



REPORT OF THE ADJUDICATOR

WASPA Member (SP): iTouch SA (Pty) Ltd (“iTouch”)

Information Provider

(IP):

(if applicable)

Service Type: Truetone or covertone

Complainant: Gavin Penkin, competitor company representative, director of eXactmobile

Complaint Number: 0059

Adjudicator: Kerron Edmunson

Complaint

The complainant states that the advertisement for downloads published in People Magazine dated 28 October 2005 by iTouch contravenes section 4.1.2 (provision of information to customers) of the WASPA Code by misrepresenting that certain ringtones are original artist ring tones when they are actually copies or ‘covers’.

The complaint states specifically that:

1. “iTouch offers True Tones in one section;
2. an average consumer will understand ‘true’ to be the original and would therefore be expecting to receive the True or original song;
3. in fine print the ad says that True tones are high quality cover tones;
4. a Cover Tone is a copy of the original and sung by somebody else, not the original artist”.

SP Response

The SP has responded by stating that:

1. “in all of 35050’s advertising (including the ad specified) we state that Truetones are “high quality covertones”;
2. it does not say this only in the Terms and Conditions but on the actual ad as well;
3. the songs are covertones, so I am not sure where Mr Penkin believes us to be misleading anyone”.

Consideration of the WASPA Code

The General Provisions of the Code provide at:

1. section 4.1.1 (customer relations) that members are committed to honest and fair dealings with their customers, and in particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers; and
2. section 4.1.2 that members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

What is a “true tone” and what is a “cover tone”? Is there a standard in the industry? It is clearly important to understand whether or not the complaint should be upheld, based on whether or not, in all the circumstances, there has been a misrepresentation. I have considered the following:

1. A misrepresentation is generally regarded as an “intentionally or sometimes negligently false representation made verbally, by conduct, or sometimes by nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally”¹.
2. “Real” is defined variously as “being or occurring in fact or actuality; true and actual not imaginary, alleged or ideal; genuine and authentic, not artificial” and “true” means “consistent with fact or reality, not erroneous or false; genuine, reliable; so as to conform to a type, pattern or standard”².
3. “True tones” are an industry term, coined as the content industry has grown. There does not appear to be an industry manual or dictionary which defines either “true tones” or “cover tones” but I have considered what might be likely standards in South Africa and internationally in the content sector:
 - a. eXactmobile defines a true tone not by referring to the word “true tone” specifically but by stating that they offer an “original artist guarantee”. This, they say, means that “eXactmobile is the ONLY provider to support the ORIGINAL ARTIST for true tones and full track downloads. Beware of FAKES from other providers advertised as “sound-alike”, “cover version”, “made famous by” or “in the style of”³;
 - b. Vodafone uses the word “realtone” to describe music ringtones which “sound just like the real thing”⁴;
 - c. MTN categorises truetones separately from polyphonic and monophonic ringtones, they cost more and you must be a subscriber to access them. MTN’s terms and conditions state that unless otherwise specified MTN owns all intellectual property in its content. It is therefore not clear, other than by subscribing, what MTN regards as true tones.
4. “Covers”, whilst also not capable of definition in terms of a manual or dictionary, have come to be accepted as copies of original songs performed by other artists.

In a recent ASASA ruling ⁵ it was found that there are no standards for the use of the term “true” or “real” tones, and both are used interchangeably to refer to original artists’ work and the work of covers.

¹ www.dictionary.com

² www.dictionary.com

³ www.exactmobile.co.za

⁴ www.vodafone.co.uk

⁵ www.asasa.org.za

Decision

The complaint seems to relate to two things, (i) the incorrect and deliberate use of the word “true tone” as a description of what the complainant notes is a cover tone (which is not disputed by the SP) which may amount therefore to a misrepresentation; and (ii) the use of fineprint to qualify the real or true meaning of the description “true tone”.

I find as follows:

- (i) To say in an advertisement that a “true tone” is a “high quality covertone” seems to me to be a juxtaposition of two concepts which is likely to relate in confusion of and complaints from, customers, and where the price charged is not insignificant, it is possible that the description of the ringtone as a “true tone” when coupled with a premium, could, on an extreme interpretation, amount to a misrepresentation, whether or not this was intentional.
- (ii) The ‘fineprint’ referred to is situated next to the word “true tone”. I do not believe that the explanation is incorrectly sized nor is it inappropriate to append qualifications to services, subject to what I say in (i).

I note, for the sake of completeness, that iTouch has recently amended its advertisements to refer to “cover tones”.

Sanction

Given the passage of time and the fact that iTouch has amended advertisements in the mean time, and that international precedent is not clear on the meaning and use of the terms “cover”, “true” and “real” in relation to ringtones, I am of the view that it would not be appropriate to impose a sanction at this point, but iTouch is required to take note of the caution in (i) above.