



REPORT OF THE ADJUDICATOR

Complaint reference number:	#25201
WASPA members: Information Provider & SP:	MARYCEL (PTY) LTD (IP) (1374) "Ubermobi" / Smartcall Technology Solutions (SP) (0090)
Membership number:	1374 / 0090
Complainant:	Media Monitor
Type of complaint:	Misleading consumers, inadequate pricing and subscription text.
Date complaint was lodged:	2 October 2014
Date of the alleged offence:	30 September 2014
Relevant version of the Code:	13.1
Sections considered:	3.6, 3.7, 5.4, 5.5, 12.1, 12.2, 11.1.1, 24.11, 24.15

Complaint

This complaint arises from a messenger application service ("the Service") being offered by Ubermobi ("the IP") which was marketed, at first glance, as the Whatsapp application, but which, on closer inspection was being offered via a domain vwhatsapp.co (i.e. v-v-hatsapp.co).

The WASPA media monitoring service ("the Monitor") investigated the Service and identified a number of problems of such a serious nature that the Monitor requested an emergency panel hearing for this complaint.

The problem areas identified by the Monitor were:

- misleading the consumer;
- inadequate placement of Subscription Service text; and
- inadequate placement of billing information.

Information Provider's Response

Within one (1) hour of receiving news of such complaint by the WASPA Secretariat, the IP informed the WASPA Secretariat that it had immediately taken steps to suspend the Service. The IP also advised WASPA that a "*marketing affiliate*" who was based

in “*Far East Asia*” had actual control over the contents of the initial “*pre-lander*” marketing page for the Service. The IP advised WASPA that it had requested that its marketing affiliate cease marketing the Service.

The IP further informed the WASPA Secretariat that it had taken steps to update the placement of Subscription Service text on the Service as well as all offers across their product range, and in addition had also adjusted the billing information to reflect the changes suggested by the Media Monitor.

The IP also expressed the view that the matter should not be dealt with by formal adjudication as the complaint had been sufficiently adequately addressed by the IP in response to the Monitor's complaint.

It appears as though an Emergency Panel hearing was not required due to the voluntary suspension of the Service, however the matter was referred for formal adjudication.

Adjudicator's Consideration of the Merits

Although the IP has contended that this matter should not have proceeded to a formal complaint, section 24.15 of the Code makes it clear that WASPA “*has the discretion to make use of either the informal, formal or emergency complaint procedure, as appropriate, to process any complaints received.*”

The discretion is not an entirely unfettered one. Section 24.11 also makes it clear that WASPA will not consider a complaint if it falls outside the jurisdiction and mandate of WASPA, is prima facie without merit, or is vexatious, taking into account factors such as malicious motive and bad faith.

There is nothing in the evidence to suggest that WASPA has exercised its discretion arbitrarily or even unreasonably and there is no basis to dismiss the complaint on the basis of the IP's assertions that no formal complaint should have been instituted.

Having reviewed the testing documentation associated with this complaint, there can be little doubt that the Service was indeed misleading and presented a serious breach of the Code of Conduct.

The use of the domain name v-v-h-a-t-s-h-a-p appears to be a cynical attempt to confuse consumers by trading off the widely recognisable Whatsapp trademark. The business ethics of the persons responsible for the creation and marketing of the Service appear to be entirely inconsistent with the spirit, purpose and objects of the WASPA Code of Conduct, which is a statement of principles and rules designed to ensure that consumers can access and use mobile application services with confidence and trust. Marketing campaigns such as one assessed in the course of this Complaint strike at the very heart of the Code and are seriously prejudicial to consumers and damaging to the industry as a whole.

The IP's response to the initial complaint reveals that it was not responsible for all aspects of the Service. It is not clear whether the Service is the IP's own service and that its “marketing affiliate” was responsible for only the marketing of that Service, or whether the Service was in fact offered for a specific customer (and, if so, whether that customer was in fact the “marketing affiliate”). It is therefore not clear from the evidence put up in this complaint whether the IP was responsible for the creation of the Service, or if not, whether it was a “knowing” participant in the apparent consumer

deception. As such, I do not find that there is any evidence to find that the IP has knowingly breached section 5.4 of the Code.

However, with regards to the complaints in terms of section 12.1 and 12.2, the IP's responses contained what is effectively a concession that the Service was offered in a manner that breached those sections and the complaint of a breach of section 12.1 and 12.2 is therefore upheld.

The IP was notified of the potential breach and within one (1) hour of notification thereof the IP had taken steps to remedy the breach.

As can be seen from the documentation provided in support of the adjudication of this complaint, the IP constantly kept the WASPA Secretariat updated with regards to their communication with the advertising company and the suspension of the campaign and marketing material giving rise to the breach.

Upon receipt of an email from the IP informing the WASPA Secretariat that such campaign had been suspended, the WASPA Secretariat requested that the Media Monitor re-test to confirm the suspension. The result of the re-test was that the Service and marketing campaign had not yet been suspended.

The IP was informed of this and identified that the Media Monitor was clicking on a link contained within a word document previously published and that such link was still 'live' when it was alleged that it was in fact not being marketed at all. The IP then confirmed that the affiliate had stopped sending traffic to this formally identified link and that the IP further cancelled that specific campaign link to ensure that no further confusion would arise during the re-testing by the Media Monitor.

Sanctions and Referral Back

1. It has been noted that the IP responded swiftly and took action upon notification of the breach identified by the Media Monitor.
2. However, the adjudicator has also noted that this is not the first breach identified by the Media Monitor during testing of a service by the IP, and it is in fact the fourth Heads Up in the past few months lodged by the Media Monitor against the IP.
3. According to the Media Monitor documentation made available during the course of this adjudication, each of these prior Heads Ups was sent to the IP, *"which 'made' the necessary amendments and the Heads Up was closed. When the MM team tested one of their services again, they found a similar non-compliant service to the previous 3 lodged Heads Ups. Therefore, it would appear that the IP makes amendments to get the Heads Up closed, but then continues with the same non-compliant behaviour"*.
4. In the light of all relevant circumstances, including the very serious nature of the breach, the need to protect consumers and the industry from prejudice and harm and the mitigating steps taken by the IP to suspend the Service, a fine is imposed on the IP, however certain portions of this fine are to be suspended as outlined below.
5. The IP is fined an amount of R90 000 of which:

- 5.1 R30 000 is immediately payable;
 - 5.2 R30 000 is suspended for a period of 12 months provided that the IP is not found to have breached any section of the Code dealing with the provision of misleading or deceptive information to consumers during the suspended period; and
 - 5.3 R30 000 is suspended for a period of 12 months provided that the IP is not found to have breached any section of the Code dealing with the minimum or obligatory standards pertaining to subscription service price advertising during the suspended period.
6. There appear to be a number of additional potential breaches of the Code related to the Service which were not specified in the original complaint. These include:
- 6.1 whether, if the Service was offered by the IP itself, the IP has acted in a manner that is consistent with its general duties in terms of section 4.2 of the Code;
 - 6.2 whether, if the Service was offered on behalf of a customer, the IP ensured that its customer offered the service in a manner consistent with the requirements of the Code as contemplated by section 3.6 of the Code read with section 3.7 thereof; and
 - 6.3 whether the marketing of the Service infringed upon the intellectual property rights of any another person (including but not limited to the proprietors of the Whatsapp trademark) and whether sections 4.4 or 4.5 of the Code were breached.
7. I therefore refer back to WASPA for consideration whether an additional complaint should be lodged against the IP investigating and dealing with the potential breaches of sections 3.6, 3.7, 4.2, 4.4 and 4.5 of the Code as outlined above.