



Wireless Application Service Providers' Association

Report of the Appeals Panel

Complaint number	30621 and 30643
Cited WASPA members	Tech Garden (1484)
Notifiable WASPA members	N/A
Appeal lodged by	Tech Garden (1484)
Type of appeal	Face to Face
Scope of appeal	<input checked="" type="checkbox"/> Review of the adjudicator's decision <input checked="" type="checkbox"/> Review of the sanctions imposed by the adjudicator
Applicable version of the Code	14.4
Clauses considered by the panel	5.5
Related complaints considered	N/A
Amended sanctions	The sanctions are not amended.
Appeal fee	Appeal fee is not refunded
Is this report notable?	Yes
Summary of notability	Whether a particular advertising campaign is knowingly deceptive will depend on the factors in each campaign. No hard and fast rules can or should be made as each case should be considered on its own merits.

Initial complaint

The respective formal complaints lodged by the Media Monitor pertained to potential breaches of clauses 4.5; 5.5 and 12.1 of the WASPA Code of Conduct (Code) and can be summarised as follows:

Regarding 4.5 of the Code, the Media Monitor expressed concerns that the Member's respective campaigns did not respect the intellectual property rights of third party companies, WhatsApp and Gumtree;

Regarding 5.5, the Media Monitor was concerned with whether the campaign for subscriptions to the Member's services was misleading particularly the manner in which the campaign content potentially conveyed an association with the WhatsApp and Gumtree applications; and

Regarding 12.1, the Media Monitor was concerned with whether the requirement that pricing must be placed immediately adjacent to the call-to-action button in a clear and prominent matter, was fulfilled by the campaign content.

Adjudicator's findings

While the adjudicator found that clause 4.5 of the Code was not breached and clause 12.1 was breached, no appeal has been lodged by the Member regarding clauses 4.5 and 12.1 of the Code. As a result this appeal is confined to the adjudicator's finding that the Member breached clause 5.5 of the Code.

The adjudicator referred to extracts from other appeal reports relating to breaches of 5.5. After considering these as well as the facts before him/her, the adjudicator found as follows:

"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 provider. The overall designs of the service's two landing pages also appear 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."

The adjudicator sanctioned the Member with a fine of R15 000.00 for a breach of clause 5.5, to be suspended pending withdrawal of the version of the service that forms the subject matter of this complaint within 10 business days of communication of the adjudicator's report to the Member.

Appeal submissions

In the Member's written submission for the purposes of the appeal, the Member submitted that the Member's advertising content for the respective campaigns was accurate and sufficiently described the services to which each pertained. On this basis the Member submitted that the content was not deceptive or likely to mislead and as such the Member did not violate 5.5 of the Code.

Furthermore, the Member submitted with reference to case law discussed below that there was no evidence that the Member's advertising content was *intended to deceive* or *knowingly deceive* consumers. In this regard, the Member raised the Adjudicator's report did not present sufficient detail or explanation on how the Member breached 5.5 of the Code.

With reference to case law, the Member submitted that the principle of conveying an association with another brand in your advertising was not misleading.

The Member clarified that each of the advertisements pertaining to the respective complaints were for the Whatsmob service offered by the Member to consumers. The Whatsmob service features a variety of mobile content services.

For the purposes of illustration of the Member's submissions, the Member's pointed to specific elements of the relevant advertising content before the appeal panel.

In connection with the advertisement pertaining to "Backgrounds for WhatsApp," the Member submitted that the Whatsmob service to which the advertisement relates *includes* content downloads by a consumer for use in a WhatsApp application amongst a variety of mobile content services.

The "Directory WhatsApp" advertisement allows Whatsmob users to see which other Whatsmob consumers use WhatsApp and in so doing generates a *listing of WhatsApp users who are also subscribed to Whatsmob*.

The Dr App service (the logo of which was referenced in a particular advertisement) merely provides Whatsmob users with consumer's reviews and tips of various third party applications.

To the issue of deceptive association, the Member's position on the use of a third person's trademark to describe their own services, was defended with reference to BMW/Verimark case cited by the Member and an associated European Council Regulation (see <http://www.saflii.org/za/cases/ZASCA/2007/53.html>) and article 12, letter c) of the COUNCIL REGULATION (EC) No 207/2009 of 26 February 2009 on the Community Trade Mark. In summary, the case provided that the incidental use of a third person's trademark in describing a product was allowed referencing according to the European Council Regulation allowing the use of a third person's trademark where the intended purpose of the product or service is to be

an accessory or spare to a third person's product. The Member raised this case in the context of when it is permitted to use third party trademarks in advertising campaigns

The Member put forward a test to be applied by the panel in its appeal deliberations.

The Member argued in relation to one specific advertisement, that:

- had their advertisement "Backgrounds for WhatsApp" been titled, "WhatsApp Backgrounds" (i.e. there are no words prior to the use of the trademark to show that it is not the trademarked service itself), and
- had the trademarked logo been identical or indistinguishable, that it would have been an impermissible use of such trademark and foul of 5.5 of the Code.

Turning specifically to clause 5.5 of the Code, the Member emphasized that the that the test for breach of 5.5 comprises of two hurdles. It requires that the advertising content in question:

- "is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission"; and
- it also requires that the false information is "knowingly" disseminated.

In essence, the Member submitted that even if the advertisement was found to be false or deceptive, or that is likely to mislead, the Member argued that there was no intention on the part of the Member to disseminate such false or deceptive advertising content and on this basis the Member ultimately, has not breached clause 5.5 of the Code.

Finally, the Member stated their concerns pertaining to:

- the processes within WASPA to obtain clarity on the legality of services vis-à-vis the application of the Code; and
- the "chilling effect" of an unsuccessful appeal finding by the panel on the entire WASP industry that relies on being able to use third party trademarks to describe their services.

Deliberations and findings

The clause in question reads as follows:

"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."

There are 3 different advertising campaigns involved in this appeal and each will be separately considered below.

The 3 advertisements are:

1. "Backgrounds for WhatsApp";
2. "Dr App Gumtree"; and
3. "Directory WhatsApp".

The arguments posited by the Member are the following:

1. The advertisements accurately describe the Member's services;
2. The use of the respective third party application's trademarks is permissible and in line with both the Verimark/BMW case and the European Council Regulation (and so does not fall foul of 5.5); and
3. The adjudicator failed to use the two hurdle test set out in 5.5 of the Code.

The adjudicator found that:

1. The services were designed to give the appearance of an association with the respective third party applications (WhatsApp or Gumtree);
2. The Member understanding that WhatsApp and Gumtree are popular consumer applications, relied on the reputations of each of such applications to likely persuade consumers to make use of the Member's (Whatsmob) service;
3. It was not clear from the advertisements that the (Whatsmob) service offered by the Member is not associated with such third party applications; and
4. The overall design of the advertisements appears to be calculated to inform an association with such third party applications.

In determining whether the decisions of the adjudicator were correct, the panel assessed all of the facts and information before it and the Member's submissions, both written and oral.

We note, as explained by the Member, that although each advertisement was different, the Whatsmob services which they are intended to advertise are the same. Whatsmob services are "a platform that offers users the ability to download content, interact with other users on a social basis, get news and reviews, an all-encompassing platform for content." In addition, the Member described the service as a social network service with content feeds which is communicated to users as a social networking service (see extract from advertisement below):

The panel considered the case law and regulatory references provided by the Member. The panel finds that the case law cannot be applied to this appeal as the facts in that case rested on incidental use of a trademark. The product being marketed was Diamond Guard car paint protector. The marketing featured Diamond Guard's trademark prominently and the use of the BMW trademark was incidental. In both the "Directory WhatsApp" campaign and the "Gumtree" campaign, there is very little presence of the Whatsmob branding (indeed the only reference to Whatsmob is in the fine print at the bottom) while the WhatsApp and Gumtree trademarks are prominently used. The European Council Regulation dealt with a product being "accessory or spare to such third person's product". But neither the "Directory WhatsApp" nor the "Gumtree" services are spare parts or accessories to WhatsApp or Gumtree. In fact, both are Whatsmob services. The "Directory WhatsApp" service allows users of Whatsmob to see and chat to other Whatsmob users, provided that they have consented to their profiles being public and are also WhatsApp users. It is in fact a Whatsmob directory of WhatsApp users. It is not a WhatsApp directory and on the Members admitted that it does not integrate with WhatsApp.

In assessing each advertisement in order to determine whether they were deceptive, the panel followed a dominant impression test. As with the law dealing with unlawful competition, passing off and trademark infringement, what is deceptive or confusing is specific to each case. The World Intellectual Property Organization's Paris Convention for the Protection of Industrial Property sets out that: "a proprietor of a trade mark which is entitled to protection under the Paris Convention as a well-known trade mark is entitled to restrain the use in South Africa of a trade mark which constitutes, or the essential part of which constitutes, a reproduction, imitation or translation of the **well-known trade mark** in relation to goods or **services which are identical or similar** to the goods or services in respect of which the trade mark is well known and **where the use is likely to cause deception or confusion.**" (our emphasis)

International case law follows this general approach when determining when there has been a contravention of the Paris Convention and in deciding whether consumers are likely to be confused. Courts will typically look to a number of factors, including the strength of the mark; the similarity of the goods or services; the similarity of marketing channels used; the degree of caution exercised by the typical purchaser and the defendant's intent.

Whilst it is clear that the use of an identical mark would clearly constitute infringement, using a very similar mark may also give rise to a claim of infringement, if the marks are sufficiently similar so as to cause confusion. However, using the same mark on a completely unrelated product will not necessarily give rise to an infringement claim. This is subject to case by case assessment.

The panel accepts the two hurdles test proposed by the Member for contravention of 5.5. As a result the panel will first set out to establish whether the Member was involved in disseminating "information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission".

"Backgrounds for WhatsApp"

The panel agrees that for this advertisement, had the advertisement "Backgrounds for WhatsApp" been titled "WhatsApp Backgrounds" i.e. there were no words prior to the use of the trademark to show that it is not the trademarked service itself) and had the trademarked logo been identical or almost identical, this would fall foul of clause 5.5 of Code. However, the insertion of the words "Backgrounds for" before the trademarked name "WhatsApp" and the fact that the logo was not identical means that the "Backgrounds for WhatsApp" advertisement does not fall foul of 5.5 of the Code.

This should not be interpreted however, as a strict guideline for determining permissible use of third party trademarks in connection with clause 5.5 compliance. This decision was based on a dominant impression of the advertisement .Overall the association was assessed as not deceptive.

“Directory WhatsApp”

The panel considered various factors including the test posited by the Member. 5.

In determining whether the first part of the Member’s submitted test in 5.5 of the Code was addressed, i.e. whether the advertisement was deceptive, we looked at the dominant impression of the advertisement and the likelihood that it would deceive. The “Directory WhatsApp” service allows users of Whatsmob to see which Whatsmob users (that have consented to their profiles being public) are also WhatsApp users. It is in fact a Whatsmob directory not a WhatsApp directory and by the Member’s own testimony Whatsmob does not integrate with WhatsApp. The description of the Whatsmob service as a “directory WhatsApp” is misleading by virtue of the discrepancy between the service and the impression created by the advertisement. The misleading nature is not cured in our view even if the Member had chosen to call the service “Directory for WhatsApp”.

The similarity in the logo further points to misleading character of the advertisement. On examination of the advertisement, it is our view in accordance with the adjudicator’s impression that the deliberate use of a similar logo, font, colour scheme of the third party application trademark referenced in the advertisement for the overall advertisement of the Whatsmob service demonstrates the Member’s overall intention in constituting the content of the advertisement. The panel consequently agrees with the adjudicator that the “overall design of the service’s landing page appears to be calculated to inform an association with otherwise unrelated services,” i.e. this was in the Member’s words “knowingly deceptive.”

Based on a dominant impression of the advertisement we find the Member to have breached 5.5 of the Code for this advertisement.

“Gumtree”

In determining whether the first part of the test submitted by the Member for violation of 5.5 of the Code was addressed, namely the requirement that the advertisement was deceptive, we looked at the dominant impression of the advertisement and the likelihood that it would deceive. In order to do this the panel considered the actual association with Gumtree as opposed to what was conveyed by the advertisement. The Dr App service as part of the Whatsmob allows users of Whatsmob to get reviews of, and tips for, amongst other things, games, technology and other applications including Gumtree. It is not an accessory to or spare part for Gumtree. There is no association between Gumtree and Whatsmob.

The use of the name Gumtree without any other wording, an almost identical logo, the same font and colour scheme, and the placement of the “Dr App” description at the top of the

campaign with a different background a colour (which makes it look like an unrelated banner ad) all highlight the deceptive nature of the campaign. As a result, the panel agrees with the adjudicator that the “overall design of the service’s landing page is calculated to inform an association with otherwise unrelated services,” and furthermore knowingly deceptive. Using the dominant impression test we confirm that this campaign breached 5.5 of the Code.

Other comments by the panel:

1. The Member objected to the Media Monitor providing advice on how to rectify any errors. In this regard, the panel restates that the Media Monitor is not authorized to provide advice. The Heads-up process, furthermore, is not a process for obtaining advice nor is the Head of Complaints able to provide advice for Members. Members requiring legal advice should get it from legal advisory professionals engaged by the Member.
2. The WASP requested that guidelines regarding compliance with clause 5.5 of the Code and the use of third party trademarks be provided by this Appeal Panel. It is our view that the provision of these guidelines is out of this appeal panels’ mandate and such a request should be referred to WASPA for consideration by the appropriate channels at WASPA’s discretion.

Amendment of sanctions

No amendment of sanctions.

Appeal fee

The Member has been substantially unsuccessful in that the Adjudicator’s ruling in respect of two of the three advertisements complained of was upheld, and as such the appeal fee is not recoverable by the Member.