



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	SMSnet
Information Provider (IP)	Waptrick
Service Type	Content
Source of Complaints	Competitor
Complaint Number	3337
Date received	12 February 2008
Code of Conduct version	5.7

Complaint

The Complainant alleged breaches of sections 3.1, 3.4, 3.5, 4.1, 6.2.3, 11.1.1, 11.1.7 and 11.2.2 of version 5.7 of the WASPA Code of Conduct:

“While browsing on the WAP Site <http://waptrick.com> I saw a link called \"Thousands of Full Track MP3\" On going to this link I found myself at <http://piwap.com>. I then noticed numerous infringements of the WASPA Code.”

The Complainant provided a number of screenshots in support of the Complaint. Certain of these are set out in Annexure A to this Report.

The SP denied that it had breached the Code in any of the respects alleged and provided a detailed Response with screenshots. Certain of these are set out in Annexure B to this Report.

As there are a number of alleged breaches I have set out separately

- The relevant clause of the Code
- The specifics of the alleged breach as raised by the Complainant, and
- The Response as provided by the SP

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- Any additional information requested and received by the Adjudicator
 - References to screenshots provided
 - The finding in respect of the relevant clause(s) and alleged breach(es)

The alleged breaches of sections 3.1, 3.4.1 and 3.5.1 have been grouped together as they all relate to the alleged breach of third party IP rights.

Breach of Third Party Intellectual Property (IP) Rights

Code

3.1. Professional and lawful conduct

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.

3.1.2. Members are committed to lawful conduct at all times.

3.4. Intellectual property

3.4.1. Members will respect the intellectual property rights of their clients and other parties and will not knowingly infringe such rights.

3.5. Content control

3.5.1. Members must not knowingly transmit or publish illegal content.

Complaint

"Plwap and waptrick are selling and giving away Full Track Music and True Tones where they do not have a license from the record labels. This can be confirmed with the major labels."

"SMSNet is fully aware that they do not have an agreement with the major record labels as they approached the labels to license which was not granted."

"SMSNet knows that they are selling content without a license."

SP's Response

"All these three claims about the copyright issues are not reflecting the truth. We have agreements with some of the labels and we are at the process of agreement

with some others. We have paid to some of the labels and we are waiting invoices from some others to make their payments.

“The strange thing about these copyright issues is that the complaint is not coming from the side of any Copyright Companies but from one of our rivals; exactmobile. We believe in fair rivalry but we are not considering this complaint in the borders of fair rivalry.

“In addition to these, due to the “Confidentiality Term”s in the agreements we have with the Copyright Companies, supplying any information related with the agreement to the third parties is forbidden. The information they claim to have is forbidden to be supplied.

Although knowing these facts, we have stopped selling and taken all the contents with copyright on hold in order to check them again and not to cause any damage.”

Additional Information

Given the nature of the complaint and the Response received the Adjudicator requested that the Complainant provide further evidence in support of its claims involving third party IP violations by the SP.

The following are excerpts taken from e-mails from two third party licensors as provided by the Complainant:

“Warner Music Gallo Africa Pty Limited is the exclusive licensee in Africa of the Warner content. WMGA has the sole and exclusive right to license and sell Warner music content.

It has come to our attention that SMS-Net are selling and giving away (WMGA) content in South Africa.

I can confirm that SMS-Net have no license from WMGA to sell this content and are thus unauthorized.

Any unauthorised use of our content is copyright infringement and thus illegal.”

and

“[Universal Music] confirm that SMS Net did approach us for a licence last year and the terms and conditions of were not agreed to. We were in the process of negotiating.

They have resumed negotiations with us offering to pay for past use of our product etc.”

Finding

The Adjudicator is satisfied on the basis of the information set out above that the SP has breached sections 3.1.2, 3.4.1 and 3.5.1. Section 3.1.1 does not specifically mention third party service providers which I regard as being distinct from “the public” as I believe it to be intended in this section.

It appears that the SP has partially disclosed the true position but the emails quoted from above appear to settle the crisp question of whether the SP has knowingly infringed the intellectual property rights of other parties.

The SP is indeed correct that the IP rights lie to be enforced by the third party licensors but it does not follow that an infringement of such rights should not be an infringement of the Code of Conduct and therefore properly the subject of a complaint under such Code.

Nor is the SP saved by the term and condition evident from Figure 5 in Annexure B hereto which states that “[S]ome of the contents may not be included in the subscription due to their copyrights, these will be notified and can be bought separately by ‘cost per download’ method”. Not only is it unclear how this will result in copyright being respected but it appears as if the Complainant has in any event obtained copyright material to which the SP did not have rights subsequent to subscribing to the service.

The Adjudicator accepts in mitigation of any sanction to be imposed that the SP is making efforts to regularise the position, including offers to make back payments, and that it has removed offending content from the relevant site. The SP clearly

needs to regularise its position as soon as possible as it is running a significant risk of civil action.

The Adjudicator further does not believe that it is the role of WASPA to stand in the shoes of the third party licensors so as to enforce their rights. This is more properly done through the courts – WASPA's concern is rather the protection of consumers and the promotion of fair and lawful practises.

In aggravation, however, is the fact that the SP must have known that it was in breach of the Code but continued to offer copyright material in breach of the Code and only ceased to do so upon notification of this Complaint.

This is a serious breach of the Code. I have not been able to locate any previous complaint where a WASPA member has been found to have breached the provisions of the Code in this manner.

Sanction:

The Adjudicator refers to the Report issued in respect of Complaint 3336 which was delivered at the same time as this one. Although the sites are different the breaches stem from the same facts.

The Adjudicator accordingly believes that the sanction delivered in respect of the breach of section 3.4.1 in respect of Complaint 3336 should apply to the same breach under this Complaint as if they were a single Complaint.

For the sake of convenience the relevant sanction under Complaint 3336 is as follows:

“Taking the above factors in mitigation and aggravation into account the following sanctions are imposed:

- The SP is ordered to ensure that it does not offer any material which it does not have third party copyright holder permission to offer or which is in breach of section 3.4.1 of the Code of Conduct. The SP is required to take immediate steps to remove any content which it does not have authorisation to offer and which may remain available. This sanction shall not be subject to suspension through the noting of an appeal by the SP.

- The SP is fined the sum of R50 000 with payment of R30 000 of this amount suspended for a period of one year from date of receipt of this Report by the SP subject to the SP not being found to be in breach of section 3.4.1 of the Code during this time.
- The SP is issued with a formal reprimand and requested to note that any further breach of section 3.4.1 may result in suspension from WASPA and action being taken at network level.”

No pricing displayed

Code

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.

Complaint

”SMSNet on the WAPSite piwap.com do not clearly display the pricing. The pricing is placed at the top of the page and when you select on an item, you are automatically billed. The user is not given the option to confirm their purchase.”

The Complainant provided the graphic set out as Figures 1 and 2 of Annexure A.

SP's Response

The SP's response is simply that the Complainant has not provided a full screen shot and that an examination of such a screen shot clearly shows compliance with this section of the Code.

The SP referred specifically to Figure 7 in Annexure B.

Finding

The version of the SP is accepted. No further investigation of the compliance of the full page was entered into by the Adjudicator as it does not appear that the Complaint took such full page into account. There is no explicit requirement in the section cited requiring a confirmation of purchase.

Hidden Costs*Code:*

6.2.3. Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.

Complaint:

"Consumers are not advised that when they purchase the track, they will incur costs in excess of R2.00 to download the track via GPRS."

SP's Response

The SP's response is simply that the Complainant has not provided a full screen shot and that an examination of such a screen shot clearly shows compliance with this section of the Code.

The SP referred specifically to Figures 6 to 8 in Annexure B.

Finding

The version of the SP is accepted. No further investigation of the compliance of the full page was entered into by the Adjudicator as it does not appear that the Complaint took such full page into account.

Identification as subscription service*Code*

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

Complaint

On the first page, you are shown Download and the Subscribe and download free. By download there is no pricing to indicate that this will cost R20.00 and no confirmation of this transaction. For the Subscription there is no subscription price, billing frequency or any other information. The wording \"Subscription Service\" is not present, there are no details of how to unsubscribe.

The Complainant provided the graphic set out as Figures 1 and 2 of Annexure A.

SP's Response

"The "subscribe and download free" link is shown for the entries by phone and this link is directed to our subscription agreement page of hugemob.com. The screenshots and the flowchart of our subscription system can be seen below. The complaint #3336 was about this subject and a report prepared by us regarding to this matter is sent to WASPA. There is an ongoing formal complaint about this subject.

The price and the billing frequency is clear and available on the agreement page. The red marked parts are the places where the pricing is shown."

The SP referred to the screen shots as set out in Annexure B to Report 3336.

Finding

The version of the SP is accepted. No further investigation of the compliance of the full page was entered into by the Adjudicator as it does not appear that the Complaint took such full page into account.

Notification message*Code:*

11.1.7. Once a customer has subscribed to a subscription service, a notification message must be sent to the customer containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number.

Complaint

"Once I had subscribed to the service I received no SMS advising me of the cost of the subscription, frequency or how to unsubscribe."

SP's Response

"The "subscribe and download free" link is shown for the entries by phone and this link is directed to our subscription agreement page of hugemob.com. The screenshots and the flowchart of our subscription system can be seen below. The

complaint #3336 was about this subject and a report prepared by us regarding to this matter is sent to WASPA. There is an ongoing formal complaint about this subject.

The price and the billing frequency is clear and available on the agreement page. The red marked parts are the places where the pricing is shown.”

The SP referred to the screen shots as set out in Annexure B to Report 3336.

Finding

The Adjudicator has tested the service and received the confirmation SMS. The Adjudicator does not, however, find that there are grounds to reject the version of the Complainant.

Accordingly no finding is made in respect of this Complaint and no sanction is imposed.

Unsubscribe facility

Code:

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

Complaint

” There is no mention anywhere of how to unsubscribe. Nothing on the WAP Site, web site and as no SMS is sent there is no way to unsubscribe.”

SP's Response

“The “subscribe and download free” link is shown for the entries by phone and this link is directed to our subscription agreement page of hugemob.com. The screenshots and the flowchart of our subscription system can be seen below. The complaint #3336 was about this subject and a report prepared by us regarding to this matter is sent to WASPA. There is an ongoing formal complaint about this subject.

The price and the billing frequency is clear and available on the agreement page. The red marked parts are the places where the pricing is shown.”

The SP referred to the screen shots as set out in Annexure B to Report 3336.

Finding

The version of the SP with regard to the presence of an online facility is accepted. No further investigation of the compliance of the full page was entered into by the Adjudicator as it does not appear that the Complaint took such full page into account.

Annexure A – Screenshots & information as provided by the Complainant

Access <http://waptrick.com> from your mobile phone. You will see the following page:



Figure 1

The ads rotate. Above are 2 screen shots with different ads. You will see on the left a number of ad signs. When you select on the first one “ Thousands of Fulltrack Mp3, you will be routed to the following page at the URL.

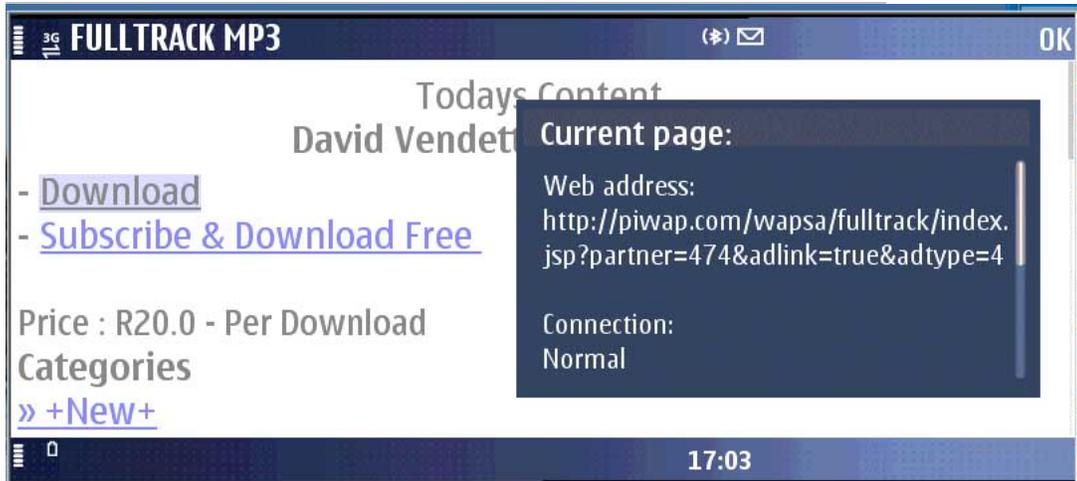


Figure 2

If you select new or one of the links below new, you will be taken to a list of content such as :

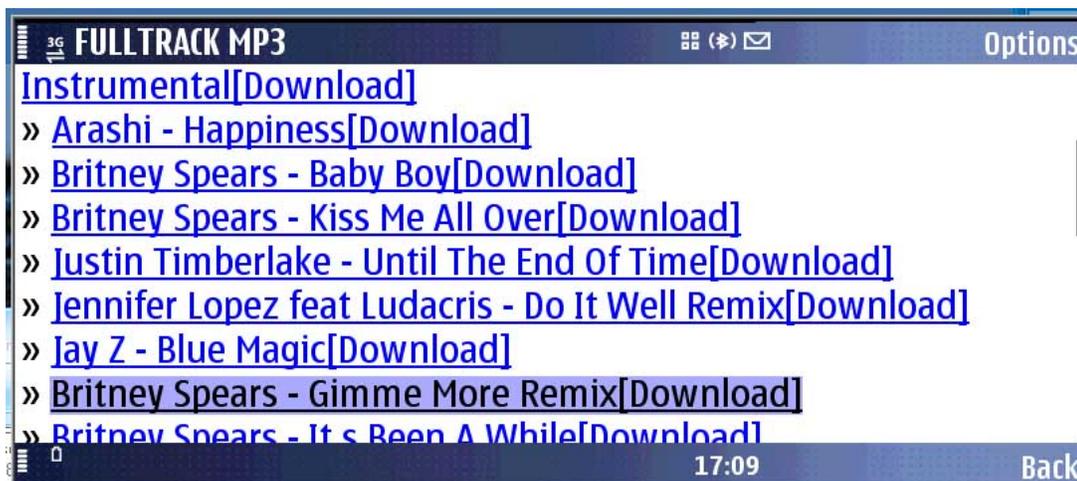
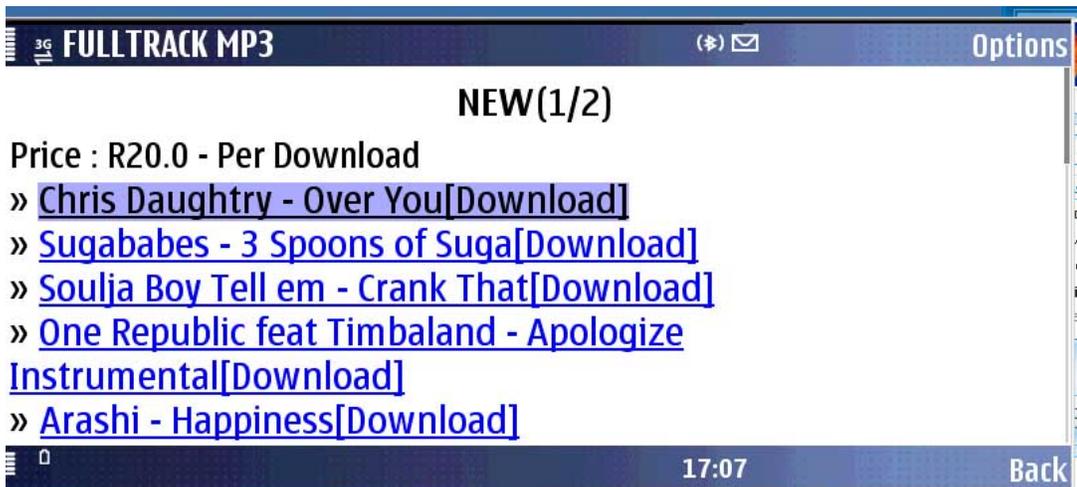


Figure 3

By selecting one of these links, you are automatically billed R20.00 and the content downloaded.

Clicking on home will take you to the following page :

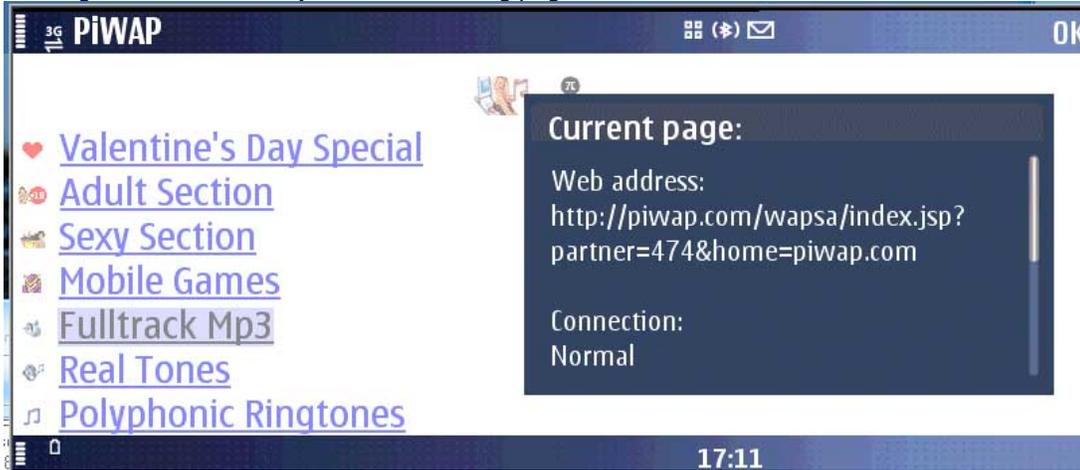


Figure 4

Selecting customer services will take you to the following page:



Figure 5

Annexure B – Screenshots & information as provided by the SP

Piwap Main Page



Figure 6

By Clicking Fulltrack MP3

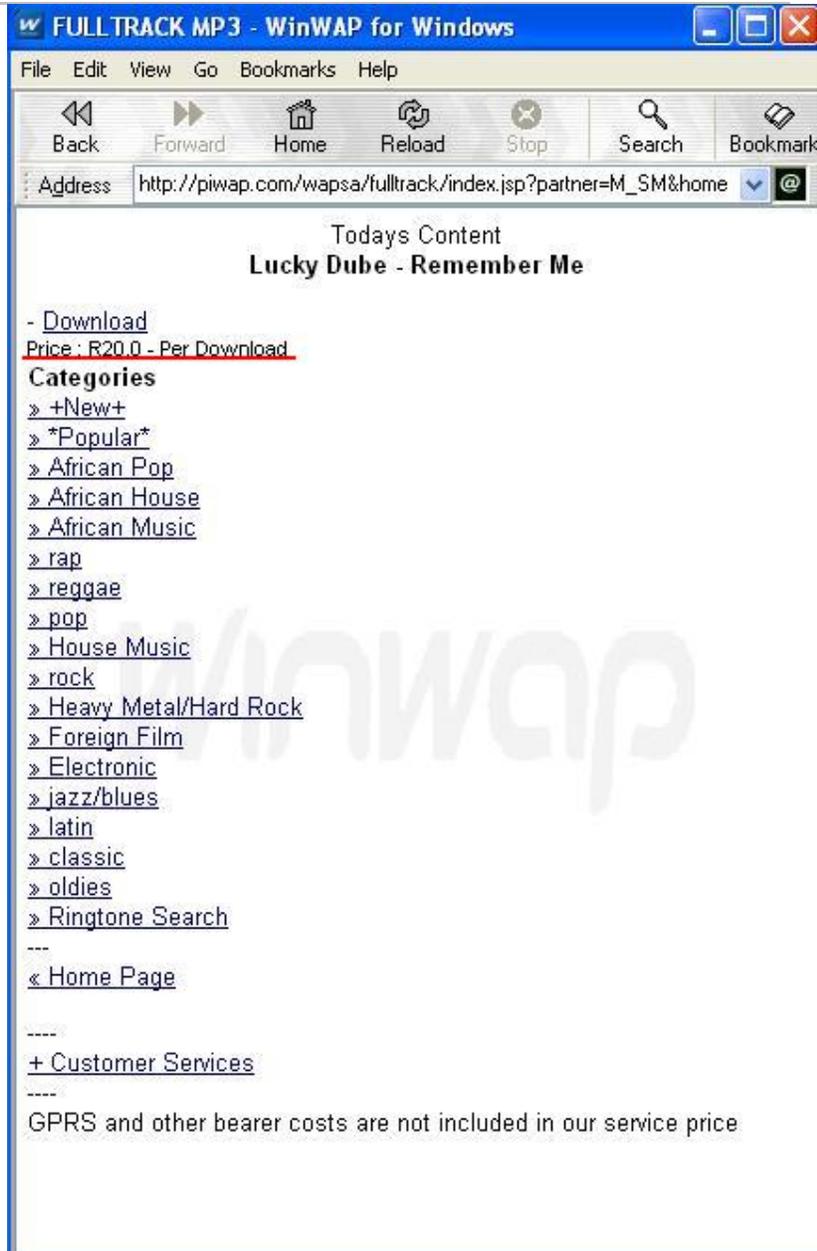


Figure 7

And Then Selecting African Pop as an Example

Figure 8