



REPORT OF THE APPEALS PANEL

Complaint reference number:	20299
WASPA member(s):	Buongiorno South Africa (Pty) Ltd
Membership number(s):	0002
Complainant:	Public
Type of complaint:	Competition
Date complaint was lodged:	18 April 2013
Date of the alleged offence:	September 2012
Relevant version of the Code:	12.1
Clauses considered:	Clause 9.7

Introduction

1. The complaint originated with a member of the public who reacted to an advertising banner stating "You are today's iPad 2 Winner". On clicking on the banner the Complainant was redirected to a landing page with subscription service information of the Appellant and with a message that he only stood a chance to win a different prize, namely an iPhone. The Complainant did not complete the subscription process.
2. In its response to the complaint the Appellant denied liability but conceded that the landing page belonged to it. It explained its denial as follows:

In the case where we are unable to identify the Affiliate following some investigation, which is often the case as most Affiliate networks use so - called "blind networks" where the publishers that connect to the network is not identified to the advertiser, unfortunately on such occasions, we can only issue a strong written warning to all contracted Affiliates to

ensure any offending publishers are removed immediately but without a URL that includes the tracking information or the logs from a completed subscription of a customer it remains difficult to establish exactly who the offending party is.

3. The Complainant was not satisfied with the explanation and the matter was referred for adjudication.
4. The Adjudicator considered sections 3.1.1, 3.9.2 and 9.1.1 to 9.1.9 in relation to the complaint.
5. The Adjudicator indicated that the banner in question was clearly in breach of section 9.1.7 of the Code (quoted below) as it indicated that a respondent had already won a prize, whereas that was clearly not the case, but indicated that the responsibility of the Appellant for this breach was a more complex question.
6. The Adjudicator expressed alarm at the fact that although the Appellant conceded that the banner in question was placed by an affiliate, that it did not have proper controls in place to identify the particular affiliate unless there is a successful transaction following on the lead.
7. The Adjudicator held that in terms of section 3.9.2 a service provider remains liable for any breach of the Code committed by information providers that make use of the facilities of a WASPA member.
8. The Adjudicator held that the Appellant was in breach of Section 9.1.7. The Appellant was fined an amount of R50 000.00.

Grounds of Appeal

9. The Appellant has acknowledged that the banner is clearly in breach of section 9.1.7, but denies that it has any responsibility for the banner or its content for the following reasons:
 - 9.1 The Appellant uses affiliate networks to promote its subscription services, including the service involved in this instance.

- 9.2 The relationships between the Appellant and its affiliates and the matters for which each party accepts responsibility are governed by contract and/or by general good industry practice including *inter alia* observance of the WASPA Code of Conduct.
- 9.3 In turn, the affiliate networks employ the services of various publishers who place advertisements promoting the Appellant's services on various websites.
- 9.4 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.
- 9.5 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.
- 9.6 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.
- 9.7 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. It also concedes that such conduct is fraudulent which it does not tolerate.
- 9.8 The banner advert in this case (i.e. "*You are today's iPad 2 winner*") 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. This is also clear from the differences between the banner and the landing page.
- 9.9 Although the Appellant has the means to identify the affiliate network that placed the advertisement, it is not possible in this instance

because the Complainant did not provide a URL for the banner and did not subscribe to the service creating the necessary link.

Sections of the Code considered

10. The following sections of the Code were considered:

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.

[Our emphasis]

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 9.1.7. Competition services and promotional material must not:

- (a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;*
 - (b) exaggerate the chance of winning a prize;*
 - (c) suggest that winning a prize is a certainty;*
 - (d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.*
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Findings of the Appeal Panel

On the merits

11. It is clear that the banner in question is an infringement of section 9.1.7 of the Code of Conduct. This is also readily conceded by the Appellant although it denies liability for the breach for the reasons set out above. The essence of the defence is that the banner was placed without the approval of the Appellant by an independent affiliate or publisher of such affiliate.
12. Sections 3.9.1 and 3.9.2 are clear however about the responsibility that a service provider has for affiliates or content providers who provide services on behalf of for the service provider. 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.
13. 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.
14. 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. Any sanctions imposed on the Appellant should in principle be recoverable as damages from such an affiliate. Although the identity of the affiliate or publisher in this instance may not be readily established from the information by the Complainant, the pool of potential offenders are clearly within the control of the Appellant and it should be able to track down the offending party.
15. 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.
16. On the basis of the evidence presented by the Complainant 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.
17. For the sake of completeness, the appeal panel finds that the provisions of section 9.1.7 read with sections 3.9.1 and 3.9.2 were contravened.
18. The appeal on the merits is therefore dismissed.

Sanction

19. 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.
20. 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.
21. In terms of the prior adjudication record of the Appellant, numerous complaints have been upheld against the Appellant and several large fines have been imposed and paid.
22. 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 as set out in its submissions. 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. It is also taken into account that the Appellant may have difficulties in establishing the identity of the offending affiliate in this instance. However, the breach is a serious one as acknowledged by the Appellant due to the fraudulent nature of the breach, although the fraudulent conduct cannot directly be attributed to the Appellant.
23. This too has to be taken into account as a factor in mitigation.
24. Based on the foregoing factors, both in aggravation and mitigation, we are of the view that the adjudicator's sanction was appropriate in the circumstances and the appeal against the sanction recommended by the adjudicator is also dismissed.

Appeal fee

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