



REPORT OF THE APPEALS PANEL

Complaint reference number:	19827
WASPA member(s):	Buongiorno South Africa (Pty) Ltd
Membership number(s):	0002
Complainant:	WASPA Media Monitor
Type of complaint:	Adult Subscription service
Date complaint was lodged:	6 March 2013
Date of the alleged offence:	5 March 2013
Relevant version of the Code:	12.1
Clauses considered:	4.1.1, 6.2.2, 8.1.1, 8.1.3, 11.1.1 and 11.1.2

Introduction

1. This appeal is against a complaint lodged by the WASPA Media Monitor regarding the Appellant's Blinko SexyCherry subscription service.
2. The Monitor conducted a service test on 5 March 2013. This included clicking on a promotional banner advert and following the process through to final subscription.
3. The grounds for the complaint were as follows:
 - 3.1 The banner advert and landing page from the link did not prominently or explicitly advertise that it was a subscription service.
 - 3.2 The billing information and required subscription service wording was not included in the banner advert.

- 3.3 There was no verification step in place to verify that a user was an adult. There was also no notice that the page was for users 18+ years old.
- 3.4 Only 1 example of content was shown.
4. In its initial response to the original complaint, the Appellant took the view that the issues underlying the complaint were the same or similar to the subject matter of other adjudicated complaints which were currently being appealed. The Appellant requested that the complaint be stayed pending the outcome of these appeals.
5. The WASPA Secretariat did not agree with the Appellant's view that there was an overlap between the complaint and the other matters under appeal. The complaint was therefore referred to the formal adjudication process.
6. The Appellant did not provide any further response to the complaint and the matter was adjudicated by the adjudicator on the evidence and submissions made by the Monitor.
7. The adjudicator upheld the complaint without citing specifically which sections of the Code were breached. The Appellant was fined an amount of R20 000.00.
8. In its appeal, the Appellant has admitted a contravention of section 11.1.2 but has denied any further contraventions of the Code.
9. It has requested that the appeal panel consider a proportionate reduction of the sanction handed down by the adjudicator.
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Grounds of Appeal

10. In dealing with its initial lack of response to the complaint, the Appellant has stated that the decision not to respond to the initial complaint was made by an ex-employee who drew her own conclusion that the complaint was connected to other matters which were currently being appealed against.

11. The Appellant has now acknowledged in its appeal document that the complaint was not, in fact, related to the other matters which were the subject of pending appeals.
12. The adjudicator was therefore correct in proceeding to adjudicate the complaint on the basis of the evidence presented by the complainant and in the absence of any further response from the Appellant.
13. However, the Appellant has now, in its appeal document, provided further information and submissions to be considered by the appeal panel in terms of section 14.6.4 of the Code.
14. The crux of these submissions were that:
 - 14.1 The Appellant uses affiliate networks to promote its subscription services, including the Blinko SexyCherry subscription service.
 - 14.2 The relationships between the Appellant and its affiliates are governed by contract and/or by general good industry practice including *inter alia* observance of the WASPA Code of Conduct.
 - 14.3 In turn, the affiliate networks employ the services of various publishers who place advertisements promoting the Appellant's services on various websites.
 - 14.4 The Appellant has stated that the identity of these publishers and the websites they use are not disclosed to the Appellant. The Appellant is also not privy to the contractual arrangements between the affiliates and the publishers.
 - 14.5 The Appellant provides its affiliate networks with the advertising material to be used to promote its services. The Appellant pays its affiliates on a "cost per lead" basis, i.e. whereby the affiliate receives a set fee for all successful user subscriptions in response to an advert which links to the Appellant's services.
 - 14.6 The Appellant alleges that the publishers appointed by its affiliate networks often use their own advertisements with the relevant link to the Appellant's services.

- 14.7 The Appellant does not permit or condone this practice as it disregards the requirements of the WASPA Code and Advertising Rules and brings the entire industry into disrepute.
- 14.8 The banner advert in this case (i.e. *"Tanya1 has sent you a video message"*) originates from one of these non-compliant publishers and the Appellant has neither created, allowed to be placed, authorised, delivered, nor disseminated the said banner to the affiliate networks for use in any of its campaigns.
- 14.9 Following receipt of the Monitor's report, the Appellant was able to ascertain from the URL provided underneath the screenshot of the banner which affiliate network was responsible for its unauthorised publishing.
- 14.10 Correspondence was exchanged between the Appellant and the affiliate in question, where it was confirmed by the said affiliate that it was responsible for the content of the banner which one of its publishers had published without any consent or authorisation whatsoever obtained from the Appellant.
- 14.11 The Appellant believes that the landing page for which it is responsible is compliant with the Code (except for the contravention of section 11.1.2) and reveals the billing information and subscription service wording in the first page of its landing page.
15. The Appellant made certain other submissions which have been considered but which are not relevant to the findings of the appeal panel.

Sections of the Code considered

16. The following sections of the Code were considered:

Section 1.6 - Some companies may be required to comply with the WASPA code by virtue of a contract with one or more network operators and/or a contract with one or more voting WASPA members. In such cases, all clauses in the Code of Conduct and the WASPA Advertising Rules that are binding on

WASPA members shall be deemed to be binding on those companies, irrespective of whether or not those companies are members of WASPA.

Section 2.1 - An “adult service” is any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature.

Section 2.2 - An “adult content service” is any service for the provision of content which has been classified as suitable only for persons 18 years or older by an appropriate body (such as the Film and Publications Board), or content reasonably likely to be so classified.

Section 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 or the Advertising Rules.

Section 3.9.2 - Where any information provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider.

Section 4.1.1 - Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

Section 6.2.2 - All advertisements for services must include the full retail price of that service.

Section 8.1.1 - Any adult service must be clearly indicated as such in any promotional material and advertisements.

Section 8.1.3 - Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services.

Explicit confirmation of a user's age must be obtained prior to the delivery of an adult content service.

Section 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.

Section 11.1.2 - An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed, except as provided for in 11.1.3.

Section 14.3.16 - In determining any appropriate sanctions, the adjudicator must take into consideration:

(a) any previous successful complaints made against the member;

(b) any previous successful complaints of a similar nature.

Section 14.6.1 - Any member found to have breached the Code of Conduct by an adjudicator has the right to appeal for a review of the adjudicator's decision, and/or a review of the sanctions imposed by the adjudicator.

Section 14.6.4 - Once the secretariat has been notified that a member wishes to appeal a decision, that member has fifteen working days to supply the secretariat with any additional information it deems relevant to the complaint. An extension to this time period may be given to the member at the discretion of the WASPA Secretariat.

Section 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.

Section 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.

Section 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.

Section 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.

Findings of the Appeal Panel

On the merits

17. The Appellant has accepted liability for its contravention of section 11.1.2 of the WASPA Code. However it has denied that it has breached any further provisions of the Code.
18. The emphasis of the complaint lodged by the Monitor pursuant to its service test appears to be on the banner advert ("Tanya 1") and the subsequent landing page (screenshots of both were provided by the Monitor in the original complaint).
19. In respect of both, the Monitor has correctly pointed out that they do not prominently and explicitly show that a subscription service is being advertised; nor do they display the required billing information and subscription service wording.
20. There is also no verification step to confirm that the user is an adult, nor is there the required "18+" notice displayed.
21. The Appellant has not denied that the banner advert contravenes the Code, particularly, section 8.1.1 and 11.1.1.
22. Instead, the Appellant has stated that it did not create or authorise this banner advert and that the affiliate's publisher was responsible for publishing this particular banner advert.

23. In the absence of further evidence to the contrary, the panel must accept the Appellant's version in this regard.
24. However, it remains the Appellant's responsibility to ensure that its affiliate networks comply with the Code. Similarly, the affiliates would, in turn, be responsible for ensuring that the publishers it uses also comply with the Code.
25. The Appellant has acknowledged that it enters into binding contracts with its affiliates and that these contracts contain provisions which place a positive obligation on the affiliate to comply with the Code.
26. The Appellant is therefore in a position to seek relief against its affiliates for the breach of these contractual provisions for any contraventions of the Code.
27. In light of the foregoing, the Appellant must be held responsible for such contraventions of the Code, either by the Appellant's affiliate networks or their publishers.
28. On the basis of the evidence presented by the Monitor and the further information and submissions made by the Appellant, the panel is of the view that the adjudicator's decision was correct in upholding the complaint.
29. For the sake of completeness, the appeal panel finds that the provisions of sections 4.1.1, 6.2.2, 8.1.1, 8.1.3, 11.1.1 and 11.1.2 were contravened.
30. The appeal on the merits is therefore dismissed.

Sanction

31. In terms of section 14.6.10 of the Code, the appeal panel must review the sanctions recommended by the adjudicator if a breach of the provisions of the Code has been found.
32. In the present complaint, the adjudicator does not appear to have taken into consideration any previous successful complaints made against the Appellants, including any previous successful complaints of a similar nature.

33. Reference was made in the appeal to various other complaints which had been adjudicated against the Appellant, but which were the subject of other pending appeals at the time.
34. However, the Secretariat pointed out that none of these matters dealt with adult subscription services.
35. From our perusal of the WASPA complaint archives, it does not appear that any previous complaints have been upheld against the Appellant for complaints of a similar nature.
36. This must be taken into account as a mitigating factor.
37. Although we have found that the Appellant is ultimately responsible for the actions of its affiliates, we must take into account the fact that the Appellant has taken reasonable steps to ensure, in its contracts with its affiliates, that they do not contravene the provisions of the Code. In the present circumstances, the Appellant has indicated that it had no knowledge of the non-compliant banner advert that was used to promote this particular service.
38. This too has to be taken into account as a factor in mitigation.
39. However, it has also long been accepted by WASPA and its members that contraventions of the provisions of the Code which regulate adult services must be treated as very serious, considering the potential harm that may be caused to consumers, particularly children.
40. It is the responsibility of all members to ensure that the provisions of the Code and the Advertising Rules relating to the promotion of adult services are closely followed, regardless of whether a member uses the services of affiliate networks and other third parties to promote those services.
41. It is for this reason that the panel is of the view that the sanction chosen by the adjudicator is correct notwithstanding the other mitigating factors referred to above.
42. The appeal against the sanction recommended by the adjudicator is also dismissed.

Appeal fee

43. As the Appellant has not been successful in its appeal, it is not entitled to a refund of its appeal fee.