



Wireless Application Service Providers' Association

Adjudicator's Report

Complaint number	31013
Cited WASPA members	Media Union Limited (1601)
Notifiable WASPA members	
Source of the complaint	Media monitor
Complaint short description	Misleading advertising
Date complaint lodged	12 July 2016
Date of alleged breach	12 July 2016
Applicable version of the Code	14.5
Clauses of the Code cited	4.2, 5.4, 5.5, 5.7, 5.8 (a-i), 12.1, 12.4, 12.5 (a-b), 15.4, 15.5
Related complaints considered	26211, 26240, 31195

Fines imposed	Clause 4.2 – R 25 000 Clause 5.5, 15.4 and 15.5 – R 15 000
Is this report notable?	<i>Not notable</i>
Summary of notability	

Initial complaint

The essential complaint relates to the use of a competition to win a phone to mislead the consumer into subscribing. The consumer has no indication of what the subscription service is for, and is led to believe that they are almost certain to win the phone. The Monitor submitted that it is well established that this tactic is unacceptable.

The Monitor also raised:

- Entries should cost R1,50
 - Pricing is not prominent
 - No call centre number
 - No T&Cs
-

Member's response

The Member submitted that it is not running live subscriptions yet and is simply testing different models. It submitted that it had seen similar advertising and was under the impression that it was approved by WASPA.

They submitted that they will stop their campaigns after they have finished their research.

In a second response, the Member submitted that the campaign was the result of an affiliate marketing company, that the terms and conditions were included so they are not in breach of the clauses cited and that they have cancelled the marketing. They submitted that the wrong procedure was followed and that the Head of Complaints should reconsider the procedure.

Clauses

- 4.2. *Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.*
- 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.*
- 5.7. *A web page containing the full terms and conditions of a service must be readily available to current and potential customers of that service.*
- 5.8. *The full terms and conditions for any service provided by a member must contain:*
- (a) the registered company name of the WASPA member providing the service;*
 - (b) a customer support number;*
 - (c) unsubscribe instructions (for subscription services);*
 - (d) any handset compatibility requirements for the service;*
 - (e) an indication that network fees may apply;*
 - (f) an indication of how billing errors are handled;*
 - (g) a statement that the service must only be used with the permission of the bill-payer (for paid services);*
 - (h) a statement that the service must only be used with the permission of a parent or guardian (for children's services); and*
 - (i) the following statement: "[member name] is a member of WASPA and is bound by the WASPA Code of Conduct. Customers have the right to approach WASPA to lodge a complaint in accordance with the WASPA complaints procedure. [member name] may be required to share information relating to a service or a customer with WASPA for the purpose of resolving a complaint. WASPA web site: www.waspa.org.za".*
- 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.*

Display of minimum terms and conditions

- 12.4. *For any web page advertising a service for which there is not a subsequent confirmation step containing a link to the terms and conditions, the minimum terms and conditions for the use of the service must be clearly displayed.*
- 12.5. *The minimum terms and conditions displayed on any web page must include at least the following information:*
- (a) a customer support number, and*
 - (b) a link to a web page where the full terms and conditions for the service are available.*
- 15.4. *A member must not require that a customer join a subscription or notification service in order to claim an existing reward, to be able to redeem existing loyalty points or to claim a similar benefit. (Example of incorrect marketing: “to claim your prize, join this service”.)*
- 15.5. *A member may offer an incentive for joining a subscription or notification service, provided that it is clear that the benefit only applies once the customer has joined the service. (Example: “if you join this subscription service, you will be entered into a monthly draw for a prize”.)*

Decision

Should the matter be referred back to the HOC?

The Member has requested that this matter be referred back to the Head of Complaints (HOC) and the process reconsidered. This has not been done and the question before me is therefore whether that is procedurally correct.

I am satisfied that it is. In the first place, Clause 24.29 makes it clear that a formal complaint will, once the response steps have been completed, be assigned to an adjudicator. There is no provision for reconsideration of the process by the HOC.

In addition, the Member appears to believe that because they were using an affiliate marketer, the matter should have simply been treated as a “Heads Up” or informal issue. As will appear for below, WASPA does not consider the use of affiliate marketers to be any less serious than if the Member commits the offence themselves.

The use of Affiliate Marketers

This is an issue that has been canvassed repeatedly in WASPA rulings, but for the benefit of the Member, who appears on one hand to be relying on their own ignorance, I will reiterate what has been said in many decisions.

In matter 26211, the Appeal Panel was charged with a situation where an affiliate marketer has committed an act that the WASP immediately acknowledges as wrong, but seeks to mitigate because of the fact that it was an affiliate marketer. In that matter, the Panel said:

At the core of this complaint is the very pertinent question of how much supervision and control a WASP is expected to exercise where it chooses to advertise and promote its websites and services using third parties and affiliate advertising networks in light of the overarching requirements of clauses 4.2, 5.4 and 5.5 of the Code.

In outsourcing advertising and promotion for its services to an affiliate who, it would appear, was either expressly or tacitly permitted by the member to use further third parties without needing to run either the identity of those parties by the member or the content of the material being used to promote the member's websites and services, the Appellant took a risk of the advertising for its services being misleading, deceptive and unfair. The Appellant itself states that, "Often, in these cases, the promotions are delivered on blind networks, and Advertisers are unaware of who the publishers are to maintain business interests". In other words, because the affiliate "delivers" the advertising, the WASP does not concern itself with the details of the actual advertising itself.

Clause 1.2 of the Code makes it clear that an objective of the Code is to ensure that members operate in accordance with ethical and reasonable business practices. This objective is codified into express obligations in clauses 4.2 and 5.4 of the Code which stipulate that:

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

5.4. Members must have honest and fair dealings with their customers.

Misleading and deceptive advertising is not fair. It appears that in this matter it is not contested that the actions of Payrip0.com were not acceptable, were grossly misleading and prejudicial to members of the public.

This Panel does not consider that it is professional to simply allow unchecked use of advertising by unidentified affiliates who the member appears to know often publishes advertising using "blind" networks consisting of other persons who do not comply with the Code and who do not need to seek the Principal's approval on campaigns and strategies.

This Panel therefore upholds the finding that the Appellant has breached clauses 4.2 and 5.4 of the Code.

In matter 26420, the Appeal panel reached the same conclusion via a slightly different route:

The Panel notes that it is common cause that the material in question, alerting consumers to a virus, was unacceptably misleading.

On the question of liability, the Panel notes that one need look no further than the Code, which states:

3.6. Members must ensure that any customer who is not a member of WASPA, but is providing services covered by this Code of Conduct, provides those services in a manner consistent with the requirements of this Code of Conduct.

3.7. A member is liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.

We can therefore accept that the Appellant is liable for the conduct of its affiliates, whether directly or indirectly employed.

The only remaining question is whether the Appellant took reasonable steps to ensure that the affiliates complied with the Code. The Appellant set out a number of processes that it has in place, all of which indicate a concern around this type of behaviour and a monitoring thereof.

However, it remains that the Appellant allows affiliates to run campaigns that are not signed off and are by unidentified publishers. In contracting to an affiliate who it would appear used further third parties without needing to run either the identity of the party by the Appellant or the content of the material by the Appellant, the Appellant took a risk. It would appear in these cases that because the Advertiser "delivers", the WASP does not concern itself with the details of the transaction.

This Panel is of the opinion that this is not the reasonable level of care envisaged by Clause 3.7. More pertinently, this is not behaviour that is consistent with the following clause:

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

The Panel notes for the guidance of the Appellant and other WASP's that it considers the contractual resolution of these issues – which appear to be the current trend in both complaints and appeals – to be simple. If a WASP requires all campaigns to be signed off, and an Affiliate fails to do so, that affiliate is in breach of contract. In the current environment, it is simply not reasonable for a WASP to allow unapproved campaigns to run. It is simply unacceptable for WASPs to hide behind the unauthorised behaviour of unidentified affiliates.

The Panel also notes that, as the Adjudicator pointed out, if the Appellant has indeed put good contractual protections in place, the fine will be recoverable from the Affiliate who appears to be the party most directly responsible for the campaign.

It is clear that the WASP cannot simply “blame” the affiliate marketer and expect to walk away from the matter. When a WASP uses an affiliate marketer, they are expected to put checks and balances in place.

I will revert to this point.

Merits

There are a number of issues in this matter that concern me.

The first is that the Member has submitted two mutually exclusive versions of its defence. In the first response, it submits that it is merely doing research, has copied what it believed to be compliant advertising, and must be excused as it is learning about the rules applicable in South Africa. However, in its subsequent response, the Member lays the blame at the feet of an affiliate marketer.

The second issue is that, in its second response, the Member appears to think that the primary issue in this matter is that it does not include terms and conditions, and relies partly on a defence that it does. To put it bluntly, the issue of the terms and conditions are the least of the problems in the complaint before me.

For the purposes of this ruling, I am going to accept that an affiliate was used, and that the Member has, in this matter, abandoned the defence that it was simply “testing”. This issue is, in any event, dealt with in matter 31195 where this defence is not abandoned.

The questions before me at this point are therefore as follows;

- Does the material breach the Code as alleged?
- Is the Member liable for such breaches?

The second question has already been answered. Even if I give the Member the benefit of the doubt and accept that an affiliate was used, the decisions of previous WASPA committees and the provisions of the Code are unambiguous – the Member is liable. I also note that the liability goes beyond the unprofessional conduct referred to in Clause 4.2, as Clause 3.7. says “*A member is liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is not also a member of WASPA*”.

I therefore turn to the specific breaches.

Clauses 5.7 and 5.8, as well as 12.4 and 12.5 relate to the terms and conditions. The Member has pointed out that there is a link to terms and conditions, and the Monitor has provided same. There is no submission that these are a minimum version and that a full version exist, nor is there a link to a fuller version. I must therefore presume that this is the full version.

The question is whether these are compliant. I will treat this as a check list:

5.8. The full terms and conditions for any service provided by a member must contain:

(a) the registered company name of the WASPA member providing the service;

The name provided is Media Union. In future, the full company name should be included, but I do not consider this a serious breach as it is identifiable.

(b) a customer support number;

There is an email address.

(c) unsubscribe instructions (for subscription services);

Yes

(d) any handset compatibility requirements for the service;

Refers to “compatible cellular phones” without any detail – not compliant.

(e) an indication that network fees may apply;

No

(f) an indication of how billing errors are handled;

No

(g) a statement that the service must only be used with the permission of the bill-payer (for paid services);

No

(h) a statement that the service must only be used with the permission of a parent or guardian (for children’s services); and

Not applicable on the material before me.

(i) the following statement: “[member name] is a member of WASPA and is bound by the WASPA Code of Conduct. Customers have the right to approach WASPA to lodge a complaint in accordance with the WASPA complaints procedure. [member name] may be required to share information relating to a service or a customer with WASPA for the purpose of resolving a complaint. WASPA web site: www.waspa.org.za”.

No. Although the WASPA website is given.

Given this, the terms are not compliant and are in breach of Clause 5.8.

Clause 12.1 says

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 matter involves a subscription service that costs R7 a day. This information should be next to the call-to-action button in all the material. This does not appear on the first call to action before me, although it does on the second which triggers the subscription.

There is therefore a breach of Clause 12.1 in relation to the first call to action.

This brings us to the core of the matter, which is the use of the competition as a “hook” to the subscription service. This is covered by Clauses 15.4 and 15.5:

15.4 A member must not require that a customer join a subscription or notification service in order to claim an existing reward, to be able to redeem existing loyalty points or to claim a similar benefit. (Example of incorrect marketing: “to claim your prize, join this service”.)

15.5 A member may offer an incentive for joining a subscription or notification service, provided that it is clear that the benefit only applies once the customer has joined the service. (Example: “if you join this subscription service, you will be entered into a monthly draw for a prize”.)

In addition, Clause 5.5 states that a Member must not “knowingly disseminate information that is false or deceptive, or that is likely to mislead. . .”.

The first banner before me states: Congratulations! Enter to WIN Samsung S7 (15) units left. Select your Colour!.

There is no mention of a subscription service and it is not clear that to claim the phone you will need to subscribe. **This is misleading and in breach of the clauses cited.**

The second page again congratulates you, but also states, “Enter your Mobile to GET your product” and indicates that only one unit is now left, and time is running out.

In very small print at the top of the page it states: Join BESTDEAL and enter into a monthly draw for a prize”

In the first place, this is in breach of Clause 15.4 as one may not require a consumer to subscribe to claim a prize. It is further in breach of Clause 15.5 in that it fails to clearly communicate that you will only stand a chance (NOT guaranteed, on the papers before me) to win the prize if you subscribe. It implies that you can claim the prize separate from the subscription.

I am not satisfied, in addition, that the communication as to what the Best Deal service actually is was communicated with sufficient prominence and clarity, and **the material is therefore in breach of Clause 5.5.**

As the Member seeks to hide behind its inexperience, I will explain for purposes of clarity that a compliant service would clearly and prominently communicate that BY SUBSCRIBING

TO BEST DEAL (Primary communication) you will stand a chance to win a phone and other prizes (Secondary communication).

Finally, I note that the Member has acted unprofessionally on two counts:

- It may have utilised an affiliate marketer without sufficient supervision, as set out above;
- It has submitted two mutually exclusive defences to WASPA, the first of which indicates a highly unprofessional practice of “researching” the market with advertising that it would appear, on that version, to have no intention of honouring.

The Member is therefore in breach of Clause 4.2.

In mitigation of these breaches is the fact that the Member is *ex facie* a new member, and appears to have a language barrier. However, this finds little sympathy with me. As a new entrant to the market, the duty to understand the terms of its WASPA membership is particularly clear. If unclear, the member should seek professional advice – from WASPA, from the aggregator, from the affiliate marketer, from a lawyer. The failure to do so is, frankly, more aggravating than mitigating.

In addition, the practice of “hooking” a subscriber with a competition is one that WASPA has historically regarded as serious, and had hoped to have seen the back of. The fact that, on the first version of events, “other people” also do it, is not mitigation.

In deciding on sanctions, I have nonetheless taken the Members inexperience into account. Those sanctions that are fundamentally and clearly in breach of any reasonable behaviour by a WASP are sanctioned harshly, but those that are more technical in nature have been sanctioned less harshly.

I therefore sanction the Member as follows:

- In relation to the instances of unprofessional behaviour and breaches of clause 4.2, R25 000.
- In relation to the use of a competition as a “hook”, and breaches of clauses 15.4 and 15.5, and 5.5, R 15 000.
- In relation to the breach of clause 12.1, I issue a warning to comply in future.
- In relation to the breach of clause 5.8, I issue a warning to comply in future.