

WASPA appeals panel
Complaint 21352

REPORT OF THE APPEALS PANEL

Date of report: 10 September 2015

WASPA Member: Imobic

Complaint Number: 21352

Applicable Code versions: 12.4

Background

1. This matter involves a finding of breach of the Code upheld against the Member for promotional materials for the member's services that appear to have been placed and managed by what the member describes as an "affiliate". The full facts of the matter appear in the record and do not bear repeating in this report.
2. Notably, the member concedes that the promotional material in question was not compliant with the Code, but the member argues that it should not be held responsible for this breach as the advertising of the member's services was performed by an affiliate and not the member itself.
3. The member's argument is essentially that the code should not be interpreted as impose strict liability on the member for non-compliant advertising for its services. In this regard, the Code does not expressly specify whether fault-based liability or strict liability for advertising should apply and an interpretation of the Code is required.
4. The primary purpose of the Code is described in section 1.2 thereof as follows:

The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made.

The Code of Conduct also sets standards for advertising mobile application services, and includes a framework for the provision of adult services, to ensure adequate protection of children from potentially harmful content.

5. In the opinion of the Panel, were the member's argument accepted that only fault based liability is intended by the Code in relation to advertising, this would lead to an absurd and untenable result where non-compliant advertising for the member's services could continue unabated, the member could continue to derive the commercial benefits from the advertising of its services through the affiliate advertising network. In light of section 1.2 of the Code, this surely cannot have been the intention of the drafters of the Code.
6. Further evidence that strict liability is indeed to apply to members for the acts of others can be found in sections 3.9.1 and 3.9.2, read with the definition of an "information provider" in section 2.1.4.
7. In terms of section 2.1.4, an "information provider" is any person on whose behalf a wireless application service provider may provide a service, and includes message originators.
8. Sections 3.9.1 and 3.9.2 then go on to provide that:

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.

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.

9. In the present case, the member has stated in its appeal that:

Imobic does everything in its power to prevent the affiliates from promoting Imobic's products in any method contrary to relevant laws and regulations.

Imobic has very strict terms and conditions in place for affiliate networks and its publishers and full compliance with these terms and conditions is mandated.

Imobic, as part of the worldwide Cliq Digital group, uses strict terms and conditions for publishers (Please see the attached 'Terms and Conditions – Publishers'), but also imposes additional country specific rules and regulations, please see the attached "Rules and Regulations Marketing Promotion ZA".

10. Clause 6 of the Publisher Terms and Conditions supplied by the member provide the member with a full indemnity against losses suffered by the member as a result of the Publisher's transgression of the above terms.

11. Wherever a member enters into a contractual relationship in terms of which another person performs promotional activities in relation to the member's services that fall within the ambit of the WASPA Code, whether directly or indirectly through a network of advertisers, the member is liable for any acts or omissions of its contractors. To hold to the contrary would allow members to enjoy the fruits of an affiliates marketing activities whilst avoiding any of the responsibilities. This would lead to a patently absurd result and completely circumvent the purpose of the Code of Conduct. Members should simply ensure (as the member in this case has) that they are indemnified by their contractors for losses, penalties and damages that flow from the acts or omissions of those contractors.

12. The Appeals Panel accordingly finds no basis to interfere with the Adjudicator's decision, including the decision that the member's initial representations that the offending promotional campaigns had been discontinued (when they in fact had not) was misleading.

13. As such the appeal is dismissed and the appeals fee is forfeited.