

Report of the Adjudicator



Wireless Application Service Providers' Association

Complaint number	#27548
Cited WASPA members	Cructiq AG (1529) Mira Networks (Pty) Ltd (0011)
Notifiable WASPA members	N/A
Source of the complaint	Public
Complaint short description	Alleged copyright and trademark infringement
Date complaint lodged	2015-09-08
Date of alleged breach	2015-09-08
Applicable version of the Code	13.6
Clauses of the Code cited	4.2, 4.3, 4.5, 4.6, 4.7, 5.1, 8.8, 12.1-5, 15.4, 15.9, 15.10, 15.11, 15.12, 15.13
Related complaints considered	N/A
Fines imposed	N/A
Other sanctions	N/A
Is this report notable?	N/A
Summary of notability	N/A

Initial complaint

The Complainant in this matter raised a complaint pertaining to possible scam vouchers using Pick n Pay branding. Copyright Infringement and Trade Mark allegations were also raised.

Member's response

The First Respondent in this matter stated that it was unable to validate any association of its campaigns to the alleged infringing website listed by the Complainant and could also not validate any association of its campaigns with the images provided by the Complainant.

The First Respondent therefore requested further information from the Complainant to assist them with their investigation of any alleged breaches.

Complainant's response

The Complainant did not provide any further responses and ceased any communication.

Member's further response

In the absence of receiving any further information from the Complainant, even after the Secretariat requested same, the First Respondent issued the following formal response:

"The complainant claims that "a scam website links to this WASP for a subscription service using our brand". This brand is Pick n Pay and the WASP is supposedly Cructiq. Attached to the complaint is a screenshot of a webpage showing a content unlock offer. There is no mention of Cructiq on this screenshot and there are no further screenshots or documentation attached to the complaint which actually show that this content unlock offer is linked to Cructiq's services.

Cructiq has investigated the details from the little information that was provided by the complainant and has not been able to discover any association of Cructiq's services to the website that is mentioned by the complainant.

The website itself is not from Cructiq and Cructiq had no knowledge of it until it received this complaint. Cructiq has also not been able to validate any association of Cructiq's services to the images displayed in the screenshot document. On 22 September we have therefore contacted the WASPA Secretariat and have asked for the following additional information:

- Any Cructiq URL found to be associated to the website:
<http://exposedfootage.com/picknpay/meijer.html>
- Any Cructiq URL found to be associated to the PickNPay trademark infringing website displayed in the screenshot provided by the complainant.

- Any MSISDN which subscribed via a Cructiq campaign found to be associated <http://exposedfootage.com/picknpay/meijer.html> or the website displayed in the screenshot provided by the complainant (or involved in the infringement described by the complainant).

The WASPA Secretariat has informed us that WASPA's complaint team has requested this information from the complainant, but at the date of this response Cructiq has not received any additional information.

There is therefore no evidence showing a link between the website:

<http://exposedfootage.com/picknpay/meijer.html> and Cructiq's services so there is no basis for finding that Cructiq has breached the 4.2, 4.3, 4.5, 4.6, 4.7, 5.1, 8.8, 12.1, 12.2, 12.3, 12.4, 12.5, 15.4, 15.9, 15.10, 15.11, 15.12, and 15.13.

Cructiq submits that it did not breach Clauses 4.2, 4.3, 4.5, 4.6, 4.7, 5.1, 8.8, 12.1, 12.2, 12.3, 12.4, 12.5, 15.4, 15.9, 15.10, 15.11, 15.12, and 15.13 of the Code and that the full complaint should be dismissed. "

Sections of the Code considered

Professional conduct

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

Lawful conduct

4.3. Members must conduct themselves lawfully at all times and must co-operate with law enforcement authorities where there is a legal obligation to do so.

Intellectual property

4.5. Members must respect the intellectual property rights of their clients and other parties and must not knowingly infringe such rights.

Content control

4.6. Members must not knowingly transmit or publish illegal content.

4.7. If a member becomes aware of illegal content under that member's control, the member must, immediately suspend access to that content. Where required to do so by law, the member must report the illegal content to the relevant enforcement authority.

Service levels

5.1. Members must not offer or promise services that they are unable to provide.

Accuracy of content advertised

8.8. Content that is promoted in advertising, must be the same content that is provided to the customer as part of the advertised service.

Display of pricing information

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

12.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated. It must not be a requirement that the viewer of an advert has additional software installed in order to see pricing information in the advert.

Verification of a customer's number

12.3. A member must confirm that any MSISDN entered into a web page by a customer is, in fact, an MSISDN belonging to that customer. This must be done in one of the following ways, or in a functionally equivalent manner:

- (i) The customer's mobile carrier can provide the member with confirmation.
- (ii) The member can send an SMS to the customer's MSISDN containing a unique password or PIN which, when entered on a web page, validates the handset number.
- (iii) The member can send an SMS to the customer's MSISDN containing a unique link, which, when clicked, validates the handset number.

Display of minimum terms and conditions

12.4. For any web page advertising a service for which there is not a subsequent confirmation step containing a link to the terms and conditions, the minimum terms and conditions for the use of the service must be clearly displayed at the bottom of the web page.

12.5. The minimum terms and conditions displayed on any web page must include at least the following information: (a) a customer support number, and (b) a link to a web page where the full terms and conditions for the service are available.

15.9. The confirmation step for any subscription service must require an explicit response from the customer of that service. The confirmation step may not be performed in an automated manner in such a way that the process is hidden from the customer.

Subscriptions initiated via a web page

15.10. For all subscription services initiated via a web page, there must be an additional specific confirmation step before the customer is billed. This confirmation step must be provided in one of three ways:

- (i) The customer's mobile carrier may implement the confirmation step.
- (ii) The member can provide the customer with a "confirmation page".
- (iii) The member can send a "confirmation message" to the customer. The customer must not be charged for the confirmation message.

15.11. A confirmation page must contain the following information: (a) the name of the service, (b) the pricing information, (c) a customer support number, (d) instructions for confirming the initiation of the subscription service, and (e) a link to any applicable terms and conditions. Additional information about the service may also be included, provided it follows the above information.

Subscriptions initiated via an SMS

15.12. For all subscription services initiated by the sending of an SMS, there must be an additional specific confirmation step before the customer is billed. This confirmation step must be provided in one of two ways:

- (i) The customer's mobile carrier may implement the confirmation step.
- (ii) The member can send a "confirmation message" to the customer. The customer must not be charged for the confirmation message.

15.13. A confirmation message must contain only the following information, in this order: (a) the name of the service, (b) the pricing information, (c) a customer support number, (d) instructions for confirming the initiation of the subscription service, and (e) (optionally) additional information about the service.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the First Respondent's subsequent replies.

The Adjudicator is of the opinion that the Complainant in this matter did not provide sufficient information to link the First Respondent to the specific complaint. The complaint in itself also did not carry sufficient evidence to sustain the alleged infringements.

The Adjudicator has also noted that the First Respondent in this matter continuously engaged with the Secretariat and further exhausted all its resources in trying to resolve this matter.

Without suggesting that the Complainant acted frivolously, the Adjudicator is however of the opinion that the Complainant erred in this complaint and that his / her subsequent failure to provide the Secretariat and First Respondent with further information, contributed to the origin of his / her complaint being left unresolved.

The Adjudicator therefore has no hesitation in dismissing the complaint, finding no link between the origins of the complaint and the First Respondent in this matter.

Sanctions

N/A

Matters referred back to WASPA

In lieu of insufficient information pertaining to this matter and a difficulty in evidencing a link between the complaint and the First Respondent in question, the Adjudicator in this matter requested further information from the Secretariat to understand if any connection in terms of this complaint could be made with the Complainant's alleged claim and his / her own assumption that the Member is indeed the correctly identified First Respondent.

The Secretariat in response indicated that WASPA was never able to determine if the information that the Complainant provided was indeed the service of the WASPA member.