



Wireless Application Service Providers' Association

Appeal Panel's Report

Complaint/s on appeal	23939
Appellant/s	Mira Networks
Date appeal lodged	2015-02-26
Appeal decision date	2015-09-28
Relevant Code version	12.4
Clauses considered	3.9, 14.3
Relevant Ad Rules version	Not applicable
Ad Rules clauses	Not applicable
Related cases considered	6759, 15092

The Appeal

1. The member, Mira Networks (Proprietary) Limited, is the appellant in this appeal and we will refer to the appellant as "the appellant" and the "SP" interchangeably in this report. The appellant was cited as a respondent along with Nexus Enterprises Limited ("IP") in complaint 23929 which was lodged

against both members by the WASPA Monitor on 2014-05-05. The original complaint is available [here](#) and included the following citation of the respondents to the complaint:

WASP or service: Nexus - Mira Networks

2. This citation is important given the nature of the appeal presently before us.
3. The adjudicator upheld the complaint and ruled that sections 5.1, 5.2 and 11.1 of the Code were breached. The adjudicator also ruled that section 11.2 of the Code had not been breached. Crucially, at least for the purposes of this appeal, the adjudicator held both respondents responsible for the breaches of the Code. The adjudicator's resulting sanctions were as follows:

The initial sanction I had in mind was a fine of R 15 000.00 be imposed on the IP/ SP in the case of a single transgression of the relevant sections of the Code however because the IP/ SP had failed to heeds the advices of the HEADS UP that was sent to the IP/SP by the Media Monitor in the initial stages of the complaint and as a result there were further flagrant breaches of the Code and as a result I rule as follows:

- 1. A sanction of a fine of R 30000.00 is to be paid by the IP and SP together;*
- 2. That said fine be paid jointly and severally (the one absolving the other) within 60 days of this Ruling;*
- 3. The Media Monitor continue monitoring the activities for any further breaches of the code;*
- 4. That in the event of any further transgression of Clause 4.1 the Adjudicator consider a sanction of Suspension of Membership should any deceptive or dishonest campaign be run by either the IP / SP in the future;*

4. The appellant appealed against the adjudicator's ruling on the following basis:
 - 4.1. The appellant was not properly before the adjudicator as a respondent and ought to have been regarded merely as an interested party in the complaint lodged against the IP alone.
 - 4.2. By including the appellant as a co-respondent to the complaint and ruling against the appellant, the adjudicator exceeded his/her authority and created a procedural irregularity that breached the appellant's right to a fair hearing.

- 4.3. Moreover, the WASPA Secretariat, itself, exceeded the authority it was granted by the Code for similar reasons: it included the appellant as a respondent.
 - 4.4. The appellant was not “mentioned or referred to” in the complaint and, again, ought not to have been cited as a respondent.
5. The appellant stated 5 “facts” which formed the basis of its appeal (at 4.1.3) which we will examine below:
 - 5.1. The Secretariat’s email notification about the complaint to the appellant included the following wording (emphasis added by the appellant): “...the WASPA Secretariat believes that the Affiliate member involved is making use of your infrastructure to provide this service and we are thus making you aware of this complaint”.
 - 5.2. “The fact that the e-mail notification (sent to Nexus Enterprises Limited (“Nexus”) by the WASPA Secretariat on 5 May 2014 at 16:02), in terms of which Nexus was informed of the Complaint (the “IP Notification”), only identified Nexus as the member against whom the Complaint was lodged.” (paragraph 4.1.3.2)
 - 5.3. “The fact that the “Description of complaint”, which was attached to the IP Notification and which, in fact, constituted the “complaint” for purposes of clause 14.3 of the Code (the “Description of Complaint”), only named Nexus as the offending party (and not the Appellant).” (paragraph 4.1.3.3)
 - 5.4. The “fact” that the Description of Complaint “makes no reference at all to the Appellant” or to any specific wrongdoing on the appellant’s part. (paragraph 4.1.3.4)
 - 5.5. “The fact that the IP Notification preceded the SP Notification and carried the subject “WASPA Code of Conduct complaint Ref:#23939”, whereas the SP Notification carried the subject “SP notification for Affiliate member complaint #23939”. (emphasis added)” (paragraph 4.1.3.5)
6. The appellant argued that the only basis on which it could have been a part of the complaint proceedings was “merely that of a party made aware of the Complaint as a consequence of the Appellant having an interest in the fact and/or outcome of the Complaint”. Consequently, the appellant argued that, by including the appellant in the findings in the adjudicator’s report, the adjudicator improperly extended the scope of the complaint. In the process, the adjudicator and, by extension, the Secretariat exceeded their authority granted by the Code and violated the appellant’s rights to a fair hearing.

7. The appellant referred further to the notice which the Secretariat sent to it on 2014-05-05 which included the following:

Dear WASPA member,

The appended formal complaint has already been sent directly to the Affiliate member indicated below for their response. However, the WASPA Secretariat believes that the Affiliate member involved is making use of your infrastructure to provide this service and we are thus making you aware of this complaint.

You may:

- 1. Choose to allow the relevant Affiliate member to respond to this complaint, and not provide any response of your own; or**
- 2. Provide a written response to the complaint, which will be considered by the adjudicator in addition to any response provided by the relevant Affiliate member.**

Depending on the severity of the alleged breach, you may also wish to take additional steps regarding the service that is the subject of the complaint. If you do choose to take such steps in response to this notification, please notify the WASPA Secretariat of the steps taken.

Please note that this message constitutes formal notification of this complaint in terms of clause 14.3.3 of the WASPA Code of Conduct. This means that whether or not you choose to respond, it is possible that the independent adjudicator will treat you as a respondent for this complaint, and sanctions could be imposed on your company. The adjudicator may also hold you liable for the actions of the Affiliate member in the event that that member does not comply with any sanctions imposed on that member by the adjudicator.

8. We have highlighted portions of the notice for emphasis. The appellant similarly highlighted the last paragraph we quoted in support of its argument that the original complaint did not cite the appellant and this notice improperly extends the complaint to include the appellant as a respondent to the complaint. Specifically, the appellant argued as follows:

4.1.5.2 The WASPA Secretariat's duties and powers in relation to formal complaint proceedings are set out in clause 14.3 of the Code. Clause 14.3 does not empower the WASPA Secretariat to alter or increase the ambit of the Complaint. Had the WASPA Secretariat, on the basis of the Description of Complaint, formed the view that

the Appellant had or may have breached the Code in one or more respects, it could have initiated (and was confined thereto) a separate complaint against the Appellant in terms of clause 14.1.6 of the Code. We, accordingly, submit that the WASPA Secretariat acted ultra vires in attempting to join the Appellant as a co-accused or respondent in relation to the Complaint.

*4.1.5.3 The learned adjudicator's duties and powers in relation to formal complaint proceedings are also set out in clause 14.3 of the Code, and the types of sanctions he may impose are set out in clause 14.4 thereof. Whilst clause 14.3.10 of the Code empowered the learned adjudicator to, having afforded the relevant member an opportunity to respond thereto, adjudicate upon any additional breaches of the Code discovered during the investigation of the Complaint (but which were not specified in the original Complaint), **the learned adjudicator was confined to adjudicating only upon any additional breaches by the member against which the Complaint was lodged** (i.e. Nexus). The learned adjudicator was not empowered, in terms of either of these clauses of the Code, to treat the Appellant as a co-accused or respondent in relation to the Complaint or to impose any sanction on the Appellant. By purporting to do so, we submit that the learned adjudicator acted ultra vires his powers conferred upon him by the Code.*

9. Again, we highlighted portions of the appellant's arguments which we will return to shortly. The appellant reiterated the following in paragraph 5.1.2 of its appeal submissions:

Nowhere in the Complaint is the Appellant mentioned or referred to.

10. In its submissions regarding a proper interpretation of the complaint, the appellant argued that only the IP could have been held accountable for a breach of the Code on the basis that the IP "was the message originator and, therefore, was seized with the duty to ensure that the provisions of the aforementioned clauses of the Code were not breached".
11. The appellant then turned to section 3.9 of the Code (which we will also discuss below) and argued that –
 - 11.1. The adjudicator failed to mention section 3.9 in his/her report and therefore did not apply his/her mind to section 3.9 as a basis for a finding against the appellant.
 - 11.2. Even if the adjudicator has applied his/her mind to section 3.9 and used it as basis to hold the appellant liable, he/she incorrectly did so either because the IP is a WASPA member (negating the application of section 3.9.2) or because previous WASPA appeal panels (specifically

regarding complaints 6759 in November 2010 and 15029 dated 2 May 2012) indicated that an element of fault on the part of an SP is required to justify a finding against a SP for an IP's wrongdoing in terms of section 3.9.3 of the Code.

Sections of the Code Considered

3.9. Information providers

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.

3.9.3. Notwithstanding clause 3.9.2, where an information provider makes use of a member's facilities for the sending of spam or fails to comply with the provisions of 5.1.11, the member shall not be liable for any such breach unless the member failed to take the reasonable measures contemplated and provided for in 5.3.1.

14.3 Formal complaint procedure

14.3.3. The member (or members) named in the complaint, or identified by the WASPA Secretariat on the basis of any identifying information included in the complaint, will be notified by the secretariat that a complaint has been lodged and that the formal complaint procedure is being followed.

14.3.4. The secretariat will provide the member with a copy of the complaint, and any additional information relevant to the complaint.

14.3.5. The member will be given five working days to respond to the complaint, and to provide any additional information the member deems relevant to the complaint, including any mitigating factors that the member wishes the adjudicator to consider.

14.3.6. If the member fails to respond within this time period, it will be assumed that the member does not wish to respond. An extension to this time period may be given to the member at the discretion of the WASPA Secretariat.

Analysis

12. The appeal panels' decisions in complaints 6759 and 15029 certainly have a bearing on this complaint. As the appellant pointed out, these earlier appeals were decided on similar facts and in consideration of previous versions of section 3.9 which we are currently considering. The version of clause 3.9 which the appeal panel in complaint 6759 ("the 6759 appeal panel") considered read as follows:

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.

13. The 6759 appeal panel made the following comment regarding a proper interpretation of section 3.9.1 before continuing with its further analysis of the appeal submissions before it:

The Panel agrees that the clear meaning of section 3.9.1 is that members of WASPA are required to take steps to ensure that information providers that they deal with observe the requirements of the Code.

14. The 6759 appeal panel considered whether a SP could be held liable for an IP's breach of the Code under section 3.9 and ruled that section 3.9 could not be read to impose strict liability on an SP. In other words, section 3.9 could not be interpreted to mean that a SP is automatically liable for an IP's breach of the Code. This ruling was underscored by section 18.2 of the WASPA Constitution which read:

18.2. No member of WASPA shall be answerable or deemed to be in any way responsible for any act or default of any other member or for any deficiency or insufficiency of any title or security whatsoever taken by WASPA, save to the extent that such member acted negligently or fraudulently.

15. One of the 6759 appeal panel's concerns was that a SP could not be made liable for an IP's breach of the Code where the SP was not a party to the complaint proceedings in the first place and we agree with this. Doing so would be a clear violation of the SP's right to a fair hearing.

16. The appeal panel in complaint 15029 ("the 15029 appeal panel") considered an appeal where the SP had been cited as a party to the initial complaint. The appellant in complaint 15029 raised similar arguments that joining it as a party to the complaint exceeded the Secretariat's and the adjudicator's authority and violated the SP's rights to a fair hearing. The 15029 appeal panel considered sections 14.3.3 and 14.3.6 of version 11.0 of the Code which read as follows:

14.3.3 The member (or members) named in the complaint, or identified by the WASPA Secretariat on the basis of any identifying information included in the complaint, will be notified by the secretariat that a complaint has been lodged and that the formal complaint procedure is being followed.

...

14.3.6. If the member fails to respond within this time period, it will be assumed that the member does not wish to respond. An extension to this time period may be given to the member at the discretion of the WASPA Secretariat.

17. The 15029 appeal panel dismissed the appellant's arguments –

5.2.8 Section 14.3.3 clearly allows the WASPA Secretariat to identify members as respondents on the basis of any identifying information included in the complaint. 5.2.9 This is in the opinion of the Panel, exactly what the WASPA Secretariat has done.

5.2.10 The Secretariat also acted accordingly by notifying the SP and Appellant in this Appeal in accordance with section 14.3.3.

5.2.11 This Panel does therefore not see the relevance of the "Ultra Vires" principle and finds that the Appellant failed to prove the principle by its attempt in drawing inference from the Appeal mentioned in paragraph 5.2.5.

18. The 15029 appeal panel turned its attention to section 3.9 in light of the 6759 appeal and made the following comments:

5.2.16 Section 3.9.1 of the Code states that 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.

5.2.17 Proof of such assurance could however only be achieved if some qualifying criteria applies.

5.2.18 Section 3.9.4 states that a WASPA member shall, by obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider.

5.2.19 It is this Panel's opinion that section 3.9.4 of the Code might be interpreted as only applying to those members that are dealing with Information Providers that are not members of WASPA, since Information Providers that are members, have on the basis of their membership, been indoctrinated in the workings and sections of the Code of Conduct.

5.2.20 However, section 3.9.1 applies to ALL Information Providers and section 3.9.4 could therefore then serve to provide mitigating circumstances for a member where it contracted with an Information Provider that is also a member.

19. The 15029 appeal panel distinguished complaint 15029 from 6759 by pointing out that, in complaint 15029, the SP had been cited as a respondent to the complaint and was properly before the adjudicator. The 15029 appeal panel went on to rule on the argument that the appellant's rights to a fair hearing were violated:

5.2.24 The Panel is also satisfied that the Appellant, through such notification – which did take place, had sufficient time to proof that there was no negligence on its side by providing the learned Adjudicator with proof of its compliance with inter alia section 3.9.4 of the Code.

5.2.25 At no stage did the Appellant, whether through its communication with the WASPA Monitor or as a response to the SP notification made any attempt to clarify its position. All this communication was directly addressed to the SP and Appellant in this matter, and the SP was also forewarned of possible consequences.

5.2.26 This Panel is therefore satisfied that the principle of "Audi Alteram Partem" was met in relation to section 3.9.1.

20. After affirming the 6759 appeal panel's ruling that section 3.9.1 does not create strict liability on the part of a SP for an IP's breach of the Code, it continued with the following:

5.2.30 This does however not negate the workings of section 14.4.6. of the Code which states that where a service is provided by one WASPA member using the facilities of another member, if the member providing these facilities has taken reasonable steps in response to any alleged breach of the Code by the member providing the service, this must be considered as a significant mitigating factor when considering any sanctions against the member providing the facilities.

5.2.31 This Panel is of the opinion that the SP, and Appellant in this matter, being aware of the alleged breaches, should have brought the reasonable steps, belatedly indicated in its appeal, ab initio to the attention of the Adjudicator.

5.2.32 It is this failure by the SP that might have been interpreted as negligent behaviour.

5.2.33 The Panel is also of the opinion that section 14.4.7 has been adhered to by the Adjudicator since the Secretariat, and Monitor before him / her, did notify the SP of the alleged breaches.

5.2.34 The Secretariat therefore did adhere to the "Audi Alteram Partem" principle and the Adjudicator accordingly did not act "Ultra Vires" in issuing sanctions.

5.2.35 Section 14.3.6 clearly states that if the member fails to respond within the required time period, it will be assumed that the member does not wish to respond.

5.2.36 The Panel has however subsequently been made aware of the fact that the SP did take reasonable steps, as detailed in its appeal, to curb the alleged breaches of the IP and will interpret such steps as a mitigating factor in its reassessment of the sanctions.

5.2.37 The Panel is therefore of the opinion that the SP, and Appellant in this matter, did not show any malice and is therefore not found to be at fault with regard to the IP's conduct.

21. Unlike that earlier matter, the appellant in the present complaint did not respond to the Secretariat's notice and certainly did not submit any details that it took reasonable steps to curb the IP's apparent breaches of the Code. It is also relevant to point out that in both complaints 6759 and 15029, the appellant was Mira Networks, the same appellant before us and which raises the same arguments in support of its present appeal.

22. The appellant contends that the subject line of the 2014-05-05 notification limits the notification to simply keeping the appellant "in the loop" regarding the complaint pending against the IP but this is not the case. While the notification advised the appellant that the Secretariat was "thus making you aware of this complaint", it continued to inform the appellant how it may respond (or not) to the complaint that named it and, importantly, that the "message constitutes formal notification of this complaint in terms of clause 14.3.3 of the WASPA Code of Conduct".
23. This message, when read with section 14.3's provisions and the content of the complaint itself, were self-explanatory. The appellant should reasonably have read this message and text of the relevant sections of the Code to inform it of the following:
 - 23.1. A complaint was lodged against both the appellant and the IP (the parties were cited as "Nexus - Mira Networks").
 - 23.2. The appellant was informed that its "affiliate member", namely the IP, was a respondent in the complaint.
 - 23.3. The appellant was afforded the option of responding in writing or, effectively, associating itself with the IP's response and submitting itself to the outcome that awaited the IP.
 - 23.4. The message also constituted a "formal complaint" against the appellant and a possible result could have been "sanctions imposed on your company".
 - 23.5. The Code didn't require a response but a failure to respond would be regarded as an indication that the appellant didn't wish to respond (and therefore waived its entitlement to make submissions to the appointed adjudicator).
24. As we mentioned earlier, the 6759 appeal panel ruled that "the clear meaning of section 3.9.1 is that members of WASPA are required to take steps to ensure that information providers that they deal with observe the requirements of the Code". While the appellant was not obliged to respond to the complaint, its failure to do so was its implicit indication that it had nothing to add in its defence and that it would simply abide the adjudicator's decision on the matter.
25. On the assumption that the appellant ought to have taken reasonable steps to ensure the IP's services complied with the Code and in light of the appellant's experiences in complaints 6759 and 15029, in particular, the only reasonable inferences are either that the appellant didn't take reasonable steps to ensure the IP's compliance with the Code or was aware of the non-compliance and elected not to address it. In either case, we see no reason to overrule the adjudicator.

26. The appellant's further argument that it adopted a passive approach because it was under the impression that it was not a respondent to the complaint but merely being "kept in the loop", so to speak, is disingenuous and unreasonable.
27. The adjudicator concluded that both the appellant and the IP were responsible for the breaches of the Code and sanctioned both, accordingly. The IP has subsequently paid the fine imposed, in its entirety.

Decision

28. We dismiss the appellant's appeal and uphold the adjudicator's ruling.
29. The appellant forfeits its appeal fee.