



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	16549
<b>WASPA member(s):</b>	TIMw.e. New Media Entertainment South Africa (IP) / Integrat (SP)
<b>Membership number(s):</b>	1067 (IP) / 0030 (SP)
<b>Complainant:</b>	Public
<b>Type of complaint:</b>	Advertising
<b>Date complaint was lodged:</b>	2012-02-28
<b>Date of the alleged offence:</b>	N/A
<b>Relevant version of the Code:</b>	11.6
<b>Clauses considered:</b>	4.1.2, 6.3.3, 11.1.1, 11.2.1 & 14.3.14
<b>Relevant version of the Ad. Rules:</b>	2.3
<b>Clauses considered:</b>	N/A
<b>Related cases considered:</b>	N/A

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### Complaint

The Complainant in this matter alleged that the IP in this matter utilises inappropriate ways in soliciting subscription services.

In reply to the IP's initial response the Complainant was adamant that the IP must take responsibility for its affiliated marketing partners.

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### Information provider's response

The IP provided a response whereby it furnished the Complainant with a detailed explanation as to why the specific banners were utilised.

In a further response it accepted responsibility and also clarified its current status on affiliates and its approach going forward by inter alia stating the following:

- *We have been proactively working towards educating and managing affiliates, promoting WASPA's code of conduct and advertising rules, and seEng them as the framework that every affiliate has to work with.*

*We have been addressing this problem with them before any complaints were lodged, as we mentioned in our previous response, and we will keep doing so.*

- *Affiliates were instructed to remove adverts a week ago because of concerns with regards to banners – this was also being done before any complaint was lodged. There is no malicious intent on the IP's part to profit from misleading advertising.*
  - *In this case specifically, we have also been informed today by this particular affiliate that they have ceased their relationship with the offending publisher as a consequence of this incident. This is in line with the conduct we expect and demand of our affiliates.*
  - *The IP has appointed a local tester to keep tabs on their affiliates, which will actively seek out examples of bad behavior by the part of publishers linking to our campaigns and report back.*
  - *Banners are immediately removed if either the SP or IP have any concerns. Should confirmation of banner removal and/or link to TIMwe's landing pages be missing or delayed, these pages, which enable the subscription, are taken down by TIMwe as well to ensure that no subscriptions come from misleading advertising, as was done in this case. Action was swiftly taken, with a low response time.*
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### **Sections of the Code considered**

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

6.3.3. Promotional material must not be of a nature that unduly encourages unauthorised calls or use of services.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

14.3.14. On the basis of the evidence presented, the adjudicator will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits.

## Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the IP's subsequent reply.

Without having to delve into the merits of the case, it is self-explanatory to the Adjudicator that the IP has taken full responsibility for the actions of its affiliates.

Although affiliates cannot necessarily be classified as Information Providers as defined in the Code of Conduct, the Adjudicator is of the opinion that the same principles as underlined in section 3.9 of the Code of Conduct, could be utilised when dealing with affiliates. This however can only form the basis of a recommendation issued by the Adjudicator in this matter, and is therefore not to be seen as a rule, but as good practise.

However, having that being said, members of WASPA have a responsibility towards the public to ensure its own compliance to the Code.

Section 4.1.2 clearly states that members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

One might argue that in this instance, the IP did not knowingly disseminate the information (banner). If one however fails to bring the Code of Conduct to the attention of your affiliates and fail to oblige them in complying thereto, then the assumption might be created that such failure could be rendered as indirect knowledge of the fact that a contravention of the Code might occur.

The Adjudicator is therefore of the opinion that a member could be bound to section 4.1.2 through its own affiliates.

In this instance the Adjudicator feels that the IP has done enough to bring the Code of Conduct to the attention of its affiliates (if what the IP stated is proven to be correct) and the IP is through such action not considered to be bound to section 4.1.2, since the dissemination in this particular instance did not knowingly take place, but through the actions of a "rogue" affiliate.

However, the Code does further state in section 6.3.3 that promotional material must not be of a nature that unduly encourages unauthorised calls or use of services. This banner is clearly evident of such unduly nature in its use of the wording "You are today's iPhone winner".

The Code continues in section 11.1.1 stating that promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

This clearly did not happen and since the IP has assumed responsibility, the Adjudicator has no hesitation in finding the IP in breach of sections 6.3.3 and 11.1.1.

The Complaint is upheld.

**Sanctions**

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SPs with regard to breaches of the relevant sections of the Code of Conduct; and
- The SPs' subsequent response

The IP is reprimanded for the non-compliance of its affiliates and encouraged to follow recommendations levied by the Adjudicator and to fulfil on its own compliance program.