

**WASPA appeals panel  
Complaint 12969**

**REPORT OF THE APPEALS PANEL**

**Date:** November 2012  
**Appellant:** Viamedia (SP)  
**Complaint Numbers:** 12969  
**Applicable versions:** 10.0

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**1. BACKGROUND TO THE APPEAL**

- 1.1. This is an appeal against the finding and sanction imposed on the Appellant by the adjudicator in complaint 12969.
- 1.2. The complaint relates to a marketing campaign for a subscription service. The Appellant was in the role of service provider (SP) to its client which provided the subscription service and hence had the role of information provider (IP).
- 1.3. The Appellant is a full member of WASPA, but the IP is not a member, and consequently this complaint was made against the Appellant.
- 1.4. The adjudicator did not set out the facts of the complaint in his report. The approach taken only makes sense where the reader of his report has access to the original material submitted to the adjudicator. As this is not the case, the report is of little assistance to WASPA members in determining compliance with the Code. This approach also forces the Panel to state the facts so that this report is intelligible, rather than merely refer to the adjudicator's report as it would normally do.
- 1.5. The complainant made an informal complaint to the WASPA Secretariat, which was forwarded to the Appellant on the 2<sup>nd</sup> of June 2011. The basis of the complaint was as follows:
  - 1.5.1. The complainant's daughter had seen a banner advertisement which advertised a competition in which she could win a Blackberry smartphone. The banner advertisement is attached as Annexure 1.
  - 1.5.2. The daughter clicked on the banner advert and was taken to a web page as reproduced in Annexure 2.
- 1.6. According to the complainant:

*She entered my mobile number, but lucky I could stop her before she entered in the code they send to my phone. These people are DISGUSTING because they use people like Justin Bieber (like in this ad) to attract children (as they are easy prey) and tricking them into unknowingly joining their services!*

*WASPA Code of conduct states that these companies can't use the word "win" in there adverts, and that they cannot disguise the subscription service as a quiz. Xcite Mobile has done both these things and I feel that serious action needs to be taken against these people because they are just disgusting! (sic)*
- 1.7. The complainant alleged breaches of clauses 9.1.6 and 11.2.2 of the Code of Conduct.

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- 1.8. The informal complaints procedure was not successful, and the matter was escalated to a formal complaint by notice to the Appellant on the 8<sup>th</sup> of June 2011.
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**2. THE APPLICATION OF THE CODE AND RULES**

*The Code, v10.0*

- 2.1. The adjudicator correctly applied version 10.0 of the WASPA Code of Conduct to this complaint. The following sections of the WASPA Code of Conduct have relevance here:

*9.1.6. Competition services and promotional material must not:*

*(a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;*

*(b) exaggerate the chance of winning a prize;*

*(c) suggest that winning a prize is a certainty;*

*(d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.*

*9.2.2. Competition services that are aimed at, or would reasonably be expected to be particularly attractive to children must not feature long or complex rules.*

*11.2.2. 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.*

*11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.*

*11.2.4. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.*

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**3. The Decision of the Adjudicator**

- 3.1. The adjudicator made rulings in respect of the following clauses.

Clause 9.1.6

- 3.2. In finding that the Appellant had breached this clause, the adjudicator argued as follows:

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*Section 9.1.6 very clearly states that competition services and promotional material must not:*

*(a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants.*

*The banner ad is a clear contravention of this section and nowhere does the Code prohibit the use of the word 'win' as a **keyword**.*

*It prohibits its use as a **word** as illustrated above.*

*The Adjudicator is of the opinion that the banner ad is a clear breach of section 9.1.6(a) and finds the SP in breach thereof.*

Clauses 9.2.2 & 11.2.4

- 3.3. The adjudicator's reasoning in respect of clause 9.2.2 took this form:

*Section 9.2.2 states that competition services that are aimed at, or would reasonably be expected to be particularly attractive to children must not feature long or complex rules.*

*The adjudicator has reviewed the terms and conditions and is of the opinion that its current format does not conform to section 9.2.2.*

- 3.4. The adjudicator also found the Appellant to have infringed clause 11.2.4.

*Section 11.2.4 states that members must ensure that children accessing subscription services must confirm that they have permission from a parent or guardian do to so.*

*The Adjudicator is of the opinion that by not complying with section 9.2.2, the SP failed in ensuring that children can confirm their parents' or guardians' consent.*

*This is further evidenced by the SP not placing the age restriction on the banner ad or subsequent landing page of the website.*

*It is therefore the opinion of the Adjudicator that the age restriction was not communicated clearly.*

Clauses 11.1.1, 11.2.2 and 11.2.3

- 3.5. The adjudicator found an infringement of clause 11.1.1 as well as clauses 11.2.2 and 11.2.3, and predicated his finding on the latter on the requirements of the former:

*The Adjudicator is of the opinion that section 11.2.2's relevance to this matter and the section's subsequent interpretation at the hand of section 11.2.3 resembles the opinion formed by the adjudicator in adjudication 14403.*

*The only difference is that in this instance the SP did not provide any indication of a subscription service apart from the wording at the bottom of the page.*

*It might be argued that the wording "Get your content and you could win" assumes subscription.*

*However, section 11.1.1 is very clear that "subscription service" must be prominently displayed and in the correct format.*

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*The Adjudicator is therefore of the opinion that section 11.1.1 and its relevant clause in the Advertising Rules were contravened.*

*Following the decision reached in 14403, the Adjudicator is of the opinion that the failure to display the subscription service prominently, as required by section 11.1.1, contributed into making the subscription service ancillary to the quiz, and not vice versa, as is required by section 11.2.3.*

*The SP is therefore found in breach of sections 11.2.3 and 11.2.2.*

- 3.6. The Panel notes the reference to complaint 14403, the appeal of which is also before it.

Sanction

- 3.7. The reasoning and nature of sanctions imposed by the adjudicator were as follows:

*In determining an appropriate sanction, the following factors were considered:*

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct; and*
- The SP's subsequent response.*

*The sanctions referred to in 14403 apply as to the breach of section 11.2.2 read with section 11.2.3.*

*The SP is further fined:*

- R 12 500-00 for its breach of section 9.1.6; and*
- R 50 000-00 for its breaches of sections 9.2.2 and 11.2.4, of which R 40 000-00 is suspended for 1 year.*

*The fines must be paid within 5 (five) working days to the WASPA Secretariat after having received notice hereof.*

- 3.8. The Panel notes that the adjudicator did not impose a sanction in respect of the breach of clause 11.1.1

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**4. Grounds of appeal**

- 4.1. The Appellant made it clear that in appealing it was acting on behalf of Opportune Trading 117CC, which acted in the role of IP to the Appellants SP. The Panel has established that this close corporation trades as Xcite Mobile, but as the Appellant is a member of WASPA and the IP is not, this complaint was correctly addressed against the Appellant.
- 4.2. While the Appellant appeals both the ruling and sanction imposed by the adjudicator, it only lists clauses 9.1.6, 9.2.2 and 11.2.4 in its appeal. It also lists "11.1.1 of the advertising rules".
- 4.3. The Panel notes that the adjudicator referred to "section 11.1.1 and its relevant clause in the Advertising Rules" in his report, and that this may have confused the

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Appellant into thinking that the adjudicator was referring to clause 11.1.1 of the Advertising Rules.

Clause 9.1.6

- 4.4. The Appellant's submission on the point reads as follows:

*The adjudicator did not take into consideration the ruling of Complaint # 11863 " ...the code does not set out a blanket prohibition of any association of a competition or promotional draw with a subscription service, nor would it be desirable to do so as this would constitute a significant restriction on the ability of members to promote their services...". With regards to the use of the word "win" in this instance, it is the SP's humble submission that that use of this word herein has been prohibited in an unfair manner as it was not meant to mislead, but to indicate to the subscriber of the content, that there is an opportunity to obtain something without having to pay for it. No winner is definite.*

Clause 9.2.2 and Clause 11.2.4

- 4.5. The Appellant chose to deal with these clauses together and submitted the following:

*The SP humbly submits that the rules attached to the subscription process are neither long nor complex but are easily understood as well as structurally easy on the eye.*

*This service offered is not aimed solely at children, but the SP would like to point out that even if children were enticed by the offer of subscription, section 7.1 of the code was complied with in that the terms and conditions did indicate that the service should only be used with the permission of the child's parent or guardian.*

*The SP submits that the children enticed by this offer are reasonably believed to have obtained the consent of a parent or guardian.*

*The adjudicator further erred in stating that the banner and subsequent website needed an age restriction to be placed on it. There is no solid requirement in the code and or advertising guidelines to place an age restriction on a banner as well as a web page that is not an adult service or an adult content service.*

Clause 11.1.1

- 4.6. The Panel was concerned that the Appellant may have been prejudiced because it seems to have been given the impression that the adjudicator made a ruling in respect of clause 11.1.1 of the WASPA Advertising Rules, whereas he in fact made a ruling in respect of clause 11.1.1 of the Code of Conduct **and** its related clause in the Advertising Rules. A brief glance at the Advertising Rules however betrays a distinct lack of a clause 11.1.1, and as the Appellant's submission on the point relates to the clause of the Code of Conduct, the Panel is confident that no confusion in fact existed, and no prejudice resulted if it did.

- 4.7. The Appellant's submission in this regard was as follows:

*Further, it is incorrect for the adjudicator to note that the text "subscription service" only appears at the bottom of the landing page, the text in fact appears on the right hand side of the landing page, at the bottom of the landing page as well as in the terms and conditions and the message one receives once entering the pin number on the*

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*landing page. There are therefore numerous instances where the user is informed of the service being that of a subscription.*

*Sections 11.1.1 of the advertising rules have also been complied with in that "subscription service" has in fact been placed on the landing page with the price point attached.*

**Sanction**

- 4.8. The Panel does not fully comprehend the Appellant's submission regarding sanction, which reads:

*In conclusion, the SP submits that having regard to section 14.4 of the code, that the fine imposed was in the spirit and purport of sub section 14.4.2 (c).*

*The SP therefore humbly requests this matter be set aside and /or the sanction imposed to be reduced.*

- 4.9. As clause 14.4.2(c) empowers adjudicators to impose "an appropriate sanction," the Panel takes the Appellant's statement to mean that it feels that the fine imposed was not appropriate.

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**5. Findings of Appeals Panel**

**Clause 9.1.6**

- 5.1. The Panel does not grasp quite what relevance the adjudicator's remarks quoted by the Appellant may have to the question of the use of the word "win", but the balance of the Appellant's argument is well founded. If every person who subscribed to the member's service / competition won the prize advertised, then the Appellant would have infringed clause 9.1.6. Clearly they did not, and consequently there is no infringement.
- 5.2. The appeal is upheld in respect of clause 9.1.6

**Clause 9.2.2 and Clause 11.2.4**

- 5.3. The Panel has two concerns with the adjudicator's reasoning in this regard.
- 5.4. Firstly, the banner advertisement complained of is not by its general nature aimed at children. The mere fact that it features Justin Bieber's coiffure certainly does not make it so, and it is a somewhat tenuous argument to say that the mere inclusion of this item, which even the members of the Panel could identify with ease, marks the competition / service as being aimed at or particularly attractive to children.
- 5.5. The Panel's second objection is that the adjudicator did not give any indication as to why the terms and conditions of the service were inappropriate for the purpose, beyond a bare statement to this effect.
- 5.6. The Panel finds that the service does not fall under the ambit of clause 9.2.2 due to the fact that it was not "aimed at, or would reasonably be expected to be particularly attractive to children".

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- 5.7. The adjudicator founded his ruling on clause 11.2.4 on the infringement of clause 9.2.2, and his ruling can accordingly not stand.
- 5.8. In the light of the finding that the service was not aimed at children, the Panel did not find it necessary to refer to the Appellant's arguments in this regard.
- 5.9. Accordingly the appeal succeeds in respect of both clause 9.2.2 and clause 11.2.4.

Clause 11.1.1

- 5.10. The Panel wishes to once more explain the correct interpretation of clause 11.1.1, which it has done several times in the past. The clause states that promotional material for subscription services must "prominently and explicitly" identify the services as subscription services. Complying with the form without taking heed of the substance of this clause will not avail the Appellant.
- 5.11. While the Panel accepts that the words "subscription service" appeared in the top right-hand corner of the banner advertisement and in both the top right-hand corner and at the bottom of the website next to the price point, these notifications were written a font size and colour that faded into insignificance next to the other text on both of those documents. The notification was hence neither prominent nor explicit and the Appellant infringed clause 11.1.1 as a result.
- 5.12. The appeal in respect of clause 11.1.1 is denied.

Sanction

- 5.13. The appeal has been successful save for that in respect of clause 11.1.1. The adjudicator did not impose a sanction in respect of that clause.
- 5.14. The Panel further notes that the Appellant did not appeal the adjudicator's ruling in respect of clauses 11.2.2 and 11.2.3, and that the adjudicator indicated that the sanctions imposed on the Appellant in complaint number 14403 should be in respect of the breaches on those sections in this complaint too. The infringement of clause 11.1.1 is inextricably tied up with the infringements of clauses 11.2.2 and 11.2.3, and the Panel will accordingly follow the adjudicator in not imposing a fine in that regard.
- 5.15. The appeal was largely successful and the Panel accordingly rules that 75% of the appeal fee be refunded to the Appellant.

## Annexure 1

**WIN**  
83/DAY

**A BLACKBERRY CURVE  
AND R5000  
WORTH OF AIRTIME**

Whose hair style is this?


A: Julius Malema    B: Prince Charles  
C: Helen Zille    D: Justin Bieber

SUBSCRIPTION SERVICE



# Annexure 2

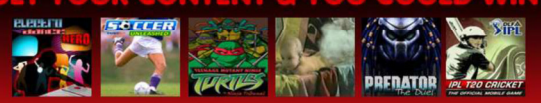
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