# Adjudicator's Report

Wireless Application Service Providers' Association

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| **Complaint number** | **30621** |
| **Cited WASPA members** | Tech Garden Media Limited (1484) |
| **Notifiable WASPA members** | Basebone Pty Ltd (1344) |
| **Source of the complaint** | WASPA Media Monitor |
| **Complaint short description** | Alleged breaches of provisions of the Code prohibiting intellectual property infringements; prohibiting false or deceptive practices and requiring certain pricing information to be displayed in subscription service marketing materials |
| **Date complaint lodged** | 2016-06-01 |
| **Date of alleged breach** | Unspecified |
| **Applicable version of the Code** | 14.4 |
| **Clauses of the Code cited** | 4.5, 5.5 and 12.1 |
| **Related complaints considered** | • Appeal panel's ("the 15477 Appeal Panel") report for complaints 15477, 15722, 16851, 16977, 17184 and 17236 |

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|---|---|
| | dated 2013-10-04 (“the 15477 Appeal Report”)<br>• Appeal panel’s (“the 16294 Appeal Panel”) report for complaints 16294, 16554, 17821 and 17828 (“The 16294 Appeal Report”)<br>• Appeal panel’s (“the 16313 Appeal Panel”) report for complaints 16313 and 17007 (“the 16313 Appeal Report”)<br>• Complaint 30643 |
| **Fines imposed** | R15 000 for an infringement of clause 5.5<br>R15 000 for an infringement of clause 12.1 |
| **Is this report notable?** | Notable |
| **Summary of notability** | This complaint raises questions about the application of clause 4.5 which merit further consideration. This report also contains fairly detailed discussions about the applications of clauses 5.5 and 12.1 which may be of interest to other adjudicators. |

## *Initial complaint*

This complaint was lodged by the WASPA Media Monitor (“the Monitor”) regarding aspects of a subscription service (“the service”) operated by the Member. The complaint is unusual in that it arose as a consequence of discussions between the Monitor and the Member regarding whether the service infringes clauses 4.5, 5.5 and 12.1 of the Code.

It appears that the Monitor and the Member disagreed on certain changes to the service in order to bring the service into compliance with the Code, presumably based on the Monitor’s understanding of these provisions of the Code.

The purpose of this complaint, as the Monitor described it, “is therefore to ask the adjudicator to rule on the disagreed points”.

I have attached the details of the complaint to this report as annexure “ **A**” as reference. The questions which the Monitor and the Member seek clarity on appear to the following:

1. *Is the member potentially breaching clause 4.5 and 5.5? When entering the consumer journey in subscribing to the Whatsmob service, the media monitoring team's opinion is that the journey is misleading as it looks like a Whats App / Gumtree campaign. It is our view that if it is mobile content that is being sold, it should sell mobile content visually – even if it is content for that specific app (without it looking like the application itself). It is our opinion that Tech Garden are potentially not respecting the intellectual property rights of Whats App and Gumtree.*

2. *Is the member potentially breaching clause 12.1? As per the WASPA Code of Conduct, the requirement for pricing is to be placed immediately adjacent to the call-to-action button, in a clear and prominent matter.*

This complaint is to be read with the report on complaint 30643 which is based on similar facts and issues.

## *Member's response*

The Member submitted its response to the complaint on 2016-06-15 and I have attached the Member's submissions as annexure "**B**" to this report.

The Member disagreed that the service infringed clauses 4.5, 5.5 and 12.1 of the Code. The Member expressed a number of concerns about this present complaint. These concerns are set out in annexure "B".

I will attempt to summarise the Member's responses to the Monitor's allegations that the service infringed clauses 4.5, 5.5 and 12.1 below.

### *Clause 4.5 - Intellectual property infringement*

The Member submitted that it operates in numerous jurisdictions and its campaigns promoting content customised for either WhatsApp or Gumtree users have not been challenged on the basis of intellectual property infringement in the past.

The Member pointed to another app in the Apple App Store that makes use of the WhatsApp logo and argued that the service would surely not have been permitted to be listed if it infringed the relevant company's intellectual property rights (in this case, WhatsApp and Gumtree).

The Member also questioned whether the Monitor and certain WASPA suppliers that were consulted about this complaint are competent to make any legal determination regarding the service's apparent infringement of intellectual property rights.

### *Clause 5.5 - Provision of information to customers*

The Member argued that it disclosed relevant information to potential consumers and suggested that this clause of the Code was raised merely to reinforce the Monitor's argument under clause 4.5 of the Code.

### *Clause 12.1 – Display of pricing information*

On this point, the Member stated that the service displays pricing information "adjacent" to the call to action button. The Member argued that this pricing information "is clearly legible as applied through the 'reasonable persons' test".

The Member pointed out further that the question of the adequacy of its pricing information disclosures had not previously been called into question and it was unsure why this "suddenly became an issue" with the Monitor?

## *Sections of the Code considered*

As I mentioned in the header of this report, this complaint falls to be adjudicated under version 14.4 of the Code. The clauses cited as as follows:

> ***Intellectual property***
>
> *4.5. Members must respect the intellectual property rights of their clients and other parties and must not knowingly infringe such rights.*
>
> *…*
>
> ***Provision of information to customers***
>
> *5.4. ...*

*5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.*

*…*

***Display of pricing information***

*12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.*

## *Decision*

### *Clause 4.5*

Although the Code not only prohibits members from infringing intellectual property rights but it also enjoins them to "respect the intellectual property rights of their clients and other parties". The question before me is how to apply this clause in this complaint?

Making a determination that a member has infringed clause 4.5 of the Code requires that the member first be determined to have infringed either a client's or "other parties'" intellectual property rights. I don't believe that it would be controversial to state that:

- where a complaint comes before an adjudicator that contains some sort of credible determination that the member has infringed a person's intellectual property,
- an adjudicator could justifiably rule that the member concerned breached clause 4.5 of the Code.

The difference in this complaint is that the Monitor has alleged that the service has infringed WhatsApp's and/or Gumtree's intellectual property rights and, as a consequence, has infringed clause 4.5 of the Code. This allegation required the Monitor to arrive at the conclusion that the service likely infringed 3rd parties' intellectual property rights and it would then fall to me to determine whether this is, indeed, the case.

Deciding whether the Member has infringed a 3rd party's intellectual property rights is, in itself, a nuanced determination that relies expertise in aspects of intellectual property law. While adjudicators are typically experienced lawyers, I have my doubts that an adjudicator would reasonably be expected to make this determination before weighing an infringement of the Code itself.

Such a determination may even fall outside the scope of the Code and, if that is the case, clause 24.11 states the following:

> *24.11. WASPA will not consider a complaint if it:*
>
> *(a) falls outside the jurisdiction and mandate of WASPA*

It would, however, be competent for an adjudicator to rule that a member infringed clause 4.5 if the adjudicator is furnished with compelling evidence of an intellectual property infringement by the member concerned. I am not convinced that such evidence is before me and I am unable to rule on whether the service infringed clause 4.5 in this complaint.

## *Clause 5.5*

Unlike clause 4.5, making a determination in terms of clause 5.5 is less problematic. There is also precedent on this point in the form of the report on complaint 25349. In complaint 25349, the member was found to have breached clause 5.5 by using a mobile service that gave the impression that it was operated by WhatsApp. In that report, the adjudicator found as follows:

> *Clearly, the intention behind the service's landing pages' design and the domain name used was to give visitors to the website the impression that the websites belonged to WhatsApp Inc, the proprietor of the WhatsApp service. A close examination of the landing pages and the website address would reveal the use but not all consumers would conduct such a careful examination and, I suspect, that was the idea.*
>
> *This sort of phenomenon has become common in a variety of fraudulent schemes and is known as "phishing". I found a few definitions of "phishing" or "phish" online and they share a common theme:*

1. *"the fraudulent practice of sending emails purporting to be from reputable companies in order to induce individuals to reveal personal information, such as passwords and credit card numbers, online."*

2. *"to try to obtain financial or other confidential information from Internet users, typically by sending an email that looks as if it is from a legitimate organization, usually a financial institution, but contains a link to a fake website that replicates the real one."*

3. *"The act of sending email that falsely claims to be from a legitimate organization. This is usually combined with a threat or request for information: for example, that an account will close, a balance is due, or information is missing from an account. The email will ask the recipient to supply confidential information, such as bank account details, PINs or passwords; these details are then used by the owners of the website to conduct fraud."*

*Phishing is synonymous with "spoofing". The verb, "spoof" is defined as follows:*

> *to fool by a hoax; play a trick on, especially one intended to deceive*

*What all of these definitions have in common is the practice of passing one thing off as another, typically legitimate, thing with the intention of deceiving people into believing the thing being presented is the authentic thing with the result that those people rely on that deceit.*

*Between sections 5.4 and 5.5 of the Code, I see section 5.5 as informing 5.4. The central questions are whether Mypengo "knowingly disseminate[d] information that is false or deceptive" or whether the manner in which the service is presented "is likely to mislead by inaccuracy, ambiguity, exaggeration or omission".*

*The service is not affiliated with WhatsApp Inc, as far I can tell, and the sole purpose for the deception is to persuade consumers to click on the "Download" button on the misleading web page which then directs the consumers to another landing page which offers wallpapers for WhatsApp users as part of a subscription service. The wallpaper offer pages*

> *are not styled as WhatsApp Inc web pages and are accessible at a completely different domain.*
>
> *The service is not only misleading, it is deceptive. It is virtually identical to common Internet frauds calculated to persuade unsuspecting consumers to part with money, personal information or both. In this case the purpose of the deceit seems to be to persuade consumers to subscribe to Mypengo's content subscription service at R5 per day. The service only appears to have affected a dozen consumers, if Mypengo's calculations are correct, but this doesn't detract from my concern about how the service was designed and presented in the first place.*
>
> *...*
>
> *Misleading consumers through poorly designed landing pages or misconceived campaigns is certainly problematic but a service such as the Sonxxie service that is specifically designed to deceive consumers in order to increase a subscription base is even more objectionable. I have no difficulty finding that the service breached section 5.5 of the Code and, flowing from this finding, I also find that Mypengo has not maintained "honest and fair dealings" with its customers and has breached clause 5.4 of the Code.*

While complaint 25349 dealt with both clauses 5.4 and 5.5, the adjudicator's comments regarding clause 5.5 are relevant to this present complaint. In this matter there is no doubt that the service was designed to give the appearance of an association with either WhatsApp or Gumtree. Both are popular consumer services and the association would likely persuade consumers to make use of the Member's service on the basis of WhatsApp's and Gumtree's reputations, respectively.

It is not clear from the service's marketing materials that the service is not associated with this two service providers. The overall designs of the service's two landing pages also appears to be calculated to inform an association with these otherwise unrelated services. Accordingly, I have little difficulty concluding that the service is "deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission" and a breach of clause 5.5.

## *Clause 12.1*

Clause 12.1 is the successor to clause 11.1.1 of the previous generation of the Code ("the superseded Code model"). The most recent version of clause 11.1.1 can be found in version 12.4 of the Code. It stated the following:

> *11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.*

The Code of Conduct was rewritten and, starting with version 13.1 of the Code, this prominence requirement was initially encapsulated in clause 12.1 of the Code which dealt with "Web advertising":

> *12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.*

Clause 12.1 was revised in version 13.6 of the Code and placed under the sub-heading "Display of pricing information":

> *12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.*

This remains the formulation of this clause in the latest version of the Code, namely version 14.5. Unlike the current formulation, clause 11.1.1 of the superseded Code model focused on "prominently and explicitly identify[ing] the services as 'subscription services'".

Clause 12.1 more directly emphasises the necessity that "pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action" where there is a call-to-action for services that are neither free or charged at standard rates.

The question of what "prominently" meant remained open to interpretation until various appeal panels began including guidance in their reports on this issue. The 15477 Appeal Report and the

16313 Appeal Report explored this question and gave helpful guidance on this issue which has since been adapted to the current Code generation, specifically clause 12.1.

## Transparency

The 15477 Appeal Report dealt with a predecessor to clause 12.1, specifically clause 11.1.1 of version 11.0 of the Code. The 15477 Appeal Panel considered the question of prominence in some details in that matter and gave guidance on the question of what prominence means in the context of subscription pricing information:

> *We considered these arguments and wish to provide the following guidelines:*
>
> *1. The purpose of the prominence of the subscription services is to alert the consumer to the potential cost in a manner that would not be easily overlooked. As a result the caveat subscriptor rule is not an appropriate test. Rather, adjudicators should prefer the more recent approach of the Consumer Protection Act in ensuring that important or unusual terms are highlighted and drawn to a consumer's attention.*
>
> *2. We consider the cost of the subscription to be a very important aspect of the service and this aspect must always be highlighted. The requirement to highlight the fact that this is a subscription service and what the cost of the subscription service is, is emphasised by chapter 9 of the Advertising Rules (version 2.3).*
>
> *3. We consider the –*
>
> > *1. position,*
> >
> > *2. size, and*
> >
> > *3. colouring of the text informing a consumer to be important when deciding whether the text is sufficiently prominent to comply with clause 11.1.1 of the Code as read with chapter 9 of the Advertising Rules.*
> >
> > *4. …*
> >
> > *5. As a result it would appear that WASPA members have assumed that the subscription services text may be placed anywhere on the email or Web page if no*

> *unique access number or Content access code exists. We can not support this approach. Clearly a member is still required to place the subscription service text in a position of prominence …*

The 15477 Appeal Panel's interpretation was quoted with approval by the 16294 Appeal Panel in the 16294 Appeal Report.

The 16313 Appeal Report considered clause 11.1.1 of version 11.6 of the Code which stated the following:

> *Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility or information promoted in that material.*

The 16313 Appeal Panel also referred to the 15477 Appeal Report. It then expanded the interpretation of the prominence requirement in the 16313 Appeal Report and its discussion is relevant to an interpretation of clause 12.1:

> *5.2.6 In the second place, and more pertinently, the size of the font cannot be the only measure of "prominence" (and we are in agreement with the appeal papers that it is "prominently" rather than "explicitly" that is in question. We are of the opinion that explicitly goes to the wording, and prominently goes to the design.)*
>
> *5.2.7 The adjudicator referred to a quote from decision 16559, but both the adjudicator and Appellant appear to have missed that this quote is in fact from the Advertising Rules introduction. It states, inter alia, that ". . .WASPs may not seek to circumvent these criteria in any way by attempting to exploit any potential loopholes in the rules where by doing so they may deprive the consumer of the minimum information required. . .". The Appellant has quite correctly pointed out that a loophole can occur when there is no rule. The fact that there is only a rule about the size of the font and not the placement cannot be interpreted to allow the WASP to place information in a manner that compromises its prominence.*
>
> *5.2.8 The relevant definition of prominent, as found on www.oxforddictionaries.com, is "Situated so as to catch the attention; noticeable". In this respect, we are in agreement that*

> *the adjudicator erred. However, that error lay in his reference to Clause 9.2.1.1 of the Advertising Rules as the only measure of prominence for Clause 11.1.1 of the Code.*
>
> *5.2.9 The question before this panel is therefore whether the communication around the subscription service is situated so as to catch the attention, and noticeable.*
>
> *5.2.10 We find that it is not. Whether this situation should be remedied by an increase in font size or a change in the placement of the information is not within the mandate of this Panel to recommend. The information must, however, be communicated with sufficient prominence that a reasonable consumer would inevitably notice same. This is not the case on the landing page in question.*

In the case of the Gumtree landing page, the pricing information and an indication that the service is a subscription service are stated in lightly coloured text on a lightly coloured background. The sentence, “Subscription R7/day”, while placed below the large “Continue” button, is hardly “situated so as to catch the attention; noticeable”.

In the case of the WhatsApp landing page, the relevant text is in the same position. Unlike the Gumtree landing page, the text on the WhatsApp page is somewhat clearer – lightly coloured text on a dark background. It is arguably more noticeable because of the colours used but it is printed in small text and I don’t believe it is sufficiently formatted to meet the requirement that it be “clearly and prominently displayed”.

In neither case does the relevant text “catch the attention” of the consumer. I therefore find that both landing pages fail to meet the standard prescribed by clause 12.1.

## *Sanctions*

In light of my finding that the service infringed clauses 5.5 and 12.1, I impose sanctions of R15 000 in respect of each clause with a total sanction of R30 000. These fines are payable on demand by the Secretariat, subject to the suspension of the sanction as I describe below.

As I mentioned at the beginning of this report, the complaint came before me as part of a joint initiative by the Monitor and the Member to seek clarification on the questions posed by the complaint.

Therefore, I believe it is only appropriate to recognise this co-operation between the Member and the Monitor by suspending the sanctions pending withdrawal of the version of the service that forms the subject matter of this complaint within 10 business days of communication of this report to the Member.

## *Matters referred back to WASPA*

The versions of the service that form the subject matter of this complaint should be withdrawn as a condition for the suspension of the fines imposed for breaches of clauses 5.5 and 12.1 of the Code. In the event the Member fails or refuses to withdraw the service within the time period specified, the fines become payable on demand by the Secretariat.

"A"

IP: Tech Garden

SP: Basebone

Date: 1 June 2016

**PURPOSE OF FORMAL COMPLAINT:**

The media monitoring team were in discussions with Tech Garden regarding a few problem areas with their Whatsmob Subscription Service. Some revisions were made by the IP, but other required revisions were not agreed upon.

The purpose of this complaint is therefore to ask the adjudicator to rule on the disagreed points.

**These are:**

1. Is the member potentially breaching clause 4.5 and 5.5? When entering the consumer journey in subscribing to the Whatsmob service, the media monitoring team's opinion is that the journey is misleading as it looks like a Whats App / Gumtree campaign. It is our view that if it is mobile content that is being sold, it should sell mobile content visually – even if it is content for that specific app (without it looking like the application itself). It is our opinion that Tech Garden are potentially not respecting the intellectual property rights of Whats App and Gumtree.

2. Is the member potentially breaching clause 12.1? As per the WASPA Code of Conduct, the requirement for pricing is to be **placed immediately adjacent to the call-to-action button, in a clear and prominent matter.**

**CLAUSES TO CONSIDER:**

**Intellectual property**

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

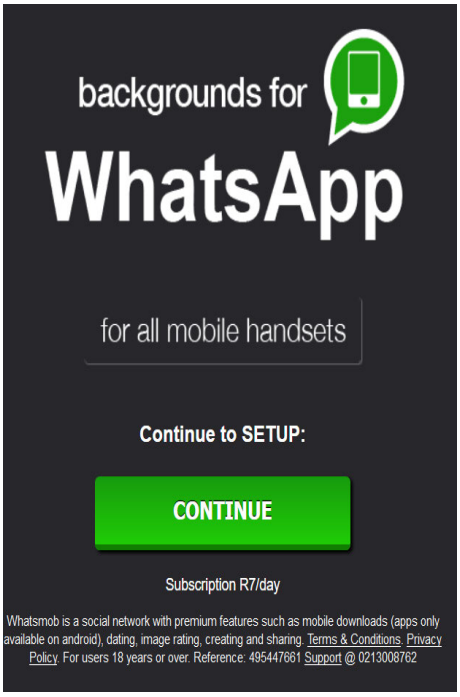
**Provision of information to customers**

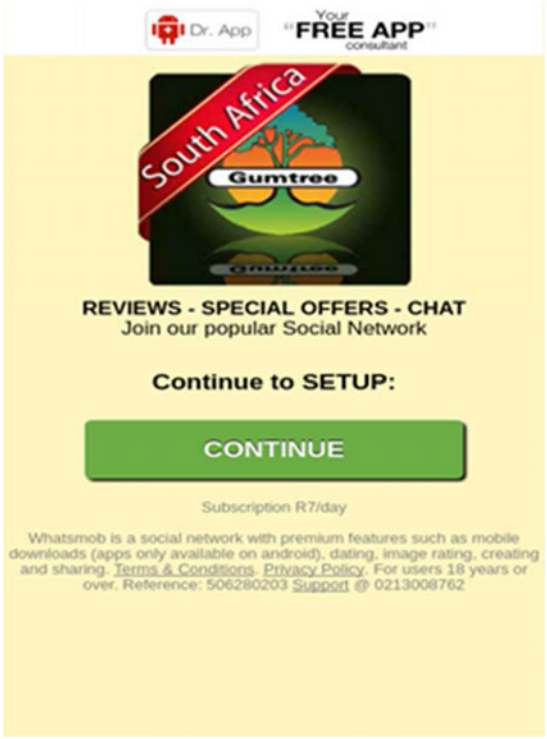
5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

**Display of pricing information**

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

**MEMBER'S LANDING PAGES:**




Note: The member has agreed to remove the "Continue to SETUP" from the WhatsApp landing page above.

"B"

TechGarden

References:
Formal Complaint Notices #30621 dated 1st of June 2016 and #30643 dated 2 d of June 2016;

Dear **WASPA**,

We have reviewed the above mentioned cases and provide our response in relation to the matters raised by WASPA's Media Monitoring team below.

**Notes:**

1) Please note that we requested that WASPA combine the 2 cases within one response/procedure, as WASPA's Media Monitor has raised the same matters within both cases.
2) WASPA's Media Monitor is seeking an independent adjudicator's opinion on the matters raised within these cases.
3) Tech Garden Media are in agreement with receiving an opinion based on the independent adjudicator's view as to the matters raised by the Media Monitor.
4) It is hoped that the opinion provided will provide the industry (WASPA and its members) with a precedent on the matters raised from a legal standpoint rather than a subjective one.

**Background:**

1) WASPA case #30621 stems from a Heads Up issued by the Media Monitor
2) The reason case #30621 has escalated from a Heads Up to a Formal, is due to the fact that no agreement could be reached between the parties in relation to the matters raised
3) WASPA case #30643 was never discussed informally between the parties, and was issued as a direct formal against our company
4) On reviewing case #30643, the matters raised by the Media Monitor are identical to those raised within case #30621
5) It was at this point that we requested that both cases #30621 and #30643 be combined

**Matters Raised:**

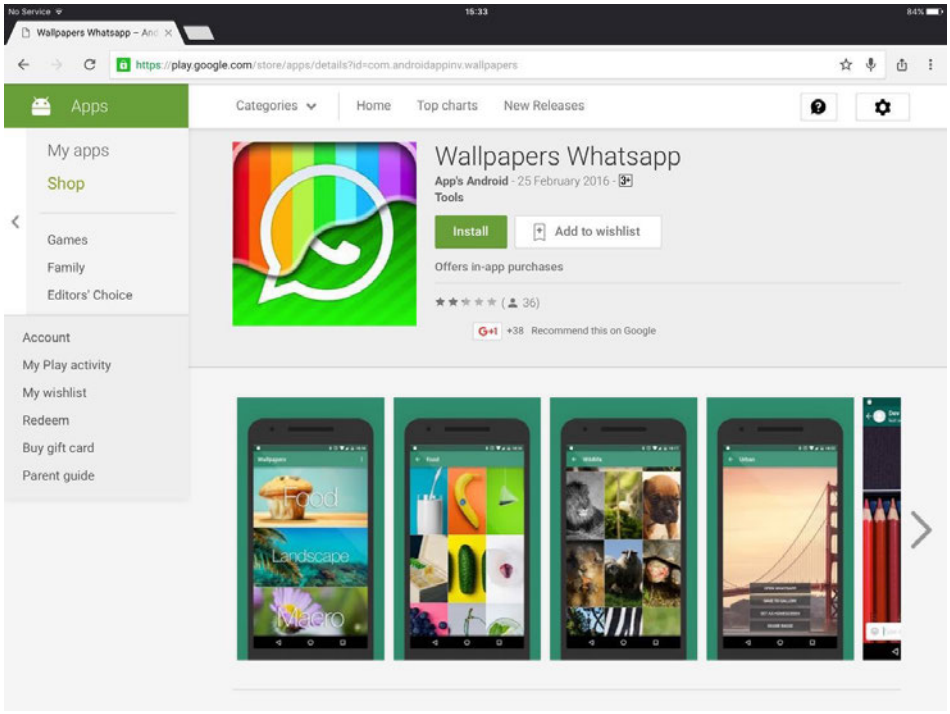
1) Media Monitor's viewpoint that Intellectual Property rights are being infringed, thus insinuating a breach of clause 4.5 and 5.5 of the WASPA Code of Conduct
2) Media Monitor's viewpoint that pricing displayed within a 'Landing Page' does not conform to clause 12.1 of the WASPA Code of Conduct

**Case(s) Response:**

1) Alleged breach of clause 4.5 of the WASPA Code of Conduct
    a. We do not agree with the Media Monitor's viewpoint that there has been a breach of 4.5 relating to Intellectual Property
    b. We operate these services across multiple territories including South Africa
    c. WASPA, a member association with its own Code of Conduct, is the only body globally (this includes legislative regulators) which has raised issue with Intellectual Property law relating to services operated by our company
    d. We have never received correspondence in any territory in which we operate relating to Intellectual Property infringement for any of our services
    e. All services across all territories are reviewed by a legal team, and applicable laws and/or regulations are applied within each separate market
    f. In relation to Intellectual Property, we apply the laws of the International Trade Mark Regulation

g. Specifically, Article 12, letter c) of the Council Regulation (EC) No 207/2009
h. Which reads:
"*A community trade mark shall not entitle the proprietor to prohibit a third party from using in the course of trade:*
*c) the trade mark where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts, provided he uses them in accordance with honest practices in industrial or commercial matters*."
i. Our products and/or services offer our users or prospective customers the opportunity to enhance an existing application/service or improve their use of the same
j. In case #30621, we are promoting backgrounds for WhatsApp in order for users to enhance the look and feel of their pre-installed WhatsApp application
k. The Dr App product (case #30621) allows users to maximise the use of their pre-installed app, in this case Gumtree allowing users to obtain tips and reviews about the same
l. In case #30643, we are promoting a directory of users who currently use WhatsApp and are registered to our service, allowing members to interact across a mainstream chat platform outside of our existing social network
m. As we operate in the field of the mobile app market, products and services similar to ours are readily available through native app stores, including but not limited to iTunes (Apple) and Google Play (Google)
n. These offerings would not be permitted within the native app stores if Intellectual Property rights had been infringed
o. Promoters of services within these native app stores are required to submit their offerings for approval to the providers of the native app stores prior to consumer availability
p. As Apple and Google control the 2 biggest app stores globally, we would be surprised to find services offered to consumers if there was an Intellectual Property rights infringement
q. An example of a similar service being offered on iTunes (Apple) is as follows:

r. An example of a similar service being offered on Google Play (Google) is as follows:




s. Based on the information provided from points A-R above, we reiterate that we are not in breach of clause 4.5 of the WASPA Code of Conduct nor International Law in respect of Intellectual Property rights

2) Alleged breach of clause 5.5 of the WASPA Code of Conduct
   a. We do not agree with the Media Monitor's viewpoint that there has been a breach of 5.5 relating to Provision of Information to customers
   b. The services clearly detail the product/service being offered and where it can be utilised by the consumer
   c. We feel that this clause has no relevance to the cases submitted as this clause is being used to support the viewpoint of the Media Monitor in relation to the alleged breach of clause 4.5 of the WASPA Code of Conduct in respect of Intellectual Property

3) Alleged breach of clause 12.1 of the WASPA Code of Conduct
   a. We do not agree with the Media Monitor's viewpoint that there has been a breach of 12.1 relating to Display of pricing
   b. The pricing information is placed 1 pixel below the call-to-action button and 1 pixel above the disclaimer
   c. The definition of 'adjacent' as per dictionary.com states: lying near, close, or contiguous; adjoining; neighbouring
   d. Based on the definition of adjacent, we believe that our pricing is positioned adjacent to the call to action button as per the WASPA Code of Conduct
   e. The pricing information is prominently displayed and is clearly legible as applied through the 'reasonable persons' test
   f. At no time in our history of operations in South Africa, has the Media Monitor previously complained about the positioning of the pricing information within our campaigns, either informally, through the Heads Up process or in any previous Formal complaints
   g. Based on point D, we are unsure as to why in May 2016, the position of pricing suddenly became an issue with the Media Monitor

TechGarden

Having reviewed all documentation submitted in relation to both cases in which are addressed within this document, it is necessary to raise 'Points of Concern' as to potential issues identified within the initial complaint submitted. We believe that the below issues are very much relevant to these cases and are a defining factor when an opinion, based on a legal standpoint, is provided.

**Points of Concern:**

1) In case #30621 the Media Monitor supplied documentation stating "but other required revisions were not agreed upon". The use of the word 'required' implies that the Media Monitor's viewpoint/opinion is final. Our understanding is that this is not the case, nor does the Code of Conduct permit such actions. The Media Monitor, or their team, may only make suggestions as a way in which to remedy a perceived matter. Such suggestions should be unbiased and based on applicable law, not on the opinion of an individual
2) With reference to clause 4.5, our understanding is that WASPA's Media Monitor is not an expert on Intellectual Property, nor do they hold a legal qualification within this field. Due to this, opinions put forward of this nature are merely subjective and not based on law
3) From reading case #30621, the Media Monitor makes reference to WASPA's suppliers also allegedly flagging the services as possible intellectual property infringements. As far as we are aware, the suppliers in question, are not experts in intellectual property, nor do they act in a legal capacity on this matter, and therefore again their opinion is a subjective one and not based on law
4) We are unsure as to why, reference was made to WASPA's suppliers. In this particular case, neither Empello or MCP have completed the necessary tender process in order to be awarded a contract with WASPA, and are only providing a service to WASPA under a test scenario in order to assist the industry in managing the monitoring of affiliate (not member) advertising
5) We would like to inform the adjudicator, that our aggregator liaised with one of the suppliers mentioned in point 3, regarding the position on providing viewpoints to potential infringements to Intellectual Property, and were informed that they are not experts within this field, nor are they legally trained in this field, and that they could not categorically state if there was an Intellectual Property infringement
6) We would also like to inform the adjudicator, that we have been informed by our aggregator that they have advised WASPA of a potential anti-competitive practice being conducted by one of the suppliers mentioned in point 3
7) As stated in point 3 f, the Media Monitor has at no time previously raised issue with the placement of the pricing within our campaigns
8) The Media Monitor has the opportunity to raise this perceived 'price positioning' issue within the CodeCom forum (the last meeting held in May 2016) as this not only affects Tech Garden, but many other members of WASPA. No such matter was raised by the Media Monitor, their team or WASPA
9) In relation to point 8 above, it is appropriate of us to enquire as to whether or not the Media Monitor, their team or WASPA in general are issuing Formal Complaints to all members relating to the same. If not, why not? As failure to operate within a level playing field could be construed as a case of targeting a specific member unfairly

In conclusion; in general we appreciate the role of the Media Monitor and their team. In circumstances such as this, an independent opinion is imperative, especially concerning legal points. It is normal for parties to not agree on all aspects, however, there is usually a middle ground. When reviewing the cases, and the content within, we have to ask if the Media Monitor and their team are getting sufficient support, from WASPA, in general. WASPA itself has the ability to seek independent legal opinion; either through their attorney on record or via external legal parties. Additionally, WASPA has Working Groups where subjective/opinionated matters, such as price positioning, can be discussed/defined and if necessary amendments to the code can be made once an agreement has been reached or further to that research conducted if there isn't general consensus. That is the purpose of a member trade body, and we are all responsible for the implementation of the WASPA Code of Conduct as well as ensuring all relevant tools and information is available to those that apply the Code. We look forward to the adjudicator's opinion in this matter.

Best regards,
Tech Garden Compliance Team