



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	#41520
Cited WASPA members	Hulk Mobile (1689)
Notifiable WASPA members	n/a
Source of the complaint	WASPA Compliance Department
Complaint short description	Member advertising subscription services on channels directed at children
Date complaint lodged	2019-06-18
Date of alleged breach	2019-06-18
Applicable version of the Code	v16.6
Clauses of the Code cited	5.4 and 22.4

Related complaints considered	n/a
Fines imposed	Member fined an amount of R 25 000.00 for breach of clause 5.4. Member fined an amount of R 50 000 for breach of clause 22.4.
Other sanctions	n/a
Is this report notable?	n/a
Summary of notability	n/a

Complaint

1. The Complainant alleged that the Member was advertising its "AppsClan" subscription service on channels aimed at children.
2. The Complainant provided reports from 5 separate tests where adverts for the Member's subscription service were displayed below animated video content on YouTube and below other promotional offers from the channel owners of the "Cartoon Network UK" and "Ben 10" inviting users to subscribe to these subscription channels on YouTube.
3. The Complainant alleged that the Member's subscription service was being intentionally targeted at children and the Member was therefore in breach of clauses 5.4 and 22.4 of the WASPA Code of Conduct.

Member's response

4. The Member denied that it intentionally advertised its services within any site, channel or applications that may be used by children.
5. The Member stated that it purchases advertising directly from Google and that adverts are placed randomly by Google within certain sites, channels or applications across the Google Ad Network (including YouTube), subject to specific exclusion lists provided by the Member.
6. The Member stated that it creates and submits daily "exclusion lists" to Google using specific keywords (e.g. "kids") and/or listing specific named sites, channels or applications (e.g. a specific children's channel such as Cartoon Network Africa) where its adverts should not be placed or displayed. However, the Member also explained how it was still possible for adverts to be placed or displayed in excluded areas and without the Member's knowledge.
7. The Member also drew a distinction between advertising that is displayed within a specific subscribed channel on YouTube and advertising displayed to a user conducting a random search on YouTube. The Member stated that if a YouTube channel was included on its exclusion list, none of its adverts would be displayed within that channel.
8. The Member referred to a previous complaint (#41372) lodged against it by the Complainant relating to the same issue. In that complaint, the Complainant had used an automated discovery tool to search across YouTube but did not supply a specific link to the originating source of the advert placement. The Member had requested the URLs to be provided in order to crosscheck if the advert was actually within an excluded channel or if it was from a random search conducted on YouTube. The complaint was subsequently withdrawn by the Complainant.
9. The Member stated that, from the information provided by the Complainant in the current formal complaint, it had identified that the URL's provided were from random searches conducted across YouTube and that they were not specific to a subscribed channel within YouTube.
10. The Member also stated that it was clear from the screenshots provided by the Complainant that the captured information did not come from a specific channel (e.g.

Ben 10) and that the relevant videos were either displayed randomly or based on search criteria for the content.

11. The Member asserts that if a user searches "Ben 10" on YouTube, but does not go into the channel, they will see display adverts (video, static etc.) for a number of products and services which are in line with that user's previous behaviour across the Google network.
 12. The Member also stated that YouTube has a specific 'kids' app, called YouTube Kids, where no advertising is permitted. This dedicated portal allows parents to control the type of content their children have access to. The Member confirmed that it does not advertise on this portal.
 13. The Member denied that it was in breach of clause 5.4 and stated that it has honest and fair dealings with its customers and any potential customers.
 14. The Member also denied that it was in breach of clause 22.4 and stated that it takes all reasonable steps to ensure that its services are not intentionally targeting children.
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Complainant's reply

15. The Complainant advised that the current complaint relates to unique and stand-alone tests conducted on the Member's services and that the current complaint was not linked with or associated with complaint #41372.
16. The Complainant explained that after receiving the Member's response to complaint #41372, the Complainant discovered that the test results submitted with the original complaint did not render properly when exported from its own system. As a result, what the Complainant had viewed and had based the complaint on did not reflect when the information was exported to a PDF document to attach as evidence in the complaint.

17. This technical error was unknown to the Complainant before receiving the Member's response and because the test results which formed the basis of the complaint were incomplete, the complaint was then withdrawn by the Complainant.
18. With regard to the current complaint, the Complainant argued that the Member was in control of selecting and managing third parties to market and promote its services (including Google). The Member remained bound by the provisions of the WASPA Code of Conduct when doing so and is responsible for any non-compliant advertising of its services carried out by such third parties. The Complainant referred to the provisions of clauses 3.1, 3.5, 3.6 and 3.7 of the WASPA Code in this regard.
19. The Complainant also argued that the Member's subscription services may only be advertised or promoted on a site, platform or via a channel that is not expressly, implicitly or tacitly targeted at children, or that would not reasonably be seen as being designed, developed or created for children.
20. The Complainant stated that various factors must be taken into consideration here, including the name of the site, platform or channel; the content used to populate the site, platform or channel; and the objective impression of the intended target audience.
21. The Complainant argued that the video content found during each of the 5 tests conducted was cartoon-like and undeniably created for children as the target market. Alternatively, this video content could reasonably be regarded as being very attractive to children.
22. The Complainant also stated that the "Cartoon Network UK" and "Ben 10" YouTube channels being promoted immediately below each of the videos (and directly above the advertising for the Member's subscription service) offer similar video content that is aimed at children as the target audience.
23. The Complainant argued that since the adverts for the Member's subscription service are placed, marketed and promoted on a site, platform or channel clearly designed, developed and created for children, the Member had intentionally targeted a subscription service at children and was therefore in breach of the WASPA Code.

24. The Complainant also clarified that its use of the word 'channel' in the original complaint should not be construed restrictively to refer to an actual YouTube channel for children. Instead the word "channel" had been used to explain the method of delivery of the content or promotional material (e.g. Facebook as a channel, a webpage as a channel, SMS as a channel, TV as a channel, and specifically YouTube as a channel).
 25. The Complainant stated that it was not alleging that the advert was placed on a subscribed channel on YouTube, but rather that the advert was placed on a platform/site/channel where children's content was displayed. Any advertisements on such a platform/site/channel, which linked to a member's subscription service, would therefore be non-compliant with the provisions of the WASPA Code.
 26. The Complainant argued that it was immaterial whether the cartoon-like videos and the promoted channels were viewed on YouTube via a random search or on a specified channel on YouTube. The adverts appeared directly below content specifically created for children and where subscription channels aimed at children were being promoted.
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Member's further response

27. The Member alleged that the previous complaint (#41372) was identical in nature to the current complaint and the proof provided by the Complainant in both complaints was the same. Therefore the Member argued that if the previous complaint was withdrawn, then this complaint should also be withdrawn.
28. The Member acknowledged that it was in control of the selection and management of third parties who it elects to do business with. However the Member argued that a distinction had to be drawn between affiliates and a global corporation like Google, which owns the platforms on which adverts are placed and which sets its own rules and regulations for the placement of advertising on such platforms.
29. The Member again denied that the marketing was in breach of the WASPA Code as the adverts in question were not placed within a children's channel, nor were they intentionally targeting children.

30. The Member argued that YouTube was not a site, platform or channel designed to target children and is instead an open video platform where users may access content across different genres using the search functionality provided. This open platform should be distinguished from the dedicated children's platform called YouTube Kids.
 31. The Member referred in this regard to YouTube's terms of use which states that persons may not use the service nor accept the terms if they are not of legal age to form a binding contract with YouTube.
 32. The Member also argued that the searches carried out by the Complainant during the testing were generic and not within a subscribed channel on YouTube or on the YouTube Kids platform. The Member stated that its adverts would not appear in subscribed channels which had been included in the exclusion lists submitted to Google, and that it did not advertise on YouTube Kids.
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Sections of the Code considered

33. The Complainant cited clause 5.4 and 22.4 of the WASPA Code of Conduct as the basis for their complaint.
 34. Clause 5.4 states that "*Members must have honest and fair dealings with their customers*".
 35. Clause 22.4 states that "*Subscription services must not be intentionally targeted at children*".
 36. No further clauses were assigned by WASPA.
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Decision

37. Before dealing with the merits of the current complaint, I must first deal with the argument raised by the Member that this complaint should be withdrawn because it is identical in nature to and based on the same proof as a previous complaint which was withdrawn by the Complainant.
38. The testing conducted by the Complainant before lodging this complaint was entirely separate to the testing conducted in respect of complaint #41372. The results of the tests conducted by the Complainant are not the same as the test results provided in complaint #41372.
39. The Member's assertion that both complaints are based on the same proof is therefore not correct.
40. I have also noted the explanation given by the Complainant for the withdrawal of the previous complaint and I am satisfied that the withdrawal of the previous complaint has no bearing on the current complaint.
41. Turning to the current complaint, I have reviewed the results of the 5 tests conducted by the Complainant. In each case, the advertising for the Member's Apps Clan subscription service appears a) below an animated video, which by its nature and subject matter is either aimed at children or would reasonably be expected to be particularly attractive to children¹; and b) below a promotional offer to subscribe to specific YouTube subscription channels (i.e. the Cartoon Network UK and Ben 10 subscription channels), which are also either aimed at children or would reasonably be expected to be particularly attractive to children by virtue of the nature and subject matter of the content offered on both channels.
42. Much was made in the exchanges between the parties about the distinction between advertising that is displayed within specific subscription channels, and advertising which is displayed to users who are not subscribed to specific channels.
43. This appears to be largely due to the imprecise manner in which the original complaint was framed by the Complainant and, in particular, its use of the word "channel".

¹ A "child" is defined in clause 22.1 of the WASPA Code of Conduct as a natural person below 18 years of age.

44. The Complainant did initially allege that the Member was advertising on “kid’s channels” on YouTube, namely Cartoon Network UK and Ben 10. The Member then correctly noted, based on the screenshots and URLs provided by the Complainant, that the advertising in question did not appear within these subscribed channels, as alleged by the Complainant.
45. However, the Complainant subsequently clarified what it meant by its use of the word “channel” and I am satisfied that the basis of this complaint is that the Member’s advertising was displayed with video content (and other promotional offers) which are intentionally targeted at children.
46. I agree with the Complainant’s view that it makes no difference whether the video content in question was accessed and viewed from within a subscribed channel or by persons using the YouTube platform generally.
47. The important point is that the advertising of the Member’s subscription services has been displayed with video content which is aimed at children.
48. The Member also incorrectly understood it to be the Complainant’s contention that YouTube, as a platform, is itself designed to target children. This is clearly not what is being argued by the Complainant and instead the Complainant has taken issue with the advertising of the Member’s subscription service with particular types of video content found on the platform.
49. The Member’s reference to the age restriction contained in YouTube’s terms of use² also does not take the matter any further. The age restriction on YouTube is 13 years of age, whereas the WASPA Code defines a child as a person under 18. It therefore follows that children over the age of 13 years, but below 18 years, can still use the YouTube platform

² Clause 2.3 of the YouTube Terms of Use states as follows: *You may not use the Service and may not accept the Terms if (a) you are not of legal age to form a binding contract with YouTube, or (b) you are a person who is either barred or otherwise legally prohibited from receiving or using the Service under the laws of the country in which you are resident or from which you access or use the Service.*

(accessed on 15 August 2019 from <https://www.youtube.com/static?template=terms>)

and advertising targeted at such persons would not be compliant with the provisions of the WASPA Code.

50. It also appears from the Member's response to this complaint that even if it is found that the adverts in question were displayed with video content aimed at children, this was not intentional.
51. In this regard, the Member advised that it purchases advertising through the Google Adwords service and explained that even though it does provide lists of excluded keywords, sites, applications and channels where its adverts should not be placed or displayed, there is always the possibility that its adverts could be placed or displayed in areas without its knowledge or control.
52. The Google AdWords service is split into two networks, the Search Network and the Display Network. When advertising on the Search Network, adverts can be placed near search results when someone searches with terms related to a keyword provided by the advertiser. When advertising on the Google Display Network, adverts can be displayed to users who access various sites, mobile applications and video content across the Google network.
53. Advertising across both the Search Network and Display Network can be strategically targeted to potential audiences in a number of ways. The advertiser can either manually set the targeting parameters itself, or it can use Google's automated targeting solution, which uses proprietary algorithms and machine learning to target advertising based on the advertiser's existing audiences and/or the nature of its products and services.
54. The important point to note here is that adverts are not placed and displayed "randomly" across the Google network, as alleged by the Member. Instead, adverts are intentionally targeted at potential audiences.
55. It is also notable that 4 of the 5 test results provided by the Complainant show that the Member's advertising was displayed with content relating to the "Ben10" animated character. This cannot be regarded as random.
56. Even if the Member's version is accepted, i.e. that it had no control over how adverts are placed and displayed through its use of the Google Adwords service, the Member would

still be responsible for advertising through Google that does not comply with the provisions of the WASPA Code of Conduct.

57. The Member has argued further that a distinction should be drawn between normal affiliate marketing and advertising through Google, which not only provides the advertising service but also owns the platforms on which the advertising is placed and displayed.
58. However, clause 3.1 of the WASPA Code states that if any supplier, affiliate or sub-contractor of a member provides or markets services covered by the Code, those services are subject to the relevant provisions of the Code, as if the party providing or marketing them was a member.
59. Similarly, clause 3.7 of the WASPA Code states that a member is liable for any breaches of the Code resulting from services marketed by a supplier, affiliate or sub-contractor.
60. These provisions of the Code are therefore clearly not limited to affiliates and would, under the current circumstances, also apply to Google insofar as it is acting as a supplier to the Member.
61. Based on the evidence presented, I have made the following findings:
 - 61.1 Adverts for the Member's subscription service have been displayed with video content and other promotional offers aimed at children (as defined in clause 22.1 of the WASPA Code of Conduct).
 - 61.2 The display of adverts for the Member's subscription service was not random and is based on manual or automated targeting through the Member's use of the Google Adwords service.
 - 61.3 The Member's subscription services are therefore being intentionally targeted at children in breach of clause 22.4 of the WASPA Code.
 - 61.4 The Member's Apps Clan subscription service is intended for users over the age of 18 years. By targeting the advertising of this service at children, the Member is

not acting honestly and fairly in its dealings with its customers. The Member is therefore also in breach of clause 5.4 of the WASPA Code.

62. The complaint is accordingly upheld.

Sanction

63. The advertising of subscription services to children is expressly prohibited and the failure of the Member to comply with these requirements must be viewed in a serious light.

64. It is also noted that a number of other unrelated complaints have been upheld against the Member (see complaints #32769, #33053, #39136, and #39886). This must also be viewed as an aggravating factor.

65. No mitigating factors were presented by the Member.

66. Based on the foregoing, the following sanctions are imposed:

66.1 The Member is fined an amount of R 25 000.00 for its contravention of clause 5.4.

66.2 The Member is fined an amount of R 50 000 for its contravention of clause 22.4.