



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	#30748
Cited WASPA members	Interband Enterprises LLC (1315)
Notifiable WASPA members	Smartcall Technology Solutions (0090)
Source of the complaint	WASPA
Complaint short description	Contravention of sanction imposed in previous complaint
Date complaint lodged	2016-06-13
Date of alleged breach	Unknown
Applicable version of the Code	v14.4
Clauses of the Code cited	24.40
Related complaints considered	n/a
Fines imposed	R15 000.00 for the breach of clause 24.40
Other sanctions	n/a
Is this report notable?	n/a
Summary of	n/a

notability	
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Initial complaint

The WASPA Media Monitor found an online promotion for the member's "Top Adult" subscription service on 9 June 2016 which contained the prominent header "WhatsApp Sex" and the call-to-action to the user to enter their WhatsApp number. The Monitor drew this to the attention of the WASPA Secretariat, who is the complainant in this complaint.

The complainant alleges that this promotion was in contravention of the sanction imposed against the member in a previous complaint (#28310) which was upheld by the Adjudicator.

The complainant alleges that the member has therefore breached clause 24.40 of the WASPA Code of Conduct.

The complainant provided screenshots of the relevant promotional pages and the results of its attempted subscription to the service, which was not successful.

Member's response

The member stated the "WhatsApp Sex" promotional campaign was started before the sanction imposed by the Adjudicator in complaint #28310 took effect. The member states that the campaign was launched on 22 December 2015.

The member confirmed that it had not started any new WhatsApp related campaigns since 20 April 2016, when the sanction in complaint #28310 became effective.

The member also alleged that the campaign in question was being pushed by one of its affiliates even though the relevant promoted service had been stopped.

The member states that it did not receive any revenue from the campaign but that it was prepared to offer a refund to all customers affected.

Sections of the Code considered

Clause 24.40:

If no appeal is lodged, or if the adjudicator has specified certain sanctions as not being suspended pending an appeal, the failure of any member to comply with any sanction imposed upon it will itself amount to a breach of the Code and may result in further sanctions being imposed. WASPA itself may initiate a further complaint against a member for non-compliance with any sanctions.

Decision

It is common cause that no appeal was lodged by the member against the findings or sanctions of the Adjudicator in their report in complaint #28310.

Complaint #28310 related to the member's unauthorised use of certain trademarks owned by WhatsApp in connection with the promotion of the member's subscription services.

The complaint was upheld in this regard by the Adjudicator and the member was ordered to *immediately suspend all services relating to WhatsApp*.

The complainant alleges that the Adjudicator's report was published on 5 April 2016 and that the sanction took effect from this date.

The member alleged in its response that the sanction only became effective after 20 April 2016. It is not clear why the member believes this to be the effective date but nothing turns on this as the complainant accessed the promotion complained of on 9 June 2016, which is after the sanction imposed in complaint #28310 became effective even on the member's own version.

Although the sanction refers to "*services*" and does not expressly refer to the promotion of such services, it is reasonable to infer from the Adjudicator's findings in that complaint that the promotion of the member's services using the WhatsApp trademarks without authority would also constitute a contravention of the Code.

I am therefore satisfied that the "WhatsApp Sex" promotion complained of in this complaint is a contravention of the sanction imposed by the Adjudicator in complaint #28310.

I have noted the member's further argument that the promotion was pushed by an affiliate after the effective date of the sanction in complaint #28310, and not by the member itself.

However it has been settled in a number of adjudications that a member cannot avoid responsibility for the conduct of its contracted affiliates insofar as such conduct falls foul of the requirements of the WASPA Code of Conduct.

The member is best placed to ensure that its affiliates comply with the WASPA Code, and in this case, to ensure that its affiliates are properly notified about sanctions relating to the promotion of the member's services.

The member is therefore precluded from raising this as a defence to the complaint.

In light of the foregoing, I find that the member has breached the provisions of section 24.40 of the WASPA Code, and the complaint is accordingly upheld.

Sanctions

I have taken into account that the member's subscription service which was the subject of the contravening WhatsApp promotion was inactive and that there is no evidence that the member has, itself, contravened the sanction imposed in complaint #28310.

However the member cannot distance itself from the conduct of its contracted affiliate and the member is ultimately responsible for the conduct of its affiliate in these circumstances.

I have also noted that the member has offered to refund customers. However this makes no sense if customers were unable to subscribe to the service.

The member is therefore fined the sum of R15 000.00 for its breach of clause 24.40.
