



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	#33364
Cited WASPA members	Tech Garden Media Limited (1484)
Source of the complaint	WASPA Media Monitor
Complaint short description	Liability for infringing conduct by affiliate Misleading advertising Required information on terms and pricing missing No double-opt in for subscription service
Date complaint lodged	31 March 2017
Date of alleged breach	31 March 2017
Applicable version of the Code	14.6
Clauses of the Code cited	3.5, 3.6, 4.2, 5.4, 5.5, 12, 12.1, 12.4, 12.5
Related complaints considered	30621
Fines imposed	A total fine of R50,000 is imposed, jointly for the infringement of sections 5.5, 12.1, 12.4 and 12.5
Other sanctions	None
Is this report notable?	Not notable

Initial complaint

The Media Monitor came across a marketing campaign by the Member on 31 March 2017 that she regarded as non-compliant with various provisions of the Code of Conduct. The marketing campaign displayed a non-compliant banner that displayed no pricing, no call centre number and no link to terms and conditions as evidenced from the screenshot attached to the complaint. The network hosted confirmation page also did not display the call centre number or a terms and conditions link.

The Media Monitor also reported that test result displayed a consumer journey that leads from a web banner ad, that leads directly to a Network Hosted Confirmation page. There is no landing page present. When promoting a service that does not display a landing page, it is very important that the banner advertisement adequately displays the subscription pricing information, a call centre number and a link to the service terms and conditions. The attached test result displays banner advertisement that omits all of this information.

The Media Monitor also alleged that there was no double opt-in present. The user is presented with pricing, for this first time, during what would be called the "mandatory second opt-in". The Media Monitor requested that the Member removes the marketing with immediate effect and that all consumers who subscribed to the service in response to this marketing be refunded.

Member's response

The Member requested further information from the Media Monitor which was supplied to determine who the affiliate marketer was, indicating that the marketing campaign was conducted by a third party. This information was subsequently supplied.

The Member indicated that it ran an internal investigation process to identify the affiliate marketer and the reason for this non-compliant flow. They were able to identify that the publisher was indeed making use of unapproved banners in connection with their campaigns. The Member admitted that such actions constituted a direct breach of the WASPA Code of Conduct as well as of their internal policy regarding advertising flows allowed in the South African market place.

The Member indicated that it decided to take the following actions:

- It banned the relevant publisher, this being Bitterstrawberry;
- It withheld all the outstanding payments relevant to the illegal flow;
- It terminated the contract with the publisher;

The Member also indicated that they normally ensure that all the banners provided to the publishers to be used for their campaigns are fully compliant, but that it is quite common that the publisher or the relevant affiliate decide, on their own and without informing them, to use their own banner adverts which were not approved nor known by the Member.

The Member indicated that this practice makes it impossible for them to fully control the nature of the banners redirecting traffic to their campaigns with the consequent risk of breaches. To ensure that this situation does not arise once again, they have set the flow into double opt-in making sure the landing page is mandatorily provided to the end-user when entering into the subscription process and ensuring that the end-user is aware of all the relevant information they need to provide an informed consent to the subscription service while completing the double opt-in steps.

Finally, the Member indicated that it takes market monitoring very seriously and that they have implemented internal measures to make sure they can grant a high quality crosscheck of their campaigns and reduce the number of breaching flows to the minimum, but even doing so, we cannot grant to ensure full compliance.

Sections of the Code considered

3.5, 3.6, 3.7, 4.2, 5.4, 5.5, 12, 12.1, 12.4, 12.5.

Third parties who are not WASPA members

3.5. Members must ensure that any customer, supplier, affiliate or sub-contractor who is not a member of WASPA, but is providing or marketing services covered by this Code of Conduct, is aware of the requirements of this Code of Conduct.

3.6. Members must ensure that any customer, supplier, affiliate or sub-contractor who is not a member of WASPA, but is providing or marketing services covered by this Code of Conduct, provides and markets 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 or marketed by a customer, supplier, affiliate or sub-contractor if that party is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that party provides and markets 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

Professional conduct

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.

Provision of information to customers

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.

12. Web advertising

Display of pricing information

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 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.

Decision

The issue here is one which, unfortunately, is quite rife in the industry, namely recalcitrant non-WASPA member affiliates, with or without the knowledge of the Member in question flouting the clear rules of the Code of Conduct. Sometimes one suspects the Members outsources these services in order to avoid scrutiny or directly infringing the Code of Conduct. It is however clear that this is not the case in this instance.

Due to the fact that WASPA has no jurisdiction over non-members, it has to resort to indirectly holding non-members accountable by provisions such as sections 3.5 to 3.7. This requires Members to inform affiliates of the requirements of the Code of Conduct, more specifically the marketing requirements, which are relevant for this adjudication. Members are in a position to ensure that such affiliates should be contractually bound to comply with the Code of Conduct and to claim any resultant fine for infringing conduct under the contract. If Members should fail to make provision for such liability by the affiliate, especially where this type of practice is well-known in the industry as confirmed by the Member, it will have only itself to blame. This of course does not absolve the Member completely from being tainted by the infringing conduct in adjudications like this. This is unfortunate but cannot be avoided if this type of conduct is to be eradicated.

The Member acknowledges that the conduct by its affiliate is non-compliant with the provisions of the Code, but without specifying which sections in particular. From the evidence presented by the Media Monitor it is clear that the conduct by the affiliate, which refreshingly, is identified by

the member as Bitterstrawberry, infringes a number of different provisions of the code. I find that there was a contravention of the following provisions by Bitterstrawberry for which the Member is liable under sections 3-5 to 3.7:

- (a) Conduct that is likely to mislead by inaccuracy, ambiguity or omission (section 5.5). The marketing campaign contained no relevant information or indication that it would lead to a subscription service or what the terms and conditions were. It also lead directly to a subscription page bypassing the mandatory double-opt in process.
- (b) Failure to display the minimum information required by sections 12.1, 12.4 and 12.5. Neither the marketing campaign nor the landing page contains the required information as indicated by the Media Monitor. This was not disputed by the Member.

The complaint based on lack of professional conduct in terms of section 4.2 is problematic as has been indicated in other adjudications due to the very wide nature of the complaint, the lack of specific standards other than the provisions of the Code of Conduct and the resultant overlap in infringing of different sections of the Code. In this case, however, as is clear from the response from the Member, there is no indication of unprofessional conduct on the part of the Member. The Member has to be commended for its response to the complaint in this matter and the particularity of its responses in regard to the conduct of its affiliate and the subsequent steps it has taken.

Sanctions

I have also considered complaint no 30621 against the Member, but the infringement there resulted from different circumstances and is not relevant, except that that case also indicated the willingness of the Member to ensure compliance with the Code. This infringement is therefore taken as a first contravention.

As indicated above, the contravention of the code by affiliates not directly subject to the Code, is widespread as is clear from the many complaints based on sections 3.5 to 3.7 such as complaint numbers 31773 where the Member also confirmed that this type of affiliate conduct is rife in the industry.

For purposes of sanctions the infringement of sections 5.5, 12.1, 12.4 and 12.5 are taken together as the infringements stem from the same marketing campaign and conduct. Although this is a first contravention by this Member, the sanction is primarily aimed at the conduct of the affiliate and based on the seriousness of the infringements. The by-passing of the double opt-in mechanism is a very serious infringement as this mechanism is an essential consumer protection instrument under the Code as is the prescribed information.

A fine of R50,000 is imposed.

As alleviation of the impact of the sanction on the Member, no refund as requested by the Media Monitor is ordered, partially in recognition of the co-operative spirit by the Member and the difficulty there may be in identifying customers who subscribed as a result of this infringing marketing campaign.