



ADJUDICATOR'S REPORT

Complaint reference number: 17220

WASPA member(s): Buongiorno SA

Membership number(s): 0002

Complainant: Public

Type of complaint: Banner advertisements for a subscription service

Date complaint was lodged: 2012-05-17

Date of the alleged offence: Unspecified

Relevant version of the Code: 11.6

Clauses considered: 4.1.2, 11.2.2, 11.2.3 and 14.6

Relevant version of the Ad. Rules: 2.3, not considered

Clauses considered: Not applicable

Related cases considered: 11863 and 16479

Complaint

The complainant in this matter is a member of the public who has raised concerns with certain banners he came across on the Web and which are associated with the member's subscription service. The banners concerned are amateurs to the member's submissions which I have dealt with in more detail below. Essentially, these banners promote promotional competitions or otherwise contain calls to action for content and information services. One of the banners which the complainant raised concerns about indicated that the person viewing the banner had

a message and was invited to click on the banner in order to open this message. This was not part of a message service and was, rather, a device intended to solicit a click on the banner and progression to the linked page or service. The complainant stated the following in his initial complaint:

I clicked on the advert, only to discover that these statements that I head a message was untrue. In fact it was nothing more than a fraudulent and underhanded attempt to get me to unwittingly subscribe to a subscription service.

The complainant subsequently added a number of additional banners to his original complaint regarding this "message banner" and this complaint encompasses all of these banners.

The subject matter of this particular complaint is substantially similar to the subject matter of complaint 16479 which was adjudicated around the time this complaint arose and the adjudicator's decision in complaint 16479 was delivered after this complaint was lodged. The member has since appealed the decision in complaint 16479 and, as far as I'm aware, this appeal is still pending.

Given the similarities between complaint 16479 and the appeal against the adjudicator's decision in that matter, I do not propose considering the same issues or expressing a view on matters already decided by the adjudicator in complaint 16479 and which will, no doubt, be considered by the appeal panel hearing the appeal against that decision. In the event that the appeal has already been decided, the appeal panel's decision regarding the banners and their compliance with the Code will most likely hold sway in this complaint as well.

Service provider's response

The member, in its submissions, pointed out the following at paragraph 7:

We also confirm that campaigns substantively similar to those forming the subject of this Complaint have been tested by WASPA and found to be compliant with the Code; examples are Adjudications numbered 11863, 13744, 15183 and 15664. The Adjudication of #11863 is the most comprehensive decision – it also deals with banners to a certain extent.

Based on the principles of double jeopardy and to avoid possibly conflicting decisions we submit that the adjudication of this Complaint a) in so far as the banners are concerned be suspended pending the outcome of the Appeal Panel's decision with respect to complaint #16479; and b) in so far as it relates to the our Reward Program campaigns be dismissed as this aspect has already been adjudicated upon, as we were found to be compliant with the Code – the Secretariat appears to agree with us on this point (see email from WASPA Complaints dated

18 May 2012, annexed hereto, marked "B7").

The member then continued with submissions on the merits of the complaint "in anticipation of the Adjudicator disagreeing with us" on its submissions that I'm not proceed with this complaint given that complaint 16479 is currently on appeal. This was unnecessary.

Sections of the Code considered

Given this complaint's circumstances, I have not considered the member's banners' compliance with the Code. Instead, I have regard to clause 14.6 of the Code which deals with appeals and, specifically, the following provisions:

14.6.7. The appeals panel must consider the evidence provided to the adjudicator, the adjudicator's decision and any additional information provided by the service provider.

14.6.8. If the member has requested a face-to-face appeal hearing, then the appeals panel must also consider the member's appeal, as presented during the appeal hearing.

14.6.9. On the basis of the evidence presented, the panel will decide whether there has, in fact, been a breach of the Code.

14.6.10. If the panel determines that there has, in fact, been a breach of the Code, then the panel must review the sanctions recommended by the adjudicator.

14.6.11. The panel may maintain the same sanctions recommended by the adjudicator, or may determine such other sanctions, as it deems appropriate given the nature of the breach and the evidence presented.

Sections of the Advertising Rules considered [if applicable]

Not applicable

Decision

The complainant was informed that complaint 16479 was currently on appeal at the time he filed his complaint. He wished to proceed with this complaint despite this. However, given that complaint 16479 deals with substantially the same subject matter as this complaint and, as far as I am aware, the appeal in complaint 16479 has not yet been finalised, it is not appropriate for me to consider whether the banners which form the subject matter of this present complaint and which are substantially similar to the banners referred to in complaint 16479

are compliant with the Code, particularly considering that the related Code infringements in complaint 16479 are mirrored in this complaint.

In the event that the appeal in complaint 16479 has been finalised, the appeal panel would, in all likelihood, have considered the matters raised in clause 14.6 of the Code and, in particular, clauses 14.6.7 to 14.6.11, and the appeal panel's finding may well have addressed the subject matter of this complaint as well.

In the event the appeal against complaint 16479 does not proceed or a decision on the merits of that complaint insofar as they relate to this present complaint is not made, I ask that this complaint be reinstated and resubmitted for adjudication, whether it be by me or another adjudicator as the Secretariat may determine appropriate.

I therefore provisionally dismiss this complaint subject to the subject matter of this complaint being finally adjudicated by way of the appeal against complaint 16479.

Sanctions

It is not necessary to make a determination regarding any sanctions as I have not made a finding against the member.