Wireless Application Service Providers' Association

Report of the Appeals Panel

Complaint number	30730
Cited WASPA members	Interband Enterprise LLC (1315)
Notifiable WASPA members	Smartcall Technology Solutions (0090)
Appeal lodged by	Interband Enterprise LLC (1315)
Type of appeal	Remote
Scope of appeal	[X] Review of the adjudicator's decision [X] Review of the sanctions imposed by the adjudicator
Applicable version of the Code	14.4
Clauses considered by the panel	4.2, 5.1, 5.4, 5.5 and 22.3
Related complaints considered	30621 and 30643 Appeal Panel Decisions
Amended sanctions	None. Original sanctions apply as follows: 1. A fine of R15 000 for the member's breach of clause 5.1; 2. A fine of R75 000 for the member's breach of clauses 5.4 and 5.5; and 3. R15 000 for the member's breach of clause 22.3."
Appeal fee	Not refunded
Is this report notable?	No
Summary of	n/a

notability	

Initial complaint

This complaint was lodged by the WASPA Media Monitor ("Monitor") regarding an adult content service offered by the member. Essentially, the member conducts a subscription service that grants access to adult content. The Monitor has raised concerns about various aspects of the service, beginning with the mobile landing page which is titled "WhatsApp Sex". Aside from the design of the landing page and the messaging from the member, the Monitor also raised concerns about the service's functionality. The provisions of the Code that the Monitor cited address these aspects of the service.

Adjudicator's findings

The adjudicator found that clauses 5.1, 5.4, 5.5 and 22.3 were breached. All of these clauses were appealed by the member and as such the appeal will deal with all of these clauses. None of the clauses cited in the complaint but where the adjudicator found no breach of the Code will be dealt with in this report.

The adjudicator's rulings in respect of the above clauses are set out below for ease of reference:

"Clause 5.1
The member has argued that it is not in breach of this clause because the underlying adult content service has been suspended. It has also argued that because consumers are unable to access the content service, they will be unable to compare offers made through the service's marketing materials and the content that would have been available had the service not been suspended.
These two arguments form the basis of its contention that it has not breached clause 5.1. These arguments belie the more fundamental issue: the member has permitted the marketing campaign promoting the service to continue to run. It has also permitted the subscription and billing mechanisms to operate even though access to the adult content service is no longer possible.

To aggravate matters, the marketing campaign is confusing. The landing page offers a "WhatsApp Sex" subscription service. The confirmation SMSes offer "iPhone 6s 7x from STS at R7.00 Daily";

“WhatsApp Directory from STS at R7.00 Daily” and a welcome to the “WhatsApp Fuck Service”. On completion of the subscription process, the would-be subscriber receives a message stating that “[y]our Directory for WhatsApp is waiting” and including login details for the Private Space site. The Private Space site is, in turn, an adult content service.

In other words, the member has offered access to a service which has been described in various terms despite being aware that, ultimately, access to the Private Space service is impossible. This is a convoluted and misleading campaign. The member clearly “offer[s] or promise[s] services that they are unable to provide”. I find the member in breach of clause 5.1.

Clauses 5.4 and 5.5

For reasons I state below, I will consider these two clauses together. 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.

In this complaint, not only did the member present a campaign that made deceptive use of the WhatsApp brand, it also made numerous confusing offers of access to multiple services, none of which it could grant access to. Even if the Private Space content was accessible through the login details the member sent to the Monitor (and other subscribers), many of the offers communicated through the campaign messaging were, quite simply, misleading and confusing. Another aspect of the member's failure to comply with clauses 5.4 and 5.5 is the fact that the service's subscription and billing mechanisms remained in operation even though the underlying service was suspended. This was negligent and the member's negligence likely resulted in consumers becoming paying subscribers despite being denied access to the service they may have thought they were subscribing to. This is particularly problematic and the member failed to give a reasonable explanation for this or steps it may have taken to ensure that consumers were not subscribed for a service no longer available to them.
I therefore find the member to be in breach of clauses 5.4 and 5.5.

Clause 8.8
The member correctly argued that it is not possible to determine whether the "[c]ontent that is promoted in advertising … [is] the same content that is provided to the customer as part of the advertised service". Although the Private Space service appears to relate to "adult content", I am unable to make a definitive determination whether that content corresponds with the various offers made, even if this appears to be unlikely. I am therefore unable to make a finding on clause 8.8.

Clause 22.3
The member has contended that it has met the requirements of clause 22.3 by stating “18+” on the “WhatsApp Sex” landing page and because the Private Space landing page bears references to “18+” in some locations on the page.
The 27729 Appeal Report also considers this clause in a similar context:
The purpose of this clause is to inform visitors to the site that the content is intended for adults only. Referring back to our discussion about clause 12.1, we remind you that the appeal panel that wrote the 15477 Appeal Report stated the following:
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.
Given the importance of protecting children from sexually explicit materials, a statement that an adult content service is intended only for “18+” is an important statement that should similarly be prominent. This is not an application of clause 12.1 but, rather, is implicit in clause 22.3’s requirements for the words to be stated and for them to be “clearly indicated”:
Any adult service must be clearly indicated as such in any promotional material and advertisement, and must contain the words “18+ only”.
Although the “WhatsApp Sex” landing page contains reference to “18+ only”, the text is relatively small when considered alongside a larger call to action and promotional elements.
The member also contended that the Private Space landing page also bears references to this age restriction. These references can be found in this paragraph of pale text in a relatively small font on a white background:
You are about to enter a website that contains content of an adult nature. This service and website requires you to be 18 years or older to enter. By proceeding you are confirming that you are 18 years or older.
This text is not prominent at all and there are no “clearly indicated” references to the requisite “18+ only” on the Private Space site. The reference to “18+ only” in the “WhatsApp Sex” landing page could be more prominent. That said, I find the text on the Private Space site to be far more problematic and I therefore find the member in breach of clause 22.3.

In summary, I find the member has breached clauses 5.1, 5.4, 5.5 and 22.3. I impose the following
sanctions which are payable on demand by the WASPA Secretariat:
1. A fine of R15 000 for the member’s breach of clause 5.1;
2. A fine of R75 000 for the member’s breach of clauses 5.4 and 5.5; and
3. R15 000 for the member’s breach of clause 22.3.”

Appeal submissions

The member appealed the decisions of the adjudicator as follows:

“Clause 5.1. - R15 000
First, we would like to state that we agree with the concern by WASPA regarding this clause. Our intention is not to mislead the customers.
However, we do not find our messages misleading in this specific part of case. We quote: - To aggravate matters, the marketing campaign is confusing. The landing page offers a “WhatsApp Sex” subscription service. The confirmation SMSes offer “iPhone 6s 7x from STS at R7.00 Daily”;
“WhatsApp Directory from STS at R7.00 Daily” and a welcome to the “WhatsApp Fuck Service”. In other words, the member has offered access to a service which has been described in various terms despite being aware that, ultimately, access to the Private Space service is impossible. Please find below screenshot taken by WASPA Monitoring Team:
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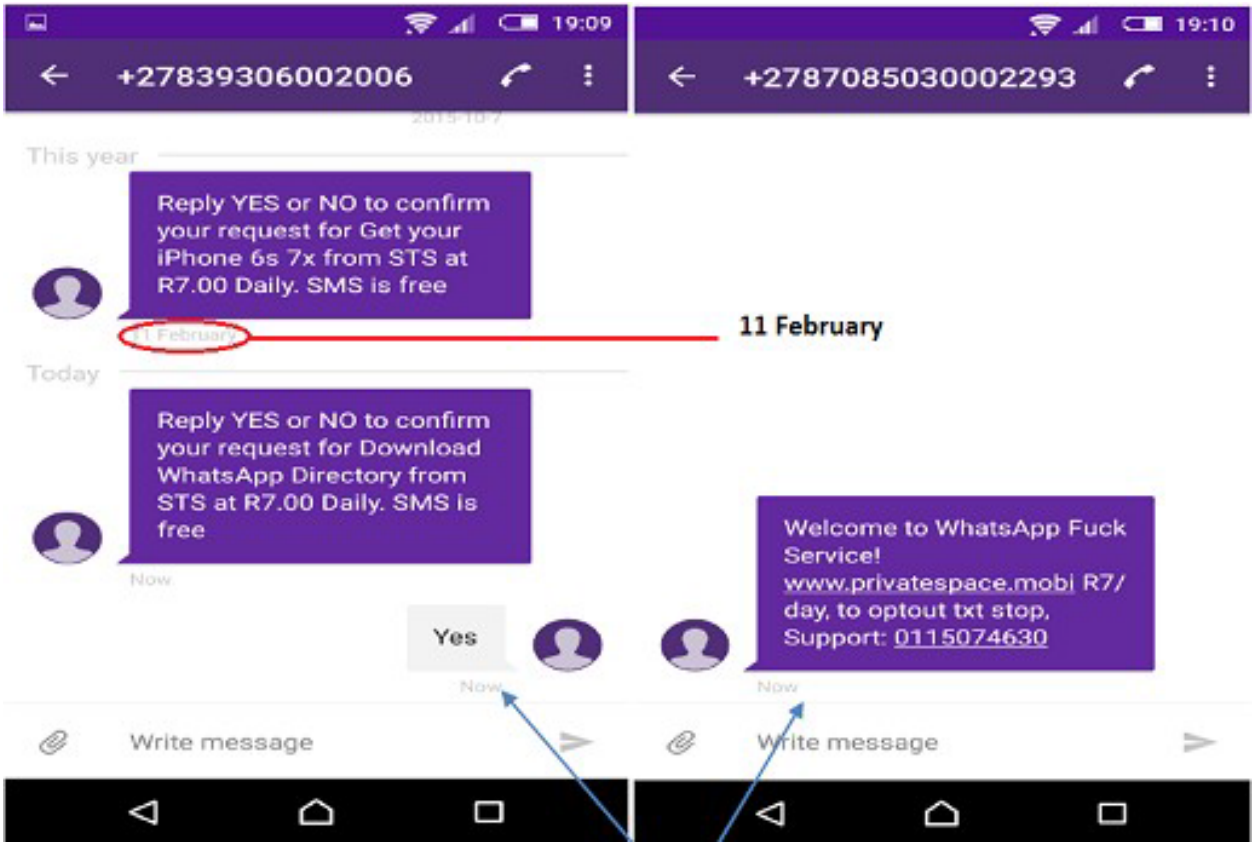

Confirmation SMS implies the number received "iPhone 6s 7x from STS at R7.00 Daily" but the testing of campaign from formal complaint #30730 was done on 9 June 2016. Message from above was not related to our "Whatsapp Sex" campaign and was probably taken from some other testing.
We will comply with the sanctions for clause 5.1. but would like the Appeal Comittee to re-consider a lower fine as at the moment it is R15 000.

Clause 5.4. and 5.5. - R75 000
Both clauses are implying that Interband Enterprises LLC misused Whatsapp name in promoting its service. Please note that this was used in our campaign for Privatespace service only in purpose of using Whatsapp Directory for adult chat.
Below is adopted document from World Intellectual Property Organization we would like you to take into consideration:

We would like to highlight Article 12 of the Council Regulation (EC) No 207/2009
A Community trade mark shall not entitle the proprietor to prohibit a third party from using in the course of trade:
(a) his own name or address;
(b) indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of the
goods or of rendering of the service, or other characteristics of the goods or service;
(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.

Further more, Interband Enterprises LLC has stopped using Whatsapp campaigns in promoting its services for some months respecting decisions and concerns from WASPA. The "Whatsapp Sex" campaign was live from 2015 and was terminated in April 2016. The main issue in this case is the billing that continued even though we stopped the campaign. It was our obligation to inform our provider to cease any operations related to this particular campaign.

We will respect the sanctions for the clauses 5.4. and 5.5. but we ask Appeal Comittee to re-consider all from above as we find sanctions R75 000 to be too severe.

Clause 22.3. - R15 000
We feel that we are not in a breach of this clause. Interband Enterprises LLC respected the clause and included "18+ only" on advertisement as shown below:


19:08
privatespace.mobi/lp3/wpfuck/
NEW Contacts added daily!
WhatsApp Sex
Enter your WhatsApp Number:
e.g. 074...
0631837584
Continue
Subscription Service R7/day
18+ only.
Total members
1 8 1 5 4 0
Camila
I'm in Johanesburg, is there anyone close to me?
Abayomi

We quote from Adjudicator's report the following: - Although the “WhatsApp Sex” landing page contains reference to “18+ only”, the text is relatively small when considered alongside a larger call to action and promotional elements.; This text is not prominent at all and there are no “clearly indicated” references to the requisite “18+ only” on the Private Space site. The reference to “18+ only” in the “WhatsApp Sex” landing page could be more prominent. -
There is also reference to the clause 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. -
a) we would like to separate pricing information from "18+ only" information and exclude clause 12.1. from this discussion.
b) we find "18+ only" visible for the customers and displayed in position below the pricing which we find easy for the customers to see and does not blend with the background.
c) Code of Conduct does clarify the size of "18+ only" information nor does explain the prominence of this.
d) Privatespace contains information 18+ only in disclaimer and T&Cs. However, Privatespace website is our final product offered to the customers and does not enter "advertisement category".
In the clause 22.3. it is clearly specified the following: Any adult service must be clearly indicated as such in any promotional material and advertisement, and must contain the words “18+”. Our banner and landing page is a promotional material before the customer subscribes to the service. As you can notice, we put "18+ only" on a promotional material.

We ask Appeal Comittee to withdraw fine imposed in full amount of R15 000. Interband Enterprises LLC will consider this as a advice to respect WASPA's demands which are in a best interest of a customer. We always respect the ruling when it comes to adult content services and will continue this practise in a future but highlight "18+" more according to this formal complaint.”

Deliberations and findings

The clause in question reads as follows:
“5.1. Members must not offer or promise services that they are unable to provide.”
“5.4. Members must have honest and fair dealings with their 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.”
“22.3. Any adult service must be clearly indicated as such in any promotional material and advertisement, and must contain the word "18+ only".

In respect of 5.1 the argument posited by the member was related to a) the fact that although the service was suspended by them they didn’t realise their Affiliate marketer was still marketing the services. In addition, in response to the complainants argument that the welcome messages

were confusing, they argued that the complainant had refered to an SMS thread relating to a different message and as such same was not applicable to this matter.

The panel finds that neither of these arguments bears any merit.

In the first case, they were still offering services via the Affiliate marketer's promotion of the service even if the service no longer worked. The clause doesn't speak to use of a service but offer or promise of a service. The Affiliate's actions should have been managed – the end result was that an unavailable service was offered.

Secondly, the issue of confusing messages raised by the complainant is a bit of a red herring in that the clause itself doesn't talk to confusion. However, for the sake of completeness we agree that, notwithstanding that the iPhone 6 portion of the messages was not related to this thread, the messages themselves still do not accurately reflect the actual service which should be received at the end of the subscription process. More specifically, the first message talks about a "WhatsApp directory", and only once the subscription is completed does it refer to a "WhatsApp Fuck service" – which is somewhat different.

Finally, the sanction of R15 000 is not on the high end of sanctions awarded by adjudicators for such an infringement and as such no adjustment will be granted.

We will deal with 5.4 and 5.5 together in the same manner as was done by the adjudicator.

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 the European Council Regulation (and so does not fall foul of 5.5); and
3. The services have been suspended by the member.

The adjudicator found that:

1. The services were designed to give the appearance of an association with WhatsApp;
2. The promotion of the service amounted to a practice similar to "phishing";
3. It was not clear from the advertisements what service is offered by the Member and that it is not associated with WhatsApp; and
4. It was deeply concerning that all opt-ins in terms of short code are billed until cancellation irrespective of whether the service in terms of the campaign is still operational.

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.

The panel considered the regulatory references provided by the member. The European Council Regulation dealt with a product being "accessory or spare to such third person's

product". But the services are not spare parts or accessories to WhatsApp. In fact, both are Private Space services.

In any event, the question before us and mandated for our consideration by the Code is not one of trademark infringement. The question that is put before us by the Code is whether the communication is misleading. A legal use of a trademark can nonetheless result in a misleading communication.

In this matter, the overwhelming impression is that the service is something to do with WhatsApp, a service offered by or through the portals of WhatsApp. This is not the case, and the content is therefore misleading.

We therefore find the member to have breached 5.4 and 5.5 of the Code for this advertisement.

Accordingly there is no amendment of the sanction. The sanction is also on the median with regards to sanctions normally handed out by adjudicators for a breach of 5.4 and 5.5.

Finally in respect of 22.3, the member argued that the test used in the pricing aspects of the Code cannot apply to promotional material. In addition, the actual Private Space landing pages cannot be assessed due to the fact that same are not promotional but content pages.

The panel is only going to deal with the promotional material as they agree with the member in respect of the landing pages of Private Space.

The adjudicator found in their ruling that the member had breached 22.3 due to the fact the words "18+ only" were not prominent enough in the WhatsApp advert. They referred to 12.1 of the Code which states: "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."

Due to the reliance on 12.1 and the fact that this was not pricing information we agree that the test in 12.1 does not apply.

However the panel still finds a breach of 22.3. Clause 22.3 requires that the words "18+ only" are clearly displayed. In our view, when one looks at the advert as a whole, the size, prominence and placement of the other text, the text "18+ only" is not "clearly" displayed. It is a smaller font than most of the other text and displayed at the bottom of all the other information relating to the service, aside from the number of members. As it comes after the call to action, it may well be missed. This, together with the harm the Code is trying to prevent means that the panel agrees with the adjudicators findings eventhough not necessarily with the process followed to determine such findings.

The sanction fined was R15 000. We do not find this to be excessive bearing in mind a previous sanction for a breach of this clause was R50 000. Accordingly no reduction in sanction is granted.

Amendment of sanctions

No amendment of sanctions.

Appeal fee

The member has not been successful, and as such the appeal fee is not recoverable by the member.