



Wireless Application Service Providers' Association

Adjudicator's Report

Complaint number	28710
Cited WASPA members	Interband Enterprises LLC (1315)
Notifiable WASPA members	<i>na</i>
Source of the complaint	Public
Complaint short description	Subscription service
Date complaint lodged	23 December 2015
Date of alleged breach	
Applicable version of the Code	<i>14.1</i>
Clauses of the Code cited	4.2, 5.1, 5.4, 5.5, 5.6, 8.8, 15.4, 15.5, 15.9
Related complaints considered	<i>26211</i>
Fines imposed	Interband Enterprises LLC – R30 000 fine.

Is this report notable?	Not notable
Summary of notability	<i>na</i>

Initial complaint

The complainant's parents received the following SMS:

"Congrats! Ur Account 0736914819 is approved to receive a R1,200 gi> today! To get click www.r7c.nl/17/v2.php?m=736914819 (FREE MSG) to optout smsSTOP. Click www.r7c.nl/17/v2.php?m=736914819 to Claim your Gi>! info@jobsalert.co.za optout?sms stop"

When the complainant investigated he found that the service is a subscription service. In essence, he feels that the SMS is misleading and people may not realise that they are subscribing.

Member's response

The Respondent submitted that the message was sent after the user interacted with a banner placed by an affiliate marketer. It submitted that "*The banner was advertising a service that we were not in any way offering and as such we acknowledge how this has been perceived as misleading marketing*" and that it was refunding all affected users and will take the service down.

Clauses

The following clauses were put to the Respondent:

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

- 5.4. Members must have honest and fair dealings with their customers.
- 5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.
- 5.6. Each member must provide contact details on their main corporate web site, which must include the member's registered company name, telephone number, email address and physical address.
- 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.
- 15.4. A member must not require that a customer join a subscription or notification service in order to claim an existing reward, to be able to redeem existing loyalty points or to claim a similar benefit. (Example of incorrect marketing: "to claim your prize, join this service".)
- 15.5. A member may offer an incentive for joining a subscription or notification service, provided that it is clear that the benefit only applies once the customer has joined the service. (Example: "if you join this subscription service, you will be entered into a monthly draw for a prize".)
- 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.

Decision

In this matter, it appears to be common cause that the clauses that relate to the merits were breached – but by the actions of the affiliate marketer. The question is whether the Code holds the WASP responsible for those breaches by the affiliate marketer.

The issue of whether or not a WASP is responsible for the actions of its third party affiliate marketers is a topical and contentious one. The decisions coming out of WASPA currently suggest that the WASP is liable for the actions of the affiliate marketer, although different decisions follow a different line of reasoning for this liability.

In matter 26211, the Appeal Panel was charged with a similar situation – that where an affiliate marketer has committed an act that the WASP immediately acknowledges as wrong, but seeks to mitigate because of the fact that it was an affiliate marketer. In that matter, the Panel said:

At the core of this complaint is the very pertinent question of how much supervision and control a WASP is expected to exercise where it chooses to advertise and promote its websites and services using third parties and affiliate advertising networks in light of the overarching requirements of clauses 4.2, 5.4 and 5.5 of the Code.

In outsourcing advertising and promotion for its services to an affiliate who, it would appear, was either expressly or tacitly permitted by the member to use further third parties without needing to run either the identity of those parties by the member or the content of the material being used to promote the member's websites and services, the Appellant took a risk of the advertising for its services being misleading, deceptive and unfair. The Appellant itself states that, "Often, in these cases, the promotions are delivered on blind networks, and Advertisers are unaware of who the publishers are to maintain business interests". In other words, because the affiliate "delivers" the advertising, the WASP does not concern itself with the details of the actual advertising itself.

Clause 1.2 of the Code makes it clear that an objective of the Code is to ensure that members operate in accordance with ethical and reasonable business practices. This objective is codified into express obligations in clauses 4.2 and 5.4 of the Code which stipulate that:

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.

5.4. Members must have honest and fair dealings with their customers.

Misleading and deceptive advertising is not fair. It appears that in this matter it is not contested that the actions of Payripo.com were not acceptable, were grossly misleading and prejudicial to members of the public.

This Panel does not consider that it is professional to simply allow unchecked use of advertising by unidentified affiliates who the member appears to know often publishes advertising using "blind" networks consisting of other persons who do not comply with the Code and who do not need to seek the Principal's approval on campaigns and strategies.

This Panel therefore upholds the finding that the Appellant has breached clauses 4.2 and 5.4 of the Code.

In matter 26420, the Appeal panel reached the same conclusion via a slightly different route:

The Panel notes that it is common cause that the material in question, alerting consumers to a virus, was unacceptably misleading.

On the question of liability, the Panel notes that one need look no further than the Code, which states:

3.6. Members must ensure that any customer who is not a member of WASPA, but is providing services covered by this Code of Conduct, provides those services in a manner consistent with the requirements of this Code of Conduct.

3.7. A member is liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.

We can therefore accept that the Appellant is liable for the conduct of its affiliates, whether directly or indirectly employed.

The only remaining question is whether the Appellant took reasonable steps to ensure that the affiliates complied with the Code. The Appellant set out a number of processes that it has in place, all of which indicate a concern around this type of behaviour and a monitoring thereof.

However, it remains that the Appellant allows affiliates to run campaigns that are not signed off and are by unidentified publishers. In contracting to an affiliate who it would appear used further third parties without needing to run either the identity of the party by the Appellant or the content of the material by the Appellant, the Appellant took a risk. It would appear in these cases that because the Advertiser "delivers", the WASP does not concern itself with the details of the transaction.

This Panel is of the opinion that this is not the reasonable level of care envisaged by Clause 3.7. More pertinently, this is not behaviour that is consistent with the following clause:

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.

The Panel notes for the guidance of the Appellant and other WASP's that it considers the contractual resolution of these issues – which appear to be the current trend in both complaints and appeals – to be simple. If a WASP requires all campaigns to be signed off, and an Affiliate fails to do so, that affiliate is in breach of contract. In the

current environment, it is simply not reasonable for a WASP to allow unapproved campaigns to run. It is simply unacceptable for WASPs to hide behind the unauthorised behaviour of unidentified affiliates.

The Panel also notes that, as the Adjudicator pointed out, if the Appellant has indeed put good contractual protections in place, the fine will be recoverable from the Affiliate who appears to be the party most directly responsible for the campaign.

Based on the reasoning set out above, I find that the Respondent breached clauses 4.2 and 5.5 when it allowed a situation to exist where affiliate marketers are able to publish unchecked material that does not require approval.

Sanction

As with the merits, this matter has many similarities with matter 26211. In that matter, the Panel said:

The Panel therefore thinks that some level of sanction is entirely appropriate. However, it does take into account that the actions in this matter were unprofessional rather than intentionally dishonest and that the appeal has been successful on Clause 5.5. It is also acknowledged that the Appellant took immediate remedial action.

The same can be said of this matter – it was not the Respondent that set out to mislead consumers with non-compliant material. The Respondent's "wrong" lies in its failure to institute professional controls.

I therefore impose the same sanction as was imposed in the above matter, being a fine of R30 000,00.