

**WASPA appeals panel
Complaint 8438**

REPORT OF THE APPEALS PANEL

Date: 14 April 2011

Appellant and Service Provider: AMV Holdings / Opera Interactive

Information Provider (IP): /

Complaint Number: 8438

Applicable versions: 9

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 8 January 2010, by an individual against AMV Holdings.

1.2 The complaint relates to adult service offerings to children.

1.3 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

2.1.1 The relevant sections of the Code cited by the Adjudicator are:

a) 2.7 defining Children's service;

b) 7.2.1-7.2.5 relating to prohibited practices for Children's Services;

c) 8.1.3 relating to the steps needing to be taken to ensure you are not dealing

with a minor;

d) 8.1.4 relating to marketing messages sent to customers of adult services;
and

e) 8.1.5 relating to the content of such marketing messages.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

The Adjudicator stated: “It is my decision after careful consideration of both the code and the intention behind the drafting thereof that the WASPA member/service provider has fallen foul of sections 7.2.1-7.2.5, 8.1.4 and 8.1.5 (partially or totally) but not 8.1.3.”

The Adjudicator provided full reasons for this finding.

3.2 Sanctions

The Adjudicator have the following sanctions:

The WASPA member must amend their adverts to exclude profanities and links to content described by such profanity. They must further desist from placing such links or marketing the service on sites clearly intended to be Children’s service, for example gaming websites.

The WASPA member is further fined an amount of R100 000.00 (one hundred thousand rand) to be paid within 5 (five) working days of this adjudication to the WASPA Secretariat.

4. GROUNDS OF APPEAL

4.1 The Appellant summarised it’s grounds of Appeal as follows:

The grounds for the appeal/review are as follows –

2.1.1 the Adjudicator made incorrect findings on the facts; and/or

2.1.2 the Adjudicator made an incorrect interpretation of the requirements of

the Code; and/or

2.1.3 the sanctions imposed are unreasonable.

4.2 This appeal was based, in essence, on the following allegations:

4.2.1 The Adjudicator incorrectly found that the service was accessed through a gaming, and therefore “children’s”, website. In fact this has not been proven, and the Appellant submits is incorrect;

4.2.2 The description “whimpering girl loves hardcore pumping” in fact linked to a video of a blonde in a bikini pumping iron. It is therefore not profane or pornographic. The Appellant, however, undertakes not to use the term “hardcore pumping” again;

4.2.3 The Adjudicator was incorrect to apply the 3 month marketing cut-off period in Clause 8.1.4 to a situation where the website was allegedly accessed in error. It is not proven that the access was in error, and it is not a requirement of the Code that the last use was deliberate;

4.2.4 In light of the above, the sanctions are unreasonable.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 The complaint was made on 8 January 2011. Version 9 of the Code was considered by the Adjudicator. This version, however, only came into effect on 31 March 2010. Version 8 was therefore the correct version.

5.1.2 However, neither party has raised this or objected to this. In light of the findings below, the Appeals Panel will also apply Version 9, as it is believed that in the circumstances it has no prejudice to the parties.

5.2 Finding

- 5.2.1 It is an ongoing challenge with complaints relating to adult content in relation to children, and more particularly teenagers, that it is often very difficult to establish exactly what occurred and how the initial contact was made.
- 5.2.2 In this matter, the initial complaint states that, “My son says that he has not subscribed to anything, but did access a Game site”. In a subsequent submission, it says, “When I asked him about that - he said he had lent his phone to a friend, and when he saw the sms the next day he had cancelled it - this does seem to tie up with their records, which confirm that it was cancelled the next day”. There are two points about this submission:
- There are contradictory submissions as to how the initial access occurred – via a gaming site or a friend.
 - The complainant herself seems to recognise that teenagers might be elusive in this respect, given her reference to the records confirming her son’s story.
- 5.2.3 The Appeals Panel concurs that it is not established how the initial contact with the website occurred, even on the complainant’s version. **There are therefore not grounds for a finding on Clauses 7.2.1 to 7.2.5, and this aspect of the adjudication is overturned.**
- 5.2.4 This also addresses, in some part, the issue of Clause 8.1.4 which deals with the 3 month cut off for marketing to people who have accessed an adult content site. In the first place, it is unclear whether the access was deliberate or not. In the second place, the Panel agrees with the Appellant that it is somewhat unrealistic to expect provider’s to know whether the site was accessed deliberately. At best, they can provide proper “unsubscribe” information, and promptly act on this. It seems that they have done so.
- 5.2.5 **The finding in terms of Clause 8.1.4 is therefore overturned.**

5.2.6 It appears that the description of “whimpering girl loves hardcore pumping” was used in its non-profane sense to link to the idea of a hard gym workout. While the Panel notes that this raises other issues with regard to the expectations of the consumer, this is not currently before the Panel.

5.2.7 The reality is that the words “whimpering” and “hard core” create a sexual (and indeed, somewhat disturbing) expectation from the word “pumping”

5.2.8 Clause 8.1.5, in both version 8 and 9 of the Code, state that :

A marketing message sent to initiate or re-initiate adult services may not:

(a) include any graphical or photographic content that includes full frontal images or portrayal of intimate parts of the body; or

(b) include any words or phrases that may be considered profane, including common popular or slang terms for excretory functions, sexual activity and genitalia; or

(c) include any links to any content described in (a) or (b).

5.2.9 While the word “pumping” in the context of gym is not profane, it is a common popular term for sexual activity. In addition, the context of the wording connotes a sexual context.

5.2.10 **Given this, the finding in terms of Clause 8.1.5 stands. The Panel does, however, note that the Appellant has conceded this to some extent.**

5.2.11 In light of the above, the Panel agrees that the sanction is not appropriate to the new findings.

5.2.12 **In respect of the Clause 8.1.5 finding, the Appellant is fined R 10 000,00.** The use of the word pumping, in the context, was clearly sexual. The Panel is of the opinion that the Appellant should have foreseen this breach.

5.2.13 **There is no further fine.**

5.2.14 As a final note, the Panel notes that the complainant's real issue lies with the fact that a teenager can access these services simply by agreeing that they are over 18 – a somewhat unrealistic control.

5.2.15 The Panel sympathises with the complainant's frustration. This is, however, not an issue for the Panel to adjudicate. The Panel can simply apply the Code, and the Appellant has, in this respect and in this matter, complied with the Code.

5.2.16 The cost of appeal is non-refundable.

5.3 **In summary:**

5.3.1 There are therefore not grounds for a finding on Clauses 7.2.1 to 7.2.5, and this aspect of the adjudication is overturned.

5.3.2 The finding in terms of Clause 8.1.4 is overturned.

5.3.3 The finding in terms of Clause 8.1.5 stands. The Panel does, however, note that the Appellant has conceded this to some extent.

5.3.4 In respect of the Clause 8.1.5 finding, the Appellant is fined R 10 000,00.

5.3.5 There is no further fine.