



REPORT OF THE ADJUDICATOR

Complaint reference number	: 25122
WASPA member(s)	: Sistemas Informaticos Espabit SL (IP) / FROGGIE S.L (SP)
Membership number(s)	: 1407 / 1194
Complainant	: Ilonka Grey (Media Monitor)
Type of complaint	: Breach of Code of Conduct / Undesirable and illegal Content / Ruling to remove illegal content or links or face further sanction / Circumstances when adjudicator may refer a matter to the FSB for further investigation
Date complaint was lodged	: 17 September 2014
Date of the alleged offence	: 16 September 2014
Relevant version of the Code	: Version 13.1
Clauses considered	: 4.2, 4.5, 4.6, 4.7, 4.8, 22 (1-7)

Complaint:

- Complaint 25122 was logged by the media monitor, Ilonka Grey, after it had run a test on the Espabit Adult Service, which according to the monitor features content on landing pages that is potentially in breach of the WASPA code of conduct and could also be illegal in terms of South African law.

- The complainant further states that,

“ The distribution of XX/X18 material (it has been established within that the content used on the landing pages provided by Espabit S.L. is classed as XX) is not permitted in the South African market. The media monitoring team would like to therefore file an emergency panel complaint and would like to suggest that this content/service is removed whilst appropriate changes are being made.

It is of great concern that this type of content is available, not to mention the harm it does our industry and consumers alike. “

Procedural history of this complaint:

- Complaint 25122 is the formal complaint concerning the unfair dealings and breach of the code by the WASPA member regarding the 18+ landing pages (Emergency Panel requested by media monitor).
- The formal complaint and emergency procedure notice was sent to the WASP on 17th September 2014
- The SP replied informing receipt of complaint on the 17th September 2014
- The IP replied to emergency notice email on the 17th September 2014
- The aggregator of the SP advises that the complaint has no relation to their services and please remove them from the complaint.
- The SP replied on the 17th September 2014 confirming that the billing cannot be performed in South Africa and not related to the aggregator.
- The IP responds to emergency notice email on the 17th September 2014
- The WASPA secretariat informs SP and IP that no emergency panel hearing will occur on the 17th September 2014 but that the matter will proceed to formal adjudication and that a formal response would still be required.
- SP responds on the 3 October 2014 confirming formal response by itself previously
- Matter refereed to adjudication on the 5th Dec 2014.

SP reply :

- The SP through its representative, Alex Hund, replied that client in question has been informed of the urgency of the situation and have asked that they remove all promotions and material relating to these campaigns immediately.

They also indicated that they had requested that the client send a formal response on the matter within 24 hours to WASPA secretariat

IP Reply :

- The IP replied that it was checking their system because the product that was being tested is their “Spanish Product “and that the “payment method is Spanish too”. IP also added that it development team are working on the issues to solve it immediately.

Aggregator Reply:

- The aggregator replied that, “ ... the service in question has no relation to Mira Networks. Kindly remove any reference to Mira Networks from the complaint ... “

Further SP Reply:

- The SP further stated that since billing cannot be performed in South there is no relation to Mira Networks and the pages in question are related to the Spanish market. It further states that it can only assume that, “ ... this is an issue with one of the affiliate publisher networks promoting the service in South Africa in error ... “. SP promised that it will investigate further.

Further IP reply :

- IP further stated that the “error” was fixed on their side. It explained that there was an error on its mobile site. It explained that the use a parameter called “allies” in the url to identify sales was responsible for this. It went on to explain that mobile site does automatic country detection to show custom offers for specific countries. In this case the alias value was “froggie” and their mobile site did not detect the Country and hence it always showed the Spanish pornographic promotion.

-If Further stated that it had fixed this error on its side and now they always show in South Africa their compliance landing page and that it regretted the mistake and apologizes for the mistake made.

Decision and Sanction

- The issue here is whether on the complainant’s version the WASPA Code was breached, in particular Clause 4.2, Clause 4.5, Clause 4.6, Clause 4.7 Clause 4.8 as well as 22.3 and 22.5 of the Code.

Clause 4.2 of the Code states that , “members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA and Clause 4.5 of the Code states that , “ Members must not knowingly transmit or publish illegal content.” Now although the content that was referred to in the link provided was referring to content that was *prima facie* in breach of Code (I will refer to the breaches below) , I cannot find that neither the SP or IP conducted themselves unprofessionally or knowingly transmitted or published (by way of link) content that was illegal.

IP and SP gave an explanation and took steps to remove the illegal content link which gave rise to the breaches - although plausible , it does not mean that the breaches of Clause 4.8 and 22.3 and 22.5 must go unpunished.

Clause 4.8 states that , “Members must not provide any services or promotional material that: (a) contains a visual presentation of explicit violent sexual conduct, bestiality, incest or rape or extreme violence which constitutes incitement to cause harm “. Unfortunately this was the case in this complaint whether in innocent error, negligence or intentionally. The IP and SP must take reasonable care to ensure that such breaches do not occur at any time nor in the future.

I rule that,

1. A fine of R 50000.00 is imposed and suspended for the period of 12 months . Should the IP or SP be found guilty of similar conduct within 12 (twelve) months of this decision the fines are to be paid immediately from the date of such finding (should it occur again)
2. That said fine be paid jointly and severally (the one absolving the other) within 60 days of this Ruling ;

- Lastly I rule, that clause 22.3 of the Code which states that, “Any adult service must be clearly indicated as such in any promotional material and advertisement, and must contain the words "18+ only" and Clause 22.5 of the Code which states “Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Reasonable steps may include the customer confirming his or her age prior to or as part of initiating the service.” have been breached by the SP/IP failed as they have failed to comply to the rules regarding “adult subscription service“ and exposed the public and minor children to such hard-core pornography (unsupervised and freely available on the Internet) which does not only hurt the WASP services but causes harm to the general public and is *contra bonus mores*. I therefore rule that ,

1. A fine of R 50000.00 is imposed and suspended for the period of 12 months . Should the IP or SP be found guilty of similar conduct within 12 (twelve) months of this decision the fines are to be paid immediately from the date of such finding (should it occur again)
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. I am unable due to the nature of the complaint and how it was dealt with to make a finding as to whether this dispute must be referred to the FSB for investigation but am of the view that the Media Monitor (if dissatisfied with this Ruling) still has it within right to report any illegal sexual content to whatever competent authority it may deem fit.