



## Report of the Appeals Panel

Complaint number	41520
Cited WASPA members	Hulk Mobile (1689)
Notifiable WASPA members	Not applicable
Appeal lodged by	WASPA Compliance Department
Type of appeal	Written appeal
Scope of appeal	<input checked="" type="checkbox"/> Review of the adjudicator's decision <input checked="" type="checkbox"/> Review of the sanctions imposed by the adjudicator
Applicable version of the Code	16.6
Clauses considered by the panel	5.4 and 22.4
Related complaints considered	None
Amended sanctions	None
Appeal fee	Appeal fee not to be refunded
Is this report notable?	Notable
Summary of notability	<b>A Member can be found to have the necessary 'intention' to breach the WASPA Code of Conduct where the Member is aware of the wrongfulness of its actions and - while not specifically intending to breach the Code of Conduct – is aware that their actions may result in a breach of the Code of Conduct and continues with its actions despite this risk.</b>

## **Initial complaint**

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The Complainant alleged that the Member was advertising its "AppsClan" subscription service on channels aimed at children.

The Complainant provided reports from 5 (five) 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.

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.

## **Adjudicator's findings**

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The Adjudicator considered the following Clauses of the WASPA Code of Conduct:

Clause 5.4 states that: "Members must have honest and fair dealings with their customers".

Clause 22.4 states that: "Subscription services must not be intentionally targeted at children".

No further clauses were assigned by WASPA.

The adjudicator 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 children; 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.

The adjudicator then clarified that although 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, this was not relevant in these circumstances. The adjudicator agreed 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. The important point was that the advertising of the

Member's subscription services had been displayed with video content which is aimed at children.

The Member advised that it purchased 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.

The adjudicator highlighted that the important point to note 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. The adjudicator also noted 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 which cannot be regarded as random.

The adjudicator then referenced 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 the services was a member.

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.

The adjudicator held that 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.

The adjudicator made the following findings:

Adverts for the Member's subscription service had been displayed with video content and other promotional offers aimed at children (as defined in clause 22.1 of the WASPA Code of Conduct).

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.

The Member's subscription services are therefore being intentionally targeted at children in breach of clause 22.4 of the WASPA Code.

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.

## Appeal submissions

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The Member responded to the adjudication report and made written representations and we have reproduced the pertinent ones below:

*“The platform where our advertising was found by the complainant, YouTube, which from reading the Complainants submissions and Adjudicators report, this platform is now deemed to be a platform where if an advert from a WASPA member appears, it would now be interpreted as a breach of the WASPA Code of Conduct due to the placement of adverts should any content within that platform not conform to the WASPA Code of Conduct.”*

*“...the adjudicator agrees with the complainants 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. This in our opinion is an extremely concerning precedent to set, as the wording and viewpoint would ultimately bring other platforms into question, not least, search engines such as Google, Bing, DuckDuckGo, and Twitter, to name a few.”*

*“..if there is content promoted that could be perceived to be aimed at children, and if you are a member of WASPA whereby your advertising appears within the generic element of any of these platforms, then there is a breach of clauses 5.4 and 22.4.”*

*“It is clear that YouTube has had major issues with targeting on its platform - mainly related to accidentally advertising to children or appearing next to hate content - hence why major players such as Nestle, the UK Government, Dr Oetker, etc took the approach of pulling all advertising from the platform. Please see appendix for a quick list of relevant details.”*

*“The Adjudicator in point 54, claims that adverts across Google inventory are intentionally targeted at potential audiences and not displayed randomly. This is incorrect. Google do place adverts randomly across their inventory, as well as display intentional targeted advertising. Google utilises exclusion lists, as referred to in point 51 of the adjudicators report.”*

*“At no time did our advertising appear within a specific channel that is aimed at children, in fact, those channels are contained within our exclusion lists.”*

*“At no time have we intentionally targeted children from our campaigns. In order to ensure we are not advertising directly at sites which are specifically orientated for kids, exclusion lists are in*

*place. These lists are provided by WASPA, monitoring companies such as Empello and MCP and also by proactive searches made by the team members.”*

*“Furthermore, it appears that the notion of children’s channels have now been expanded to the web in general and any area where a child may have access to, or a service that may be of interest to any person under the age of 18, will be deemed to be a breach. As previously stated, this is a dangerous precedent to set.”*

*“Additionally, where we are breached under clause 5.4, we have always had an honest and fair dealings with our customers. The campaigns are not ambiguous, nor are they not displaying the relevant criteria as set out by the business rules of the Mobile Network Operators, or subsequent rules of advertising within the WASPA CoC. Whenever it has been brought to our attention that our marketing material could possibly be advertised in what may be considered as a children’s site, we have cross checked the campaign interactions and in the vast majority of cases, the only clicks generated are those generated by the monitoring tools in place in use by Waspa, MCP.”*

*“Based on the above, and the fact that WASPA is setting a dangerous precedent within this ruling as to how its members should advertise within general platforms, this case should be dismissed.”*

The Complainant responded to the Member’s appeal submission. Pertinent aspects of the Complainant’s response can be found below:

*In re the Member’s submission that - The platform where our advertising was found by the complainant, YouTube, which from reading the Complainants submissions and Adjudicators report, this platform is now deemed to be a platform where if an advert from a WASPA member appears, it would now be interpreted as a breach of the WASPA Code of Conduct due to the placement of adverts should any content within that platform not conform to the WAPSA Code of Conduct.*

*“Neither the Complainant nor the adjudicator at any point stated that WASPA members may not advertise or promote subscription services on the YouTube platform. The Complainant, and the adjudicator via the report, stated that the prohibition on promoting and advertising subscription services is limited to platforms/sites/channels which are clearly designed, developed or created for children, aimed at children or would reasonably be expected to be particularly attractive to children. Therefore, an advert for a WASPA member’s service may be placed on the YouTube platform, as long as the placement is not of such a nature that the service is intentionally targeted at children based on the content and other promotional material contained on that YouTube platform.”*

*In re the Members submission that - The adjudicator agrees with the complainants 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. This in our opinion is an extremely concerning precedent to set, as the wording and viewpoint would ultimately bring other platforms into question, not least, search engines such as Google, Bing, DuckDuckGo, and Twitter, to name a few.*

“The Code is platform and technology neutral. It provides a general provision that prohibits member’s from intentionally targeting subscription services at children. This will be applicable to print; radio; television; applications; web; social media platforms; etc.

Furthermore, the provision will apply irrespective if you reached that platform/site/channel via a random search, by typing in a specific keyword or by visiting a subscribed channel on the YouTube platform, or any other similar platform for that matter.

As such, when a member, or alternatively a third party marketing supplier on behalf of the member, places an advertisement for a subscription service on a platform, they must ensure that the placement complies with the requirements of the Code and that it does not breach, for example, the prohibition on placing such advertisements on a platform/site/channel specifically designed, developed or created for children, which is aimed at children or is reasonably likely to be very attractive to children.

The above requirement will apply irrespective if the platform is a website search engine, a specific website or page, a social media platform, etc., and will therefore be applicable to platforms like YouTube, as well as the Google Search Engine, Bing Search Engine and social media platforms like Facebook, Instagram and Twitter.”

*In re the Member’s submission that - If there is content promoted that could be perceived to be aimed at children, and if you are a member of WASPA whereby your advertising appears within the generic element of any of these platforms, then there is a breach of clauses 5.4 and 22.4.*

“The Complainant has at no point stated that a member may not advertise a subscription service in a ‘generic’ element of a platform. We clearly stated that the limitation in where a member may advertise relates to platforms/sites/channels which are specifically designed, developed or created for children, which is aimed at children or is reasonably likely to be very attractive to children.

We refer to an extract of the adjudicator’s report, point 48: “...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...”, which aligns with our argument and our allegation of breaches of the Code.”

*In re the Member’s submission that - An example scenario of this would be, as a user I enter Star Wars, who’s parent company is Disney, into the search functionality of any search portal, and because Disney on occasions produces content that could be aimed at children, any advert belonging to a member within this search functionality would be viewed as in breach.*

“It is unclear what the member is trying to explain with this point and we respectfully submit that the argument is flawed.

If a consumer were to use a website search engine and type in the keyword ‘Star Wars’ as the search, they would be directed to a platform/site/channel which contains content in line with the search. If the video content and cross-promotional material is not specifically designed, developed and created for children, aimed at children or reasonably likely to be very attractive to children, then a member would be able to promote their subscription service on this platform. If however, the video content and cross-promotional material relate to content (Disney children’s movies or similar) clearly aimed at children as the target audience, then a member may not promote their subscription service on this platform.”

*In re Member’s submission that - It is clear that YouTube has had major issues with targeting on its platform - mainly related to accidentally advertising to children or appearing next to hate content - hence why major players such as Nestle, the UK Government, Dr Oetker, etc took the approach of pulling all advertising from the platform. Please see appendix for a quick list of relevant details.*

“The member is in control of selecting and managing their third party marketing suppliers offering or promoting services on their behalf, and should ensure compliance with the Code. If the member is/was aware of ‘major issues with targeting on its {YouTube} platform’, then it is our opinion that the member should potentially have elected to not use this platform for advertising its subscription services, to avoid intentional or accidental breaches of the provisions of the Code.”

*In re the Member’s submission that - The Adjudicator in point 54, claims that adverts across Google inventory are intentionally targeted at potential audiences and not displayed randomly. This is incorrect. Google do place adverts randomly across their inventory, as well as display intentional targeted advertising. Google utilises exclusion lists, as referred to in point 51 of the adjudicators report.*

“Irrespective of how the selected platform functions, it remains the member’s responsibility to selected and manage their third party marketing suppliers. As such, the member must therefore ensure that they include, for example: ‘Cartoon-like video content’ and ‘Animated video content’ for children; Cross-promotional offers for ‘Kids Channels’; etc. on their exclusion list to avoid, as stated by the member, the possibility of its adverts being placed or displayed in areas without its knowledge or control.”

*In re the Member’s submission that - As we have stated previously, at no time did our advertising appear within a specific channel that is aimed at children, in fact, those channels are contained within our exclusion lists.*

“As clarified in our supplementary response, the word ‘channel’ was used interchangeable for a platform/site/channel, and we believe that the adjudicator’s report clearly captures the clarified intention in points 24 and 25 thereof.

The fact remains that the members subscription service was advertised on a platform where the video content and other cross-promotional offers were clearly either aimed at children or would reasonably be expected to be particularly attractive to children, and as such the placement of that advertisement is in breach of the provisions of the Code.”

*In re the Member’s submission that - At no time have we intentionally targeted children from our campaigns. If that were the case, then I’d expect the complainant to have found advertising within excluded channels, that are specific to children’s content. But as we do not target children, campaigns would not be found in these channels. Instead, the complainant takes issue with advertising appearing in generic areas of a platform whereby a child may have access. At no time should we be held accountable to how a platform that is out of our control be used by its users. We conform to all relevant rules surrounding the use of such a platform.*

“As stated before, and set out in point 46 of the adjudicator’s report, it is irrelevant if the content (and by association the members advertisement for the subscription service) is accessed and viewed within a subscribed YouTube channel or by using/searching the YouTube platform generally. The advertisements placement needs to comply with the provisions of the Code.

We strongly disagree with the member’s statement that they cannot be held accountable, as the Code specifically places responsibility for compliance and liability for failure to comply on the member as set out in section 3 of the Code.”

*In re the Member’s submission that - In point 44 this is acknowledged by the Adjudicator that we the member, were correct in noting the point that we were in fact not advertising within specific channels targeted at children, whereas the Complainant was incorrect in their accusation that we were placing advertisements in specific channels targeted at children. In order to ensure we are not advertising directly at sites which are specifically orientated for kids, exclusion lists are in place. These lists are provided by WASPA, monitoring companies such as Empello and MCP and also by proactive searches made by the team members.*

“This point was clarified in the supplementary response, and clearly set out in point 45, 46 and 47 of the adjudicator’s report.”

*In re the Member’s submission that - Furthermore, it appears that the notion of children’s channels have now been expanded to the web in general and any area where a child may have access to, or a service that may be of interest to any person under the age of 18, will be deemed to be a breach. As previously stated, this is a dangerous precedent to set.*

“We respectfully submit that the above statement is incorrect and flawed. It goes without saying that subscription services may not be promoted within a children’s channel, like the Cartoon Network Africa/Cartoon Network UK/Ben 10 YouTube subscription Channels, etc. The prohibition has not been expanded to the web in general, and remains as it always has been, in that a subscription service may not intentionally be targeted at children, and therefore, the advert may



not be placed on a platform/site/channel that is specifically designed, developed or created for children, which is aimed at children or is reasonably likely to be very attractive to children.”

In re the Member’s submission that - *Additionally, where we are breached under clause 5.4, we have always had an honest and fair dealings with our customers. The campaigns are not ambiguous, nor are they not displaying the relevant criteria as set out by the business rules of the Mobile Network Operators, or subsequent rules of advertising within the WASPA CoC. Whenever it has been brought to our attention that our marketing material could possibly be advertised in what may be considered as a children’s site, we have cross checked the campaign interactions and in the vast majority of cases, the only clicks generated are those generated by the monitoring tools in place in use by Waspa, MCP.*

“Whether there is one occurrence of a breach of the Code, or one thousand, the rules remain the same and should be adhered to in all circumstances. The same applies to whether one consumer may potentially be affected, or one thousand consumers – it does not detract from the actual breach of the Code and the requirement to comply.

We respectfully submit that we believe that we have clearly set out our case and that the member has breached Clause 5.4 and 22.4 of the Code.”

## **Deliberations and findings**

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The panel read the extensive submissions of both the Complainant and the Member to both the adjudication and the appeal processes as well as the Adjudicator’s report.

Although many issues were raised both technical and factual in our view the matter can be reduced to a simple set of questions:

1. What does the Code require in terms of clauses 5.4 and 22.4?
  - a. “Members must have honest and fair dealings with their customers” and “Subscription services must not be intentionally targeted at children”.
2. Did the Member breach these provisions?
  - a. In this regard we should look at 22.4 first as the result thereof would inform our decision regarding clause 5.4. The Member went to great lengths to explain what exclusion lists they put in place to prevent their services being intentionally targeted at children. They also went to great lengths to explain how they could not control the placement of the ads on You Tube. The Member by their own admission acknowledged that You Tube had problems ensuring that inappropriate advertising was not displayed to children and stated: *“It is clear that YouTube has had major issues with targeting on its platform - mainly related to accidentally advertising to children or appearing next to hate content - hence why major players such as Nestle, the UK Government, Dr Oetker, etc took the approach of pulling all advertising from the platform.”* The panel is of the view that the issue of channel is irrelevant in that the Code is technology neutral. It does not require that no

subscription services are advertised on specific named channels but that at no point are subscription services ever intentionally targeted at children. Although we have heard the Member's submission around the fact that they cannot control the final placement of ads on You Tube, when read with 3.1 and 3.7, we agree with the adjudicator that the Member breached 22.4.

3. The panel was further informed by clause 3 of the Code. Clause 3.1 of the 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. 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.
4. In determining whether the Member intentionally targeted adverts at children the panel sought reference to the laws of delict and delictual liability. Intention (*dolus*) concerns the actor's state of mind. One will be held responsible for the intentional results of one's conduct. The test for intention is subjective. One must a) intend to injure; and b) know that it is wrongful. A person acts intentionally if he/she purposely does something he/she knows to be wrong.
5. It is important to note that Intention is present not only in the case where the Member intentionally targets children, but also in the case where the Member knew that the advertisements could target children and resigned themselves to that possibility. In our law this type of intention is termed '*dolus eventualis*'.
6. The Member by their own admission knew that the adverts may be shown to children or targeted to children as is shown by the following statement made in the appeal submission: "It is clear that YouTube has had major issues with targeting on its platform - mainly related to accidentally advertising to children or appearing next to hate content - hence why major players such as Nestle, the UK Government, Dr Oetker, etc took the approach of pulling all advertising from the platform." Notwithstanding this, the Member continued to use the advertising services irrespective of the fact that they knew the adverts could be targeted at children in breach of the Code. Coupled with knowledge of the prohibition in the Code of Conduct on intentionally targeting adverts at children, this demonstrates knowledge of wrongfulness.
7. In addition and by its own admission, the Member, with regard to YouTube and its subsequent utilisation of the platform, showed intent by its foresight of the possibility of their services being marketed to children and its reconciliation with that foreseen possibility (in that it proceeded anyway irrespective of having knowledge that some organisations have abstained from using the platform because of unwanted or accidental exposure to children). This demonstrates intent.
8. Accordingly, we find a breach of 5.4 in addition to 22.4.

We confirm the findings and the sanctions imposed by the adjudicator.

The appeal is accordingly dismissed.

### **Amendment of sanctions**

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The sanctions imposed by the adjudicator is confirmed.

### **Appeal fee**

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As the Member's appeal failed, the appeal fee is declared forfeited.