

**WASPA appeals panel
Complaint 9878**

REPORT OF THE APPEALS PANEL

Date: July 2011

Appellant: Integrat

Complaint Number: 9878

Applicable versions: 9.0

1 BACKGROUND TO THE APPEAL

1.1 This is an appeal against the finding against and sanction imposed on the Appellant by the adjudicator in [complaint 9878](#).

1.2 In that matter an anonymous complainant alleged numerous breaches by an IP working through the Appellant. The IP, Flycell, had joined WASPA as an Affiliate Member on 25 June 2009 and was accordingly a WASPA member in its own right at the time that the initial complaint was lodged.

1.3 The Appellant was notified of the complaint against the IP on 7 July 2010 and replied the same day to acknowledge receipt and to notify the complainant that it had requested advice from the WASPA Media Monitor as to making the service compliant. The Appellant further expressed its desire to have the matter resolved informally on its IP's behalf.

1.4 The notification sent to the Appellant on 7 July was worded as follows:
"The appended formal complaint has already been sent directly to the Affiliate member indicated below for their response. However, the WASPA Secretariat believes that the Affiliate member involved is making use of your infrastructure to provide this service and we are thus making you aware of this complaint.

You may:

1. Choose to allow the relevant Affiliate member to respond to this complaint, and not provide any response of your own; or

2. Provide a written response to the complaint, which will be considered by the adjudicator in addition to any response provided by the relevant Affiliate member.

Depending on the severity of the alleged breach, you may also wish to take additional steps regarding the service that is the subject of the complaint. If you do choose to take such steps in response to this notification, please notify the WASPA Secretariat of the steps taken.

Please note that this message constitutes formal notification of this complaint in terms of clause 13.3.3 of the WASPA Code of Conduct. This means that

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whether or not you choose to respond, it is possible that the independent adjudicator will treat you as a respondent for this complaint, and sanctions could be imposed on your company. The adjudicator may also hold you liable for the actions of the Affiliate member in the event that that member does not comply with any sanctions imposed on that member by the adjudicator.”

(Panel's emphasis)

- 1.5 The complaint related to a service provided by the IP which allegedly used an online quiz to trick users into agreeing to take up a subscription service with the IP. In the words of the complainant:

“After answering 5 or so questions. One gets to a page where one has to give one's cellphone number to continue (or to get one's quiz results or that's the impression gets) after which they send you a pin. The SMS with the pin only states: "Pin Number: xyx", this format is a contravention of 11.2.5 which requires a specific format. After entering the pin and clicking confirm one is subscribed. This is in direct contravention to 11.2.2. This is exactly the type of quiz that led WASPA to include the ban in 11.2.2.”

- 1.6 The complainant provided screenshots to substantiate the complaint.

- 1.7 The IP (erroneously referred to by the adjudicator as the “second SP”) responded the day after receiving the complaint. The IP confirmed that, after reviewing the screenshots provided and the provisions of sections 11.2.2 and 11.2.5 of the Code, it had taken down the adverts forming the subject-matter of the complaint and that it would remove the landing page in question.

“We do however feel it important to note that prior to even going live with this Quiz landing page, we did submit a test landing page of this type for review and did get pre-approval that the page in fact was compliant and that we were good to go live with it. So apparently there must have been some sort of misunderstanding in implementing the page.

We are taking the necessary measures so that within the next day the page/ads in question will be no longer accessible.

We would also like to ask if in return given our due diligence to address this matter as well as given the fact that this serves as our first complaint if instead this could be handled as an informal complaint. ”

- 1.8 It appears that the requests for informal resolution were not satisfactory to the complainant who averred that the service was “maliciously tricking customers” and the approach taken by the IP was “clearly intentional” (although the complainant's response in this regard is not satisfactory, about which see more below).

- 1.9 The IP therefore filed a further response, supplementary to its initial response, requesting the adjudicator to consider the following points:

- 1.9.1 The IP provided promotions for subscriptions of this nature in a number of jurisdictions and put a great deal of effort into ensuring the compliance of its services with applicable codes and rules.

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- 1.9.2 They had obtained pre-approval for the service from the Appellant:
“In this case, to confirm we were following WASPA's Code of Conduct rules - in light of section 11.2.2 and section 11.2.5 - we did first reach out to Integrat and requested that they review and pre-approve the pages in question prior to launch. With pre-approval in hand (by the end of April 2010 timeframe), our assumption was that we were good to go live with the Quiz landing page and Quiz advertisement(s) in question and thus proceeded to do so.”
- 1.9.3 The IP had acted swiftly to mitigate any harm on receipt of the complaint and ensured that the adverts were no longer “live or available to users” within a day of the complaint being received.
- 1.9.4 The complaint was the first formal complaint against the IP.
- 1.10 The adjudicator made the following findings:
- 1.10.1 The IP had admitted breaching sections 11.2.2 and 11.2.5. The adjudicator had reviewed the pages in question and confirmed the breaches.
- 1.10.2 The SP was found to have breached section 4.1.2:
“The Role of the first SP (Integrat in pre-approving the site raises concern and as such, the first SP (Integrat) is found to be in breach of section 4.1.2.”
- 1.11 The adjudicator imposed the following sanctions:
“In determining an appropriate sanction, the following factors were considered:
- The prior record of the SPs with regard to breaches of the relevant sections of the Code of Conduct;
 - The SPs’ attempt in gaining pre-approval; and
 - The SPs’ subsequent response and withdrawal of the site.
1. The second SP (Flycell) is required to uphold its suspension or withdrawal of the service and access to the site it is hosted on until such time as it complies with the orders set out below. The SP may not initiate any new or existing billing transactions for the service during such period of suspension; however it may process any unsubscription requests;
 2. The second SP (Flycell) shall send an sms notification, detailing such suspension, to all existing subscribers of the service (the second SP (Flycell) shall furnish the WASPA Secretariat with confirmation that it has notified its subscribers);
 3. The second SP (Flycell) shall clearly indicate at the first point of contact with the service and all subsequent pages and sites (irrespective of medium) that the service is a subscription service and further precisely what the subscription entails. These indications must be clearly visible and unambiguous.
 4. The second SP (Flycell) shall ensure that any reference to or implication of the availability of single items or quizzes are removed from the service’s site

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such that the site only makes reference to its subscription content in clear and unequivocal terms;

6. The second SP (Flycell) shall ensure that its terms of use are amended in accordance with Rule 9.2 of the Advertising Rules;

7. The second SP (Flycell) is formally reprimanded.

8. For its breach of section 4.1.2, the first SP (Integrat) is fined R20 000-00, payable to the WASPA Secretariat within 5 (five) working days after receiving notice hereof.”

2 THE APPLICATION OF THE CODE AND AD RULES

The Code, v9.0

2.1 The following provisions were considered:

3.9.3. A WASPA member shall, by obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider.

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.

14.4.5. Where a service is provided by one WASPA member using the facilities of another member, if the member providing these facilities has taken reasonable steps in response to any alleged breach of the Code by the member providing the service, this must be considered as a significant mitigating factor when considering any sanctions against the member providing the facilities.

14.4.6. For the avoidance of doubt, no sanction may be applied to a member who has not been given an opportunity to respond to a complaint.

14.6.7. The appeals panel must consider the evidence provided to the adjudicator, the adjudicator's decision and any additional information provided by the service provider.

3 GROUNDS OF APPEAL

3.1 The first part of the appeal document lodged with the WASPA Secretariat sets out contentions relating to the steps taken by the Appellant to prove their “due diligence” in the matter. The Appellant produced documentary evidence attesting to the effort it went to ensure compliance with the Code on the part of the IP.

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3.2 The Appellant denied having pre-approved the service and stated that it had pointed this out to the IP when the IP had first raised this allegation in its initial response. Copies of correspondence indicating that the IP recognised the incorrectness of its statement regarding pre-approval were provided by the Appellant.

3.3 The Appellant believed that the process followed was procedurally unfair in that it had not been given an opportunity to respond to any allegations raised against it.

“We also assumed that if any charges were to be brought against Integrat that we would have been given the opportunity to respond.

Please accept our response now and reconsider the sanctions in light of this new evidence provided herewith. We would also like to request that the appeal fee be waived, since Integrat is in no way responsible for the non-compliance in this regard.

Note that due to a system error the PIN message was incorrectly issued from Integrat's system - we amended our systems directly after receiving notification from Flycell as per the attached correspondence - see attachment marked Flycell3. We created a PIN API to ensure compliance in this regard which goes beyond the duties of an aggregator.

Flycell has been extremely cooperative in terms of compliance and we do not believe that there was any malicious intent here. Their services are usually models of compliance.”

4 FINDINGS OF APPEALS PANEL

4.1 The panel notes that it is only the SP in the original complaint which has raised an appeal, not the IP. The appeal therefore lies only in respect of the conduct of the Appellant and whether it was such that it justified a finding of a breach of section 4.1.2. Further, the Appellant argues that the finding should in any event be set aside as it was procedurally unfair.

4.2 The panel has no difficulty in finding that the appeal should succeed on the basis that there is no evidence before us supporting a finding that the Appellant knowingly disseminated information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

4.3 The case file reveals the following response from the complainant to the initial responses made by the Appellant and the IP:

“No. I would like this to go formal. The service was maliciously tricking customers. Their approach was clearly intentional. They have lied in their response to this complaint, claiming that there was only 1 line, after their "Confirm" link, while there were 6 or 7. They spammed with adult content. They ask consumers to "confirm" age, who are then unwittingly subscribed to the

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service. I believe that many would have fallen prey to this. I think the service provider should be sanctioned.

I would hope that they are instructed to unsubscribe all users to the service.”

(Panel’s emphasis).

- 4.3.1 It is not clear how the underlined portion of this response relates to the complaint made.
 - 4.3.2 Curiously, the reference to adult content and a dispute as to the number of lines after the “confirm” link appears to relate to another, completely distinct complaint currently before this panel for consideration, viz. complaint 9792.
 - 4.3.3 In both complaint 9792 and the current matter the complainant was classified as an anonymous competitor.
 - 4.4 The Appeal is upheld and the panel is of the view that the Appellant’s appeal fee should be refunded.
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