

REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Sybase 365
Information Provider (IP): (if applicable)	AMV Holding Limited
Service Type:	Subscription
Complainant:	Competitor
Complaint Number:	3084
Code version:	Code v5.7 and Ad Rules v1.6

Complaint

1. On the 3rd of January 2008 a competitor to the SP lodged a complaint through the WASPA website the relevant portions of which were in the following terms:

OtherID: 31314 is a Games Demon Brand and owned by Mobile 365

Code_Breached: Not clearly displayed as a subscription service in the inside cover of National Geographic (*sic*) for kids, January edition. Also not indicated on the welcome message received

Detailed_Description_Complaint: I used my mobile, [removed] and sent through the keyword nk86137 to 31434. That was the code displayed for a game called 'Mach Air Combat'. I received a message saying that the game 'Poker' was not compatible with my phone, but for another R30 I could choose another game! I did so and wasn't able to download the game and had no sms to reference the request either. I tried to call today, 3 Jan at 11AM and got through to an answering machine and left a message. I will forward a copy of the print ad later this week.

Tick_as_appropriate: Service provider has not resolved my complaint to my satisfaction

2. The complaint was accompanied by a reproduction of the advertisement in question, which is the sole attachment to this report.
3. It seems from the above that there are several grounds for complaint:
 - 3.1. The service in question is a subscription service but is not described as such as required by clause 11.1.1 of the Code of Conduct.
 - 3.2. The SP's / IP's system did not identify the game that he had downloaded correctly and that he was never sent a link to a second game that he ordered, or if he was, he could not download the game (the wording is not quite clear here).

- 3.3. The SP's / IP's complaint procedure was defective in that the Complainant received no response to his enquiries.

Response

4. The SP responded to the formal complaint on the 18th of January 2008 after consultation with the IP, which response can be summarised as follows:
- 4.1. While the complaint was directed against "Mobile 365", the SP has now been renamed to "Sybase 365".
- 4.2. The SP did not supply the advertised service, which was in fact provided by AMV Holding Limited ("the IP"), which has an "SMS Services Agreement" with the SP in terms of which the SP makes shortcode(s) available to the IP. The IP in turn agrees to abide by the WASPA Code of Conduct (as required by clause 3.9.1 thereof) and agrees to become a member of WASPA. I note that the IP is indeed listed as a WASPA member on the website at URL www.waspa.org.za.
- 4.3. As the IP is a member of WASPA, the proper party against whom the complaint should have been lodged is the IP.
- 4.4. The first ground of complaint has no basis in that:
- "...the service is advertised as 'just pay for what you order' meaning a one-off payment for each game selected. The service is not a subscription service and accordingly does not need to be advertised or promoted as such."
- 4.5. As regards the second ground, the SP produced a copy of the IP's log of SMSs between the IP and Complainant:

Message date (CET)	Message type	Account	Text
02/01/2008 20:38	MO	MO	Nk86137
02/01/2008 20:38	MT	R 30	Generated 1 x billable message: GAMEZONE! Open Me! Link to 'Mach Air Combat'
02/01/2008 20:38	MT	Free	Thanks 4 using Gamezone!Content link on its way!Click on it 2 get ur content!Games R30.Probs?Call 011-461-0317 or refer 2 ad.16+
02/01/2008 20:38	MT	Free	Generated 1 x free message: game link to 'Vegas Blackjack Deluxe'
02/01/2008 21:16	MT	R 30	Generated 1 x billable message: Your game order Link to 'Tetris'

The SP then commented as follows:

“From the above, it can be seen that the complainant ordered ‘Mach Air Combat’ and was delivered a link to download the game. In addition, he was sent a free message with a link to ‘Vegas Blackjack Deluxe’ which as shown in the advertisement was ‘free with every purchase’. It is not clear whether this is the ‘Poker’ that the complainant refers to. The complainant then ordered a further game from the wap-page (‘Tetris’) for which he was billed and sent a link. In addition, as can be seen from the above the complainant was sent an information message on 2 January at 20.38.”

- 4.6. Finally, the SP advised that the IP was liaising with the Complainant to resolve the issue.

Portion of the Code Considered

5. The following clauses of the WASPA Code of Conduct are relevant:

2.23. A “subscription service” is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

4.1.5. Members must have a complaints procedure allowing their customers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.

Decision

6. **First ground of complaint:** The definition of “subscription service” above does not allow for the IP’s service as described to be classed as such a service. The fact that the Complainant makes no mention of repeat billing for the service in question bears this conclusion out. The first ground of complaint is hence dismissed.
7. **Second ground of complaint:** It is difficult to discern the true facts here but the most likely scenario is that the Complainant received an SMS regarding the free game offered by the IP with every purchase of a game and took it as a reference to compatibility issues regarding the game he had purchased. As regards the second game that he ordered, I have no reason to disbelieve the SP / IP’s version that the download link was in fact sent. Whether it was received or not and whether the download link contained in it worked is of course a different matter and should have been resolved between the parties by use of the complaints procedure described in clause 4.1.5 of the Code of Conduct. I will deal with that aspect below, but the second ground of complaint is dismissed.
8. **Third ground of complaint:** The Complainant does not make clear exactly who it was that he telephoned on 3 January 2008. It is apparent from his complaint that he was under the impression that the SP was providing the service in question, which was in fact not the case. Moreover, given that the complaint to WASPA was made the day after the SMS exchange between the parties (which took place on the 2nd of January) and on the same day that the Complainant left a message requesting assistance on an answering machine at a number unknown to the adjudicator, it is clear that the Complainant made no real attempt to avail himself of any complaints procedure offered by the IP or the SP. Even if he had done so

there is insufficient information for me to determine exactly who he complained to. This ground of complaint is hence dismissed.

9. Given that all grounds of complaint have been dismissed I have no need to address the question of whether the SP or IP would be subject to disciplinary action where both are members of WASPA.

4/2/2008



GAMES DEMON

its easy to order:
SMS THE ITEM CODE TO 31434
 e.g. **NK85635** (found at the top of each game). All games cost just R30 (all items require a WAP enabled handset). To opt out of marketing messages reply **STOP** after your order to unsubscribe, free of charge.
JUST PAY FOR WHAT YOU ORDER!

TOP 5 CHART

FREE! **FREE!**
WITH EVERY PURCHASE!

NK86066 FUNKY MONKEY	NK86123 ZOO TYCOON 2 Mobile	NK86185 CALL OF DUTY 4	NK85863 MOTOCROSS	NK86130 SEGA POKER PACK
--------------------------------	---------------------------------------	----------------------------------	-----------------------------	-----------------------------------

LATEST+GREATEST

NK86102 SONIC JUMP	NK86125 PES 2008	NK86162 PES 2008	NK85962 TOM JERRY PINBALL PURSUIT
------------------------------	----------------------------	----------------------------	---

HOT-TITLES

GIRLY-GAMES

SPORTS-ZONE

NK86127 STUNTMAN	NK85363 Who is your Mr Right?	NK85912 POPPY	NK85164 POPSTAR	NK85947 International Rugby Sevens
NK86124 SAPO	NK86188 FROGGER 25th Anniversary	NK85799 Nrv Dog	NK85967 Water lily	NK86058 JUGGED 3D
NK85974 WHEELS OF STEEL	NK86147 AGE EMPIRES III	NK85799 Nrv Dog	NK85967 Water lily	NK86149 SONIC THE HEDGEHOG GOLF
NK86147 AGE EMPIRES III	NK86147 AGE EMPIRES III	NK86147 AGE EMPIRES III	NK86147 AGE EMPIRES III	NK85927 16 CHECK IT WORLD

DEMONS FAVOURITES

NK85140 FART BOY	NK85974 AMA Love Triangle	NK85934 MONOPOLY	NK85524 Cook n' Mania	NK85983 AFRICRAFT	NK86145 TRIBAL 2	NK85954 SNOOKER 2007	NK85019 Each A Sketch	NK85743 MILLIONAIRE
NK85820 CHUCKLE EGG	NK85859 LMA Manager 2007	NK85922 BRIAN LARA	NK86054 TRANSFORMERS	NK86114 VICTORIA TENNIS	NK85900 Pinky Bride	NK85949 Subbutec 4	NK86122 TROPICAL	NK86091 BATA NANA TENNIS

CLASSIC-GAMES

NK85924 SONIC THE ELECTED	NK85640 SUPER BOWL	NK85933 MASTERMIND	NK85845 Garfield's Day Out	NK85936 MONKEY BALL	NK85960 SUPER K.O. BOXING	NK85867 MOBILE BRAIN TRAINER	NK86118 LIMBO	NK85961 LIMBO
NK85907 ROLER FEDERER'S	NK85959 GAME OF LIFE	NK85897 ZER 36 VIDEO POKER	NK85092 BOMB HUNTER	NK85978 WORLD POOL CHAMPIONSHIP	NK85639 CASINO VIP	NK85968 WORDCASTER	NK85923 LIMBO	NK85913 TONY HAWN'S
NK85848 The Masters TEXAS HOLD'EM POKER	NK85958 Chuchuko	NK86137 MACH AIR COMBAT	NK85964 PROJECT GOTAM RACING	NK85758 MUSIC EDITION	NK85833 GALG AIR FIGHTER	NK85914 RUGBY	NK85931 SUPERBIKE	NK85823 METAL SLUG

All items on this Games Demon advert are featured as part of the Games Demon "Pay for what you order" service. All games cost just R30 each. All games require a WAP enabled handset. For compatibilities see www.blingmob.com. Network not yet available to Cell-C customers. Subscribers to the Games Demon service will receive a weekly WAP menu including new updated content, from which items can be downloaded. Normal operator WAP browsing charges apply. Free network minutes/calls do not apply. Errors billed. Text STOP to 31434 to opt-out of FREE marketing. To stop all marketing text STOP ALL to 31434. Sending STOP to 31434 will also end any active subscriptions. Customers must have the permission of the bill payer and must be aged 16+. By purchasing content from Games Demon, users consent to receiving marketing messages and promotions. For customer support e-mail: help@blingmob.com or Call: 011-461-0317 or post: BLINGMOBI BCM Box London WC1N 3XJ

MONOPOLY © 2007 Hasbro. All rights reserved. License by Hasbro Properties Group. Brian Lara © 2006 The Codemasters Software Company Limited ("Codemasters"). All rights reserved. Super Monkey © SEGA. Lemmings™ Return ©2006 Playlogic Limited. Lemmings is a trademark of Playlogic Ltd. All rights reserved. TRANSFORMERS the logo and all related characters are trademarks of Hasbro and are used with permission. © 2007 Hasbro. Crash & Spyro - Published by Vivendi Games Mobile. PAC-MAN © 1980-2001 NBGI. World Series of Poker (WSOP) and related designs are trademarks of Harrah's License Company, LLC. Who wants to be a millionaire (© 1998-2004 Gullott International Limited. World Series of Poker - Player Advisor World Series of Poker. WSOP and related designs are trademarks of Harrah's License Company, LLC. Project Gotham Racing, Xbox and Xbox 360 are either registered trademarks or trademarks of Microsoft Corporation in the United Kingdom and other countries. Project Gotham Racing is a registered trademark of Microsoft Corporation in the United Kingdom and other countries. The use of real player names and likenesses is authorised by PIFPro and its member associations. Officially licensed by Czech National Football Association. All other copyrights or trademarks are the property of their respective owners and are used under license. Downloaded and published by Konami Digital Entertainment GmbH. Distributed in EMEA & Oceania by GIGI Media Ltd. (© 2007) Konami Digital Entertainment Co., Ltd. Zuma. (©2003) PopCap Games. All rights reserved. Zuma is a registered trademark of PopCap Games, Inc.