
- 6.1.2 The SP has a marketing strategy and agreements with advertising companies who in turn have agreements with "advertising sites". The SP has no direct links to or agreements with these third party sites.
- 6.1.3 The SP prepares advertisements/banners and text for publication on these advertising sites. They emphasise that clicking on the banners will not directly subscribe anyone but rather, direct the visitor to the Hugemob.com agreement page where all the terms and conditions are found, including an option to subscribe, to download (presumably the terms and conditions) and to confirm pricing.
- 6.1.4 The SP points out that a visitor decides on the agreement page, where the terms and conditions are clearly expressed, whether or

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not to subscribe, download, or navigate away from the page without being subscribed.

- 6.1.5 The SP points out that they monitor their advertisements for misuse and in order to ensure that the advertisements are in compliance with the advertising rules. Furthermore, they ensure that all clicks on the advertisements will link to the agreement page of the websites. This process exists as a measure of protection against users and misuse of the advertising banners.
- 6.1.6 In summary, the SP states that a client cannot be subscribed from any of the advertising sites unless they choose to subscribe on the service page of the SP's website.

7 FINDINGS OF APPEALS PANEL

- 7.1 The WASPA Monitor, the SP and the adjudicator agree that the website Hugemob.com complies with the requirements of the Code. The panel will not assess the merits of the website.
- 7.2 The issue in this appeal is whether the WAP site complied with the requirements of the Code.
- 7.3 The panel has noted the Monitor's recordal of the fact that the WAP page did display terms and conditions and the fact that the Monitor chose not to read them. Ref. 3.1.1 above.
- 7.4 The panel has noted the ongoing efforts of the SP to monitor and rectify shortcomings in its subscription/ business processes, from the time of the complaint through to the appeal email.
- 7.5 The panel is of the view that if there were terms and conditions on the WAP page that properly linked to the SP's website which performed as alleged by the SP in its appeal email, specifically clauses 6.1.3, 6.1.5 and 6.1.6 above, they would have complied with the WASPA Code.
- 7.6 However, the facts of this appeal show that the WAP site was not compliant with the Code, for the simple reason that it was possible for the Monitor and therefore for other consumers to be subscribed to the service without the necessary opt in and confirmation steps required by the Code.
- 7.7 The appeal is accordingly dismissed and the adjudicator's findings and sanctions upheld. The appeal fee is not refundable.

8 APPEALS PANEL COMMENT

- 8.1 The appeal panel wishes to make a comment that is not relevant to the outcome of the decision in this appeal, but which might be helpful.
- 8.2 The panel acknowledges the SP's attempts to link to the terms and conditions on the website from the WAP page, and for attempting to provide the necessary information and checks required by the Code.
- 8.3 The requirements of the WASPA Code relating to subscription services are specifically geared to protecting consumers and therefore require the subscriber to take positive and deliberate actions to opt in, confirming the intention to subscribe after having been given all the correct information regarding pricing, frequency etc. of the service.
- 8.4 Section 11.1.2 of the Code, which was not mentioned or considered by the Monitor or adjudicator, records the steps required as "Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.....".
- 8.5 Had the SP provided additional steps forcing the consumer to opt in on the WAP page, or, forced him/her to opt in on the website, prior to being able to download subscription content, the provisions of the Code would have been complied with.
- 8.6 In summary, the SP failed because it was possible to bypass the opt in requirements set out in the Code, and because compliance with the Code remains the SP's responsibility which cannot be delegated to a third party such as the advertising site owners.