



Report of the Adjudicator

Complaint number	#60462
Cited WASPA members	U2OPIA MOBILE / Collective Networks Membership no: 1962
Notifiable WASPA members	n/a
Source of the complaint	WASPA Compliance Department
Complaint short description	Non-compliant promotion of subscription service
Date complaint lodged	2024-08-19
Date of alleged breach	2024-07-18
Applicable version of the Code	v17.7
Clauses of the Code cited	5.5, 8.8, 12.1 read with 8.9, 21.11
Related complaints considered	60461; 60463
Fines imposed	Member fined following amounts: R5 000 for breach of clause 5.5; R5 000 for breach of clause 8.8; R10 000 for breach of clause 12.1; and R15 000 for breach of clause 21.11.

Other sanctions	n/a
Is this report notable?	n/a
Summary of notability	n/a

Initial complaint

1. Whilst monitoring, testing services and conducting compliance checks of test results, the WASPA Compliance Department (“Complainant”) identified services which do not comply with the requirements as set out in the WASPA Code of Conduct (“Code”).
 2. The Complainant’s tester conducted a manual test on 18 July 2024 on the Telkom network and provided an outline of the test results, together with screenshots as evidence of various alleged breaches of the Code.
 3. The Complainant states that, while browsing on an adult content website, the tester clicked on a link that appeared to be related to an explicit (X18) adult video. Instead of being directed to the video, the tester was directed to the Telkom Network Hosted Confirmation Page (NHCP) for a non-adult subscription service called ‘Reycreo’, charged at R3.00 per day.
 4. The Complainant also alleged that there was no adult content made available to the tester.
 5. The tester elected to stop the tests at that point.
 6. The Complainant alleges that the Member has breached the provisions of clauses 5.5, 8.8, 12.1 read with 8.9, and 21.11 of the Code.
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Member’s response

7. The Member responded to the complaint by stating that they had identified the source of this promotional campaign and had immediately paused all their active promotions through that particular source.

8. The Member provided a copy of an email that was sent to all their partners to stop all traffic on the Telkom network because of the number of complaints being received.
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Complainant's further submissions

9. The Complainant referred to clauses 3.1, 3.2, 3.5, 3.6 and 3.7 of the Code and submitted that there was a positive obligation on the Member to ensure that their third-party marketing suppliers promote and market the Member's services in accordance with the requirements of the Code.
 10. The Complainant stated that the Member needs to ensure that the marketing material used to promote their service aligns with the content that is actually provided as part of the subscription service.
 11. The Complainant stated further that the use of explicit (X18) material is not only prohibited by the Code but is also prohibited by the Films and Publications Board and this type of practice should be ceased immediately.
 12. The Complainant also noted that the Member had not denied the non-compliant promotion and marketing of their service and had only referred to remedial and corrective steps taken to address the breaches emanating from their marketing partners. The Complainant submitted that the Member remains liable for the breaches occasioned or facilitated by their third-party marketing suppliers.
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Member's further submissions

13. The Member submitted further that they had terminated the services of the marketing partners involved as it appeared that their mainstream content was being misused with incorrect creatives.
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Sections of the Code considered

14. Clauses 5.5, 8.8, 12.1 read with 8.9, and 21.11 of the Code were cited in the formal complaint and considered.
15. Clauses 3.1, 3.2, 3.5, 3.6 and 3.7 of the Code were also considered.
16. No other relevant clauses were assigned by WASPA.

Decision

17. The Member has acknowledged that the promotional campaign that was the subject of this complaint was not compliant with the requirements of the Code.
18. It is common cause between the parties that this promotional campaign was conducted by a third-party marketing partner/supplier.
19. The Complainant has correctly stated that the Member has a positive obligation, in terms of clauses 3.6 of the Code, to ensure that such suppliers, who are not members of WASPA, market the Member's services in a manner consistent with the requirements of the Code. Clause 3.7 of the Code also states that the Member is liable for any breaches of the Code resulting from services marketed by such suppliers.
20. With regard to the specific clauses of the Code that the Complainant alleges have been breached and after carefully reviewing the complaint and supporting evidence, I have made the following findings:
 - 20.1 In the promotional materials used for this campaign, a representation was made that an adult video content could be viewed by clicking on the link provided. This representation was patently false since it was not possible to view any adult content, including the video advertised.
 - 20.2 This promotion of the Member's subscription service was inherently deceptive and was likely to mislead consumers by ambiguity. The campaign also appears to have been designed in this manner intentionally. I am satisfied that there has been a breach of clause 5.5 of the Code for which the Member is responsible, and the complaint is accordingly upheld in this regard.
 - 20.3 The adult video content that is promoted is clearly not the same content that is provided to subscribers when they subscribe to the Member's non-adult subscription service. This advertising also misleads consumers into believing that it is for an entirely different service or for different content. I am satisfied that there has been a breach of clause 8.8 of the Code for which the Member is responsible, and the complaint is accordingly upheld in this regard.
 - 20.4 I agree with the submission made by the Complainant that the video link used on the promotional web page, which triggers an automatic redirect to the Telkom Confirmation Page, qualifies as the 'call-to-action' as defined in clause 8.9 of the Code. There is no pricing information displayed adjacent to this 'call to action' or at all, which is in breach of the requirements of clause 12.1 of the Code. The

Member is responsible for this breach and the complaint is accordingly upheld in this regard.

- 20.5 I am satisfied that the video thumbnail for the advertised video in question contains images which are or would likely be classified as X18 by the Film and Publication Board. It is also clear that this thumbnail has been used to market the Member's service in breach of clause 21.11 of the Code. The Member is responsible for this breach and the complaint is accordingly upheld in this regard.
21. To summarize my findings, the Member is found to be responsible for the breach of clauses 5.5, 8.8, 12.1 read with 8.9, and 21.11 of the Code the complaint is upheld in this regard.
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Sanctions

22. When determining the appropriate sanctions to be imposed for the various breaches of the Code, the following factors must be taken into consideration:
- 22.1 Whether any previous successful complaints have been made against the Member in the past three years?
- 22.2 Whether any previous successful complaints of a similar nature have been made against the Member?
- 22.3 The nature and severity of the breach.
- 22.4 Whether any efforts were made by the Member to resolve the matter.
23. Furthermore, when considering the extent of the Member's liability for the various breaches of the Code and the appropriate sanctions to be imposed, clause 3.7 of the Code also provides that it must be considered whether the Member has demonstrated that it took reasonable steps to ensure that the partners/suppliers appointed by them do market their services in a manner consistent with the requirements of the Code. If so, this will be considered as a mitigating factor when determining such sanctions.
24. Two other formal complaints have been lodged against the Member around the same time as the present complaint, which both involved similar breaches of the Code but related to different promotional campaigns (see formal complaints #60461 and 60463). Both of these other complaints have also been upheld against the Member. This is taken into account as an aggravating factor.

25. In their response to the present complaint, the Member stated that they had paused this non-compliant campaign (as well as others) and had sent a notification to all their marketing partners to immediately stop all traffic on the Telkom network. The Member then subsequently terminated the services of the marketing partners responsible for the non-compliant marketing of their services. I am satisfied that the Member has made an effort to resolve this complaint and this is taken into account as a mitigating factor.
 26. The fact that there have been a number of different non-compliant promotional campaigns used by one or more of the Member's marketing partners/suppliers does cast some doubt on whether the Member takes reasonable steps to ensure that their services are marketed by third parties in a manner consistent with the Code. I am not satisfied that the Member has demonstrated that they do.
 27. The use of deceptive marketing and the failure to clearly display pricing information when promoting a subscription service must be viewed in a serious light, based on the potential risk of harm to consumers. Furthermore, the use of explicit adult content in material used to market the Member's services must also be viewed in a very serious light. These are all taken into account as aggravating factors.
 28. In light of all of the foregoing factors, the following fines are to be paid by the Member:
 - 28.1 R5 000 for breach of clause 5.5 of the Code;
 - 28.2 R5 000 for breach of clause 8.8 of the Code;
 - 28.3 R10 000 for breach of clause 12.1 of the Code; and
 - 28.4 R15 000 for breach of clause 21.11 of the Code.
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