



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	#34247
Cited WASPA members	Liberty Entertainment (1477)
Notifiable WASPA members	
Source of the complaint	WASPA Media Monitor
Complaint short description	Adult subscription services marketed in children's application zone
Date complaint lodged	12 June 2017.
Date of alleged breach	12 June 2017
Applicable version of the Code	14.7
Clauses of the Code cited	3.5, 3.6, 3.7, 4.2, 22.1, 23.1, 23.2, 23.4, 23.5, 23.6, 23.9.
Related complaints considered	
Fines imposed	Fine of R30,000
Other sanctions	Not applicable
Is this report notable?	Not notable.

Summary of notability	
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Initial complaint

On 12 June 2017 the Media Monitoring Team conducted a test in the "Vegetable Fun zone and ABC Songs" games offered by Google Play. The games, which are considered a Kids Apps/Game by their supplier MCP, displayed adult subscription service marketing. Google rates the games as "Suitable for 3+ years of age -- Suitable for all age groups. Some violence in a comical or fantasy context is acceptable. Bad language is not permitted." The Media Monitor noted that it is therefore highly likely that these games are particularly attractive to children, or at least contains minors in their user base. The WASPA Code is clear on prohibiting subscription marketing targeted at children. It is also clear that adult services marketing may not appear in media where children have access to such mediums.

The Media Monitor attached screenshot examples of the marketing posts.

The Media Monitor requested that the matter be referred to an emergency panel.

Member's response

In response to the emergency panel notification, the Member indicated on 13 June 2017 that as part of their ongoing compliance monitoring they had already picked up the problem and that they had blocked the publisher, Barna Mobile, an affiliate and not a member of WASPA, from any further interactions with the Member. The Member also stopped all campaigns related to Barna Mobile. The action was initiated as a result from a communication from MCP who advised them of a possible breach by Barna Mobile.

As a result of the action taken by the Member, the need for an emergency panel meeting fell away and was not convened. The formal complaint process initiated then took its course.

The Member responded to the formal complaint by indicating that they had contracted MCP Monitoring Services to monitor services in the South African market place. MCP informed them on the morning of 12 June 2017 of the possible breach. The Member immediately initiated internal investigations to identify the affiliate. The affiliate, Barna Mobile was identified and immediately blocked and payments withdrawn. All this happened before the WASPA complaint was received. The Member also put a technical block on their side to ensure that no more interactions would be possible with affiliates running this kind of traffic.

The Member indicated that it fully understands the gravity of the specific situation spotted and agree with WASPA's concerns, however they would like to assure WASPA that it takes market monitoring very seriously and that they had invested a lot of resources in order to put in place

proactive measures to crosscheck their campaigns and the traffic redirecting to them and prevent breaches from happening, as well as reactive measures like affiliate suspensions, technical traffic sources blocking, payment withdrawal, etc.

The Member submitted that it is safe to say that proposed clauses, and the potential breaches of these clauses, with the issue of the Formal Complaint #34247, were no longer relevant at the time of the issuing of the Formal Complaint, due to the actions that they had taken and the procedures they had in place to negate any possible issue, before such breaches became an issue. The issue was already resolved by the time the Formal Complaint was initiated.

Complainant's response

The Media Monitor replied that Members are aware that they should advise the Media Monitor Team of any non-compliances they may come across. Serious breaches, such as adult content being advertising inside children's applications, requires urgency and priority. Liberty could have or should have advised the Team that they were already managing the removal of the non-compliant content.

Member's further response

The Member responded that it perfectly understood the Media Monitor's concern about these kind of issues and they fully shared her point of view on this. They strongly believe that these kind of practices are absolutely unacceptable and have to be banned from the market. That being said, it reiterated that it acted within 2 hours from the receipt of the notice by MCP and taken due actions according to the rules in place.

The Member indicated that there are no formal requirements to notify the Media Monitor Team of breaches, but to take action against such breaches exactly as they did. The Member submitted that the arguments provided by the Media Monitor, in order to push forward the Formal Complaint, are pure assumptions, very subjective and they are not grounded on any rule in the Code.

Further information requested.

Before finally assessing the complaint, I requested WASPA to obtain further information on a number of questions I posed from the Member. The Member replied to all of the questions I raised.

The questions related to the responsibility and liability of Members to ensure that affiliates comply with the WASPA Code, Members' liability for breaches of the Code by affiliates in terms of clauses 3.5 to 3.7.

I also provided an opportunity to the Member to make further submissions on possible liability under these clauses.

The questions and answers were as follows (questions in bold, Member's answers in italics):

1. What was the relationship between Liberty Entertainment and Barna Mobile? - *Barna Mobile was a Publisher working for Liberty Entertainment. They were pushing advertising traffic to Liberty Entertainment campaigns in the South African market place.*

2. Did Liberty Entertainment approve marketing campaigns by the Affiliate prior to such marketing campaign? - *Any campaign given to a Publisher is approved by Liberty, this does not however prevent an affiliate taking the campaign within the Barna network from adapting the campaign without the knowledge of Liberty or Barna. The contractual terms agreed between Publisher and Content Provider cover for this eventuality. This is also one of the reasons we have a team of campaign monitors and external agencies that monitor our campaigns in the markets in which we operate. This allows us to act quickly and efficiently if an affiliate acts inappropriately.*

3. Did the agreement between High Gable and the affiliate provide for an obligation by the Affiliate to comply with the WASPA Code of Conduct as required by Clauses 3.5 and 3.6 of the Code of Conduct? - *We do not know who High Gable is, therefore we cannot reply to this question. Nevertheless, the Liberty Entertainment service agreement clearly states that all our partners must comply with all the applicable regulations from time to time, including the WASPA Code of Conduct.*

[Note. The reference to High Gable was an obvious mistake on my part, but the Member nevertheless addressed the substance of the question]

4. Was the Member aware of its possible liability for the actions of its Affiliate under Clauses 3.5 to 3.7(see Clauses 3.5 to 3.7 quoted below). - *Yes, Liberty Entertainment is fully aware of this and this is the reason why our agreement clearly specifies that our partners must comply with all applicable regulations from time to time (Section D, M and N of the herewith attached agreement). We have always stressed very much the relevance of complying with all the rules and regulations with our partners and on top of this, we have been always very strict with the application of the measures required by the WASPA Code of Conduct in case of breaches (blocking of the Publisher, withholding of payments, etc.). Actually, in this specific case, as specified in the responses provided before, we had spotted and blocked this source way before that WASPA notified us of the breach. We consider that the Adjudicator should take this into consideration as an irrefutable proof of our proactivity and good faith while fighting cases like this.*

5. Does the Member wish to augment its reply to the complaint with references to its possible liability under Clauses 3.5 to 3.7? Please supply such additional response in full. - *We do not consider being liable under Clauses 3.5 and 3.7 being that:*

** Our agreement actually clearly states that in order to work with us in the south African market, affiliates must comply with all applicable regulations, including the WASPA Code of Conduct (please check section M of the attached agreement)*

** We are constantly stressing the point of using only authorized advertising material in connection with our campaigns;*

** We clearly inform our partners of their direct liability in case of breach of the laws and regulations (Please check section D and N of the attached agreement)*

6. A copy of the agreement between the Member and Barna Mobile. - *Due to confidentiality and Data Protection reasons, we can only provide to the Adjudicator a copy of the standard agreement we usually provide to our partners (see attachments , but not the actual agreement with Barna Mobile showing personal and commercial details of the partner.*

7. Copies of all communications between Liberty Entertainment and the Affiliate subsequent to the member discovering the non-compliant behaviour of the Affiliate. - *Please find the communications herewith attached.*

The Member also attached a copy of their standard terms which applied to Barna Mobile.

Sections of the Code considered

The following sections of the Code of Conduct Version 14.7 were considered for the adjudication.

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.

22. Adult services

Definitions

22.1. An "adult service" is any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature.

23. Children

Definitions

23.1. A "child" refers to a natural person under 18 years of age.

23.2. "Children's services" are those which, either wholly or in part, are aimed at, or would reasonably be expected to be particularly attractive to children.

Subscription services

23.4. Subscription services must not be intentionally targeted at children.

Prohibited practices

23.5. Children's services must not contain anything that is likely to result in harm to children or which exploits their credulity, lack of experience or sense of loyalty.

23.6. Children's services must not include anything that a reasonable parent would not wish their child to hear or learn about in this way.

23.9. Advertising for children's services must not make use of adult themes or adult material.

Decision

The adjudication in this instance represents a tough situation where on the one hand there has been a clear and serious infringement of the WASPA Code of Conduct by a non-WASPA member for which a Member may be responsible in terms of the Code, and reasonable and exemplary conduct by the Member on the other hand. The infringements in this case are unfortunately a widespread phenomenon in the industry, where content providers or affiliates choose not to become WASPA members, often in an attempt to evade the Code of conduct, and are therefore outside the direct jurisdiction of WASPA and the Code of Conduct unless they become indirectly liable for such conduct based on their contractual obligations with the WASPA Member. The fact that the Member has found it necessary to employ the services of a company like MCP to monitor the conduct of affiliates bears testimony to the fact that this is a serious industry problem.

There is no doubt on the facts presented by the Media Monitor and confirmed by the Member that the conduct of its affiliate presents a serious infringement of the Code of Conduct. The member through its own initial actions in blocking not only the particular service, but all services of its affiliate and retracting payments, confirms the seriousness of the breach. The advertising material which was used in a context clearly aimed at children, displayed sexually explicit material, even if somewhat blurred, and advertised adult subscription services. This a clear infringement of clauses 23.4 (subscription services intentionally targeted at children), 23.5 (content that may be harmful to children), 23.9 (advertising for children's services must not

make use of adult themes or adult material). The term "adult material" in this context must be read with clause 22.1 where "adult content" is described as content of a clearly sexual nature. In regard to the infringement of section 23.4, the subscription service was marketed in a zone where children would not only have access, but where it would be expected to find children. Although it is hard to fathom why the affiliate would market such inappropriate services to children, it did so intentionally, in the sense that they seemingly had no regard that the advertising was inappropriate in this zone. The conduct by the affiliate also seems to constitute a clear breach of the agreement with the Member if regard is had to the standard provisions of the agreement, particularly sections D, M and N.

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 clauses 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 able 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.

It is also clear from the wording of clause 3.7 that reasonable steps taken by the Member is a mitigating factor to be taken into account in the liability of the Member, but does not absolve the Member from liability.

The conduct of the Member in this complaint has been eminently reasonable. It has engaged professional services to monitor the conduct of its affiliates. As a result, it became aware of the infringing conduct of its affiliate at an early stage and took immediate steps to suspend the service and block further communications from the affiliate. Unfortunately, it does not absolve the Member from liability for these infringements of the Code in terms of clause 3.7.

In summary, I find that there has been an infringement of clauses 23.4 and 23.9 and that the Member is liable for these infringements in terms of clause 3.7 of the Code of Conduct. I hasten to add that this finding first and foremost reflects on the affiliate, Barna Mobile, and not on the member itself. In any future adjudications this should be taken into account.

Sanctions

This is the most troublesome part of this adjudication, As indicated above, the conduct of the Member has been eminently reasonable and exemplary in all aspects, but it is imperative that recalcitrant players like Barna Mobile should be sanctioned if these unsavoury practices should be curbed. The severity of the fine in this case should also not be seen as a sanction aimed at

the Member, but rather as aimed at Barna Mobile who can be held liable indirectly as a result of its breach of contract and the indemnity contained in the contract.

A fine of R30,000 is imposed.

Matters referred back to WASPA

Not applicable
