



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Integrat (Pty) Ltd
Information Provider (IP)	Gozomo (Pty) Ltd
Service Type	Subscription
Source of Complaints	Competitor
Complaint Numbers	#0315

Complaint

A complaint was received in respect of the service offered by the IP through the SP. In particular the complaints concerned the bundling of content items and a subscription service, as evidenced by a print advertisement for the service, as placed by the IP. In particular, the complainant referred to one of the multitude of content items advertised by the IP.

The complainant specifically states:

Section 11.1.2 [of the WASPA Code of Conduct] clearly states that a request to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. It further states that to join a subscription service may not be bundled with a request for specific content.

When you request the Sudoku game by sending an SMS with the word SUD02, you receive the game and are subscribed to the service to receive other games weekly.

The Adjudicator notes that there are a number of other complaints submitted in respect of the subscription service provided by the IP, through the SP (and submitted by the same complainant), which remain to be completed. The IP has requested that these advertisements be dealt with collectively. The Adjudicator has elected to consider this complaint separately, as it is distinguishable from the other unadjudicated complaints in respect of both advertising medium (print rather than television) and content.

The following clauses of the WASPA Code of Conduct were considered:

2.20. A “**subscription service**” is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.

SP response

The Secretariat received a response from the SP in its own regard as well as from the IP. These are set out below, with minor editing of spelling and typographical errors and contact details removed.

The SP indicated:

Below the response from our customer with regards to the above complaint.

This customer is in the process of registering a South African company to enable them to register with WASPA as a member.

Integrat did not advertise the content or were not part in the process of producing the adverting material, but were merely the Connectivity Aggregator in this case. We also do not have any history about the process followed for producing the advertisement, and therefore can not respond to the complaint with the required information. We also do not initiate delivery of the content, nor modify the content during delivery.

The IP indicated:

We refer to WASPA Code of Conduct complaint #0315, and respond thereto on behalf of Gozomo (the Information Provider in respect of the advertisements that are the subject matter of the Complaints.)

This complaint was lodged against Integerat by Gavin Penkin of Exactmobile. Once more we wish to lodge our objection against a Competitor, which is represented on the Code of Conduct Committee using a disciplinary forum in respect of which we are expressly not permitted to have any vote and have in addition been prevented from even having a voice on the relevant committees. We draw to WASPA's attention once more that we continue to reserve our right to use an appropriate forum to lodge our objection to this unacceptable state of affairs and to seek appropriate relief. We view WASPA's failure to address our concerns in this regard in a serious light and once more draw their attention to the fundamentally anti-competitive nature of this situation.

It continues to be noteworthy that Mr Penkin continues to be the only source of complaints in respect of advertisements lodged by Gozomo and Services provided by Gozomo. We also question why Mr Penkin seems to be going to the lengths of testing all of our services and viewing our advertisements for the purpose of finding what he views as breaches of the Code of Conduct. We wish to point out to Mr Penkins once again that he is not the regulator of the Industry or of our Company and his role within WASPA does not require him to search out potential breaches of the Code. His conduct points specifically to him using the Complaints procedure as a competitive tool.

The provisions of Section 11.1.2 have recently been the subject of an appeal finding by the WASPA appeals board. Although we fundamentally disagree

with the finding of the Appeals Board we do not have to resort to an analysis of their interpretation of this section which the Appeals Board itself recognized is "not as clear as it should be." Nevertheless the Appeal Board has recognized that promotion of categories of content is permissible under the WASPA code where there is no code for specific content.

The Complainant seems to be ignorant of the nature of Soduku. It is clearly a category of Soduku puzzles where the subscriber receives 3 puzzles per week and not a specific puzzle, game or item of content. The advertisement clearly states this. By way of analogy our advertisement was similar to promoting subscription to a Bridge Club or a Chess Club where subscribers receive different puzzles each week. By subscribing to the Soduku category subscribers are sent different Soduku Puzzles on a subscription basis. In no way were we linking a specific game of Soduku to the request for subscription.

For sake of clarity we confirm that we categorically reject the claim that we have breached Section 11.1.2 of the Code.

We trust that WASPA will agree that there is no merit to this complaint.

WASPA Advertising Rules

The complainant did not raise the issue of a possible breach of the WASPA Advertising Rules in his complaint and as such the SP and the IP have not been given an opportunity to respond thereto.

The Adjudicator dealt extensively with this issue, as well as the relevant provisions of the WASPA Advertising Rules in the report concerning complaints #0141, #0186 and #0188 (which concerned the same SP, IP and complainant and similar advertising for the same service, namely a subscription service). The Adjudicator does not believe it necessary to repeat this lengthy discussion, save to note that *prima facie* breaches of the WASPA Advertising Rules are likewise present in the advertisement in the instant complaint.

The Adjudicator wishes to admonish both the SP and the IP for their failure to ensure that all advertising comply with the WASPA Advertising Rules and to warn both of them that this admonition may be taken into account in considering any future contravention of the WASPA Advertising Rules.

The Adjudicator has noted the IP's additional submission and in particular its commitment to compliance and public education and is encouraged by such statements as well as their initial practical manifestation.

Decision

The Adjudicator has noted the IP's various comments concerning the complainant, as well as WASPA's failure to consider various of the IP's requests, comments and submissions. The Adjudicator notes that he applies the WASPA Code of Conduct as he finds it. He is able to recommend the modification thereof, as is any WASPA member, however is bound to follow the Code unless it is in patent contravention of

national law. While such a contravention is implied by the IP, insufficient particularity is provided for the Adjudicator to consider this issue further.

The Adjudicator also notes that the IP has since become a member of WASPA and trust that this will enable the IP to have an appropriate input into future decision making within the organisation.

In addition, the Adjudicator noted the comment of Harms JA in *Telimatrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* [Supreme Court of Appeal, Case Number 459/04 – as yet unreported]:

The only aspect raised on the plaintiff's behalf was the fact that the plaintiff was not a member of the ASA but was nevertheless 'indirectly bound' by its rulings because its advertising agent was a member of a constituent body of the ASA. In Matthews v Young (1922 AD 492), counsel reminded us, by joining the union Young bound himself to its process. The answer is really this. If the plaintiff was not legally bound to the ruling through those whose services it engaged, the plaintiff could have ignored the ASA's decision but, if it chose to abide by it, its loss would have been caused by its election and not by the incorrect decision. By engaging the services of someone who is a member of a professional organisation, one has to accept the consequences of that person's professional rules and standards.

Regarding the submission of the SP, the Adjudicator has previously noted the liability of an SP for the actions of an IP and without burdening this report overly, repeats the comment of the Panel in the Appeal Decision, which held:

Nevertheless, we believe that it is implicit in the Code that non-member IPs must comply with the rulings of the Adjudicator, where the Adjudicator finds that there has been a breach of the Code, or risk the termination of their contractual relationship with their SP. This much is clear from clause 3.9 of the Code, which states:

"Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct."

Regarding the substance of the instant complaint, this concerns the "independent transaction" requirement of Clause 11.1.2 of the WASPA Code of Conduct. The Adjudicator was of the view that this can be reduced to a simple test, namely whether the "Sudoku" game included in the advertisement submitted by the complainant is a content item or a content category.

The IP's submission is accepted in this regard. A customer is first provided with new Sudoku puzzles each week. The Adjudicator nevertheless did not agree that the complainant's confusion in this regard is a matter of ignorance as many mobile and computer based Sudoku applications are able to generate new puzzles or have a very large number of puzzles supplied with the application.

The Adjudicator did not uphold the complaint, however encouraged the IP to insert wording over or adjacent to the Sudoku picture indicating "3 new puzzles per week" or similar, to avoid any possible confusion.