

Report of the Adjudicator



Wireless Application Service Providers' Association

Complaint number	#31152
Cited WASPA members	Interband Enterprises LLC (1315)
Notifiable WASPA members	Smartcall Technology Solutions (0090)
Source of the complaint	WASPA
Complaint short description	In adherence with sanctions imposed
Date complaint lodged	2016-07-27
Date of alleged breach	2016-07-22
Applicable version of the Code	14.5
Clauses of the Code cited	4.2., 4.5., 5.1., 5.4., 5.5., 8.8.
Related complaints considered	N/A
Fines imposed	R 15 000-00
Other sanctions	Re-imbursement of users
Is this report notable?	N/A
Summary of notability	N/A

Initial complaint

The Complainant in this matter alleged that the Member in this matter contravened various sections of the Code and essentially misled consumers / users by providing services that were at the time inconsistent with what was advertised or promoted.

Member's response

The Member gave a detailed response to every alleged breach of the code and the response will be replicated here in full:

1. Section 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.

Response:

- i. Interband conducts itself in a professional manner in its dealings with the public, customers, other service providers and WASPA and we respectfully submit that the media monitor has not provided any evidence to suggest otherwise.
- ii. In Complaint number #27729, the Appeals Panel held (correctly we respectfully submit) that: - Clause 4.2 speaks to the manner in which members are expected to deal with various stakeholders; namely public, customers, WASPA and other service providers. Where other provisions of the Code focus on aspects of members' services, clause 4.2 focuses on members' conduct specifically. - A finding that a member's service infringed a provision of the Code does not necessarily mean that the member infringed clause 4.2. To conflate the two would be to create situations where members are sanctioned twice for the same infractions: under the specific clauses of the Code pertaining to the specific aspects of the service in question and under clause 4.2. - It is entirely conceivable that a member could conduct itself professionally and, yet, still operate a service that infringes the Code. - We interpret clause 4.2 as saying that when members deal with members of the public, customers, WASPA and other service providers; they must conduct themselves ethically, courteously, conscientiously and in a "generally business- like manner". Put another way, clause 4.2 focuses on the members' behaviour, specifically, not on the members' services. - Where members' services breach the Code, they will have violated other, specific provisions of the Code and these infringements will be determined accordingly. - A finding of an infringement of clause 4.2 requires an adjudicator to establish the requisite degree of professionalism expected of WASPA members and to then demonstrate that the particular member fell short of that standard.
- iii. The media monitor has not established a standard of professionalism that s/he believes Interband's conduct should be measured against. Instead, the monitor appears to have conflated alleged infringements of other sections of the Code with the test applied by Section 4.2.
- iv. In the circumstances, Interband denies that it is in breach of Section 4.2.

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

Response:

- i. The media monitor has not stipulated in which respect he/she believes that Interband has not respected or has infringed the intellectual property rights of its

clients or other parties. We assume the media monitor has an issue with the reference to "Facebook".

- ii. It was Interband's intention to connect Facebook users who wanted to flirt and let them contact each other through different apps including Facebook.
- iii. Provided certain criteria are met, Facebook permits third parties to use the name "Facebook". Interband submits that it has complied with such criteria and has therefore not infringed such rights.
- iv. In the circumstances, Interband denies that it is in breach of Section 4.5.

3. Section 5.1: Members must not offer or promise services that they are unable to provide.

Response:

- i. The promotional material was advertising the service available at www.socialdirectory.info, which Interband is able to provide.
- ii. However, as a result of a technical error, the database crashed and we were unable to access our database in full. In the circumstances, users were directed in error to the "hotjizz" service, instead of the service available at www.socialdirectory.info.
- iii. Interband therefore did not deliberately offer a service that it was unable to provide.
- iv. The adjudicator is also referred to the terms and conditions that govern the service, which provide, inter alia, that: "...If for any reason this Service is not capable of running as planned due to an infection by a computer virus, bugs, tampering, unauthorized intervention, fraud, technical failures, or any other causes beyond the control of the Service Providers which corrupt or affect the administration, security, fairness, integrity, or proper conduct of this Service, the Service Providers reserve the right at its sole discretion, to disqualify any individual who tampers with the entry process, and to cancel, terminate, modify or suspend the Service..."
- v. In the circumstances, Interband denies that it is in breach of Section 5.1.

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

Response:

- i. Interband has honest and fair dealings with its customers.
- ii. Refer also to response to Section 4.2 above, as the same principles apply.
- iii. Refer also to response to Section 5.1 above. This was a case of a technical error, and not a case of dishonest or unfair dealings with customers.
- iv. In the circumstances, Interband denies that it is in breach of Section 5.4.

5. Section 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.

Response:

- i. Interband has not knowingly (our emphasis) disseminated information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.
- ii. Customers were informed that the service was a subscription service, pricing and terms and conditions were displayed, and the content page and Interband's contact information were all made available to the customers. Under such circumstances, it is respectfully submitted that Interband did not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.
- iii. Refer also to response to Section 5.1 above. This was a case of a technical error, and not a case of knowingly disseminating information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.
- iv. In the circumstances, Interband denies that it is in breach of Section 5.5

6. Section 8.8: Content that is promoted in advertising, must be the same content that is provided to the customer as part of the advertised service.

Response:

- i. Refer to response to Section 5.1 above.
- ii. Were it not for the technical error, the content that was promoted (i.e. an adult social directory) would have been provided to the customer who was directed to the service available at the link www.socialdirectory.info.

7. From the outset, the "Adult Social Directory" implies that this service is a contact/dating/chat service. The service asks questions that imply, a consumer is about to "meet" a prospective woman in their area.

Response:

Refer to responses to Section 5.1 and 8.8 above.

8. The service also implies that this is a Facebook adult social directory. The DOI message clearly states "Facebook Adult directory". However, when the media monitoring team tested all the categories within this service, Wallpapers and videos were found. There was no contact/dating/chat service to meet anyone. We furthermore clicked on the contact button, hoping that it may display what the service originally sells, but this was a contact tab to contact the Service Provider.

Response:

Refer to response to Sections 4.5, 5.1 and 8.8 above.

9. We ask that this service is de-activated with immediate effect by an EMERGENCY PANEL.

Response:

Interband immediately suspended the service when it became aware of the technical error.

10. We also ask that the adjudicator considers the following:

10.1. Refunds to consumers

Response:

Interband has refunded all users and has also offered them other content as compensation.

10.2. Database obtained is NOT marketed to in future

Response:

Agreed.

Sections of the Code considered

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.

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

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.

8.8. Content that is promoted in advertising, must be the same content that is provided to the customer as part of the advertised service.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the Member's subsequent replies.

The Adjudicator has reviewed the various alleged breaches and will individually deal with them.

Section 4.2

The Adjudicator is of the opinion that there is not enough evidence that the Member in this matter has breached section 4.2 and agrees with the findings made in appeal 27729.

Section 4.5

The Adjudicator believes that mere reference to a brand does not necessarily translate into infringement thereof. However, the manner in how reference is made to a brand in this matter might lead users to believe that the adult directory is associated with or part of the "Facebook" brand. The Adjudicator therefore finds the Member in breach of section 4.5.

Section 5.1

The response issued by the Member in response to the alleged breach of section 5.1 does not in the opinion of the Adjudicator provide sufficient evidence to negate the alleged claim.

Section 5.1 does not justify fault or technical error in this instance. It merely states that a Member *must not offer or promise services that they are unable to provide*, full stop. In this matter, due to technical error or not, the Member was unable to provide the said service.

Further, the Member's reference to its own terms and conditions does not provide legal justification for the error insofar it relates to section 5.1, as the terms merely state:

"...**technical failures**, or any other causes beyond the control of the Service Providers which corrupt or affect the administration, security, fairness, integrity, or proper conduct of this Service, the **Service Providers reserve the right** at its sole discretion, **to disqualify any individual who tampers with the entry process**, and to **cancel, terminate, modify or suspend the Service**...".

The Member only terminated the service once it was brought to its attention by WASPA that possible misalignments to the WASPA Code of Conduct might exist. It was therefore not a

pro-active move on behalf of the Member, but merely a response after alleged breaches were brought before it. The terms therefore, in this instance, have no relevance to section 5.1.

The Adjudicator finds it strange that this scale of error only became known to the Member subsequent to the WASPA monitor drawing attention thereto and consider the Member's due diligence process insofar it relates to continuous testing of its services, negligible. Especially since the WASPA Monitor discovered this at various time periods.

The Adjudicator therefore finds the Member to be in breach of section 5.1.

Section 5.4

The Adjudicator does not believe that the said breach of section 5.1 above translates into a breach of section 5.4, unless the actions leading to the breach of section 5.1 was intentional, proof of which is not evident.

Section 5.5

The Adjudicator does not believe that the said breach of section 5.1 above translates into a breach of section 5.5, unless the actions leading to the breach of section 5.1 was intentional, proof of which is not evident.

Section 8.8

The Adjudicator is not satisfied with the Response provided by the Member to the alleged breach of section 8.8.

By merely stating that:

"Were it not for the technical error, the content that was promoted (i.e. an adult social directory) would have been provided to the customer who was directed to the service available at the link www.socialdirectory.info."

does not in itself provide sufficient evidence to justify the non-provision of advertised services.

The Adjudicator therefore finds the Member in breach of section 8.8, based on the same premise of his / her argument held under section 5.1 above.

Sanctions

The Member is sanctioned as follow:

For its breach of section 4.5 the Member is formally reprimanded and advised against any unauthorised use of any Intellectual Property not belonging to itself.

For its breach of sections 5.1 and 8.8, the Member is fined R 15 000-00 (Fifteen Thousand Rand), payable to WASPA within 5 working days after having received notice hereof.

The Member is further ordered to re-imburse all affected users within 5 working days after having received notice hereof and provide the WASPA Secretariat with proof thereof within a further 5 working days after having made the re-imbursements.

Should re-imbursements already have taken place, the Member should please provide proof thereof to the WASPA Secretariat within 5 working days after having received notice hereof.

(Please note that a formal request was issued to the Member to provide proof but none was forthcoming unto the date of this adjudication)