

**WASPA appeals panel  
Complaint 6842**

**REPORT OF THE APPEALS PANEL**

**Date: 12 October 2010**

**Service Provider: Integrat**

**Appellant and Information Provider (IP): Glomobi (R&D Media)**

**Complaint Number: 6842**

**Applicable versions: 7.4**

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**1. BACKGROUND TO THE APPEAL**

1.1 This appeal concerns a complaint lodged on 19 June 2009, by an individual against Integrat (Pty) Ltd, the Service Provider (SP) and Glomobi (R&D Media), the Information Provider (IP).

1.2 The SP is a South African company and full member of WASPA. The IP is an affiliate member of WASPA. The IP alone is appealing against the sanctions imposed.

1.3 The complaint relate to subscription services, more particularly, alleged breaches of clause 11.1.2 of the WASPA Code of Conduct (Code) which seeks to prevent “bundling” of content with a subscription service.

1.4 The complaints, the findings of the Adjudicator, the IP’s response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel’s report.

**2. CLAUSES OF THE CODE CONSIDERED**

2.1 The complaint relates to alleged breaches of section 11.1.2 of the Code, which reads:

2.1.1 Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

2.2 In this appeal, the panel will be guided also, by the general provisions and purpose of the Code:

2.2.1 1.2 The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured

that they will be provided with accurate information about all services and the pricing associated with those services.

2.2.2 4.1.2 Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

### **3. FINDINGS AND DECISIONS OF THE ADJUDICATOR**

#### **3.1 Finding of the Adjudicator**

The Adjudicator stated: “The IP has acknowledged that the iPhone promotion which the complainant accessed on the Facebook is in contravention of the code, specifically clause 11.1.2.

The practice of advising customers that they have won a prize when they have not, or where the customer is required to fulfil certain further conditions before the prize is one is false and misleading.

Such practices are also contraventions of clauses 3.1 and 4.1 and subvert the spirit of the code in general.”

#### **3.2 Sanctions**

The following sanctions were given:

- The IP is fined an amount of R 150 000.00;
- The IP is ordered to refund all subscribers to the service in full;
- The IP must notify all subscribers within 7 (seven) days of it receiving notice of this adjudication report that they are entitled to a full refund;
- The IP must immediately cease any further advertising of its services which do not comply with clause 11.1.2 of the code.

### **4. GROUNDS OF APPEAL**

#### **4.1 Grounds of appeal for complaint 6842**

4.1.1 Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

4.1.2 The IP’s grounds for appeal are recorded (that is copied exactly as submitted, errors included) and paragraphed as follow:

4.1.2.1 R&D Media would like to appeal the decision made in case # 2917. The decision included a full refund for all affected subscribers and a penalty to be paid. We are only appealing the penalty portion.

- 4.1.2.2 The main issue of this case is the wrongful use of the banners used to direct customer to a landing page offer. The banner itself, which suggested the customer had already won a prize, is indeed incorrect. Even though R&D Media is not in control of third parties who place these banners, we understand it's ultimately our responsibility to comply to all rules and regulations.
- 4.1.2.3 However, the banner advertisement was placed online on the evening of June 18<sup>th</sup>. Less than 1 day later the banner was noticed and the campaign was removed on June 19<sup>th</sup>. We feel that we have taken swift and direct action on our side to stop this immediately.
- 4.1.2.4 During the few hours the online campaign was live; only 36 users have been subscribed to the service. We are in the process of refunding all 36 users, and will provide WASPA of full list of these MSISDN's.
- 4.1.2.5 We find the action taken and the relatively small impact of only 36 people affected is in no relation to the penalty imposed on R&D Media. Our service provider Integrat will be happy to disclose and verify these numbers, and will confirm that the actual revenue made was less than 1000 Rand.
- 4.1.2.6 Also adding that R&D has since ceased all online promotions, and has never intended to by-pass regulations.
- 4.1.2.7 Considering the circumstances we ask to re-consider the penalty imposed, as we find it unreasonable to get fined a high amount for an incident which has caused little damage.

## **5. FINDINGS OF APPEAL PANEL**

### 5.1 Version of the Code

- 5.1.1 The complaint was made on 19 June 2009. Version 7.4 of the Code, in use from 17 June 2009 to 13 October 2009, applies.

### 5.2 Errors

- 5.2.1 The IP has informed the WASPA Secretariat that it is aware of the erroneous case number it referred to in its appeal and the Appeal Panel therefore accepts that the case referred to in paragraph 4.1.2.1 is indeed case #6842 and not case #2917.

### 5.3 Finding

- 5.3.1 It is noted that the IP in this matter is only appealing the penalty of R 150 000.00 as part of the sanctions imposed by the Adjudicator and therefore not contending its guilt, and subsequent breach of section 11.1.2.
- 5.3.2 The Appeals Panel therefore only deliberates on the penalty imposed.
- 5.3.3 According to section 13.3.11 of the WASPA Code of Conduct an adjudicator, when determining any appropriate sanctions, must take into consideration:
- 5.3.3.1 any previous successful complaints made against the member;
  - 5.3.3.2 any previous successful complaints of a similar nature.
- 5.3.4 As per WASPA records in its complaints search directory, R&D Media has only had 4 previous formal complaints, of which two were partially upheld, one upheld but then overturned on appeal, and one not upheld.
- 5.3.5 Of the two complaints that were partially upheld, only adjudication 2048 pertained to a breach of 11.1.2.

The screenshot shows the WASPA Code of Conduct website with a search for complaints. The search criteria are: WASPA Member, Information Provider (Glomobi), and WASPA Member. The search results table is as follows:

Number	Last Updated	WASPA Member	Info Provider	Result	Report
<a href="#">2048</a>	2007-12-06	Integrat	Glomobi	Complaint partially upheld	<a href="#">download</a>
<a href="#">3148</a>	2008-02-25	Integrat	Glomobi	Complaint partially upheld	<a href="#">download</a>
<a href="#">5631</a>	2008-06-30	Integrat	Glomobi	Complaint not upheld	<a href="#">download</a>
<a href="#">5994</a>	2010-07-16	Integrat	Glomobi	Complaint upheld	<a href="#">download</a>

- 5.3.6 The complaint (a breach of 11.1.2) against the IP in this instance was dismissed and the IP was found only to be in breach of an advertising guideline. The complaint was, on that basis alone, partially upheld.
- 5.3.7 It is therefore found that the IP has neither had any previous successful claims against it, nor had it any previous successful complaints of a similar nature against it.

- 5.3.8 In fact, in most adjudications involving the IP, Adjudicators commended the IP and / or SP for the way in which it conducted itself in trying to resolve the relevant matters.
- 5.3.9 It is found that the conduct of the IP in its workings with WASPA and subsequent responses to complaints is of an impeccable nature.
- 5.3.10 It is therefore the opinion of the Appeals Panel that the penalty of R 150 000.00 imposed on the IP as a first time offender is excessive in nature.
- 5.3.11 Other aspects of the case that might be considered as mitigating circumstances are the absence of intent or malice on the part of the IP and the proportional imbalance between the damage done and the fine imposed:
- 5.3.11.1 The Appeals panel is not of the opinion that there was intent or malice on behalf of the IP. The fact that the banner was placed by a third party is an indication thereof. Concomitantly, the IP immediately removed the banner as soon as it came to its attention and gave its full co-operation to WASPA.
  - 5.3.11.2 However, it has to be stated that the IP remains accountable and therefore responsible for any breach of the WASPA Code of Conduct, whether it occurred directly or indirectly.
  - 5.3.11.3 The penalty imposed of refunding the 36 people is proportionate to the damage suffered.
  - 5.3.11.4 Imposing an additional penalty of R 150 000,00 seems disproportionate.
  - 5.3.11.5 However, a breach of section 11.1.2 remains a very serious offence and the nature of the offence in this matter cannot be seen as anything less.
  - 5.3.11.6 The Appeals panel is therefore not trying to underplay the seriousness of the offence, and is most definitely not aiming to set a precedent that might create the impression that a breach of section 11.1.2 must go unpunished.
- 5.3.12 After reviewing all the relevant material pertaining to this case and having regard to all the mitigating circumstances, the Appeal's Panel finds that the sanction imposed was excessive in amount.
- 5.3.13 This decision is based on:
- 5.3.13.1 The IP's previous record;
  - 5.3.13.2 The absence of malice or intent;
  - 5.3.13.3 Disproportionateness of the penalty imposed; and the
  - 5.3.13.4 Subsequent conduct of the IP.
- 5.3.14 The appeal is therefore partially upheld and the fine of R 150 000,00 is overturned.
- 5.3.15 However, as was stated in paragraph 5.3.11.6, the breach was a serious offence.

5.3.16 Therefore, the IP is fined R 50 000,00 for its breach of section 11.1.2 of which R 40 000,00 is suspended for 6 months from the date of notice hereof, and R 10 000,00 made payable to the WASPA Secretariat within seven (7) days notice hereof.

5.3.17 Should the IP in this matter commit a breach of section 11.1.2 within the six month suspension period, the suspended fine of R 40 000,00 will be triggered.

5.3.18 The cost of appeal is non-refundable.