



REPORT OF THE ADJUDICATOR

Complaint reference number: 15029

WASPA member(s): Atinco SA (IP)
Mira Networks (SP)

Membership number(s): 0072
(0011)

Complainant: WASPA Monitor

Type of complaint: Subscription service

Date complaint was lodged: 2011-09-27

Date of the alleged offence: 2011-09-27

Relevant version of the Code: 11.0

Clauses considered: 3.9; 4.1.1; 4.1.2; 14.3; 14.9; 11.1.1;

Relevant version of the Ad. Rules: 2.3

Clauses considered: 9

Related cases considered:

Complaint

The WASPA Media Monitor, Ilonka Gray, (“the WMM”) conducted some testing on the website offerings of Atinco SA, the Information Provider (“IP”) (the Service Provider is Mira Networks (“SP”)) during March and April 2011. The WMM found that the Club Binbit subscription service offered on the websites of the IP was not compliant with the Advertising Rules of WASPA and also contravened the WASPA Code (Version 10.0 at that time). The WMM using an informal heads up complaint procedure (now contained in Clause 14.9.4 of the Code) informed the SP about the code contraventions and requested the SP to inform the IP of the contraventions and the serious nature of such contraventions. The WMM formulated the problem as follows:

As can be seen, the common problems of the services are not explicitly showing that it is in fact a subscription service. In previous tests for this

service we came to an understanding that they were required to put a subscription service heading into the bar along the top.

The IP agreed to change the websites to make them compliant with the Code of Conduct and Advertising Rules by agreeing that the IP would put a subscription service heading into the bar along the top. This was subsequently done as illustrated in the website screen shots attached to the WMM's complaint (15029.002attachment.1). The attachment shows 4 websites that do not contain the required heading. The new websites complied with the requirements of the Code and Advertisement Rules.

In subsequent testing done on 22 September 2011 the WMM found that the headings as agreed upon had been removed and that the websites were displayed in the old format without the heading in the top bar.

The WMM also informed the SP on 22 September 2011 that:

Binbit has become extremely problematic and their modus operandi seems to be underhand. All the links below were non-compliant yesterday, and today they are all displaying "SUBSCRIPTION SERVICE" at the top of the page.

We have been through this process with them before, where they inserted the required text, and days later removed it again.

Please ensure that all these links, and any other services run by Binbit are displayed as set out by the Code of conduct.

Please note, if we come across any Binbit campaigns that are not adequately displayed as required, I will file a REPEAT OFFENSE FORMAL COMPLAINT. Our complaints department has also been made aware of this and we will all be keeping a close eye on them.

In the complaint filed on 27 September 2011 the WMM informed the SP that:

Following our recent testing, and subsequent correspondence on 22 September, we have yet again encountered the same problems with BinBit. We closed your Heads Up in good faith that the campaigns would remain compliant. However, yet again Binbit have changed their web campaigns excluding SUBSCRIPTION SERVICE text and PRICING text. The required text yet again being removed is a clear display of deliberately trying to mislead the consumer.

This modus operandi will no longer be tolerated, and as a result these problems have been escalated to an Emergency Panel Hearing.

Attached to the complaint are screenshots of 4 webpages that do not carry the required heading as agreed with the WMM.

Service provider's response

The only response received from the IP was an email from Ken Toh from Binbit, Singapore on 6 October 2011. Ken Toh states:

Waspa complaint for reference is attached with this email. We have reviewed the complaint and i have personally double checked the promoweb URLs in which they have displayed the necessary subscription details prominently for the past week.

Please do email me for any future issues (in which we hope there will be none).

There was no response from the SP as invited by the WASPA secretariat.

Sections of the Code considered

3.9. Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct or the Advertising Rules.

3.9.2. Where any information provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider..

4.1. Provision of information to customers

4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

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.

11. Subscription services

11.1. Promotion of subscription services

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

14.3. Formal complaint procedure

14.3.6. If the member fails to respond within this time period, it will be assumed that the member does not wish to respond. An extension to this time period may be given to the member at the discretion of the WASPA Secretariat.

14.9. Media Monitor

14.9.1. WASPA may employ a Media Monitor, whose role it is to monitor WASPA members' advertising and services for compliance with the WASPA Code of Conduct and Advertising Rules.

14.9.2. The Media Monitor may lodge complaints with WASPA using the procedure outlined in sections 14.1, 14.2 and 14.3 of the Code.

14.9.4. In addition to the informal and formal complaints process, the Media Monitor may also may use of the "Heads Up" process set out below. The Media Monitor may make use of this process if it seems feasible for the member concerned to provide a prompt remedy to the problem identified.

14.9.5. For the "Heads Up" process, the Media Monitor will send a notification of the problem directly to the relevant WASPA member, and send a copy of this notification to the WASPA Secretariat.

14.9.6. The Member has two working days to respond to the "Heads Up" complaint, thereafter, if the Media Monitor is satisfied that the member has adequately addressed the "Heads Up" complaint, it is considered closed, and no further action is taken against the member.

14.9.7. If the Media Monitor is not satisfied that the "Heads Up" complaint has been satisfactorily resolved then the Media Monitor may either give the member a further two working days to resolve the matter, or proceed to lodge a formal complaint, as described in sections 14.1 and 14.3 of the Code.

Sections of the Advertising Rules considered

9 INTERNET WEB SITES

9.1 SCOPE

This section applies to all advertising placed on internet-based web sites visible to the general public where Access Channels are displayed. This also includes advertisements placed on third-party web sites.

9.2 DISPLAY RULES FOR COST AND T&C INFORMATION

9.2.1 Cost OF ACCESS DISPLAY

9.2.1.1 Formatting Of Access Cost Text:

- Access cost text must be of a size that is at least 80% of the largest access number on the page, or 15 point font size, whichever is the greater. The access cost text must be in a nonserif font
- The pricing text must be clearly shown being independent of any other text or image, and not be placed or formatted in a manner where it may be obscured by other text information, graphics or marks that may be displayed around it.
- The cost text must not be part of a colour scheme or design that could obscure (objective) easy reading of complete details of the price.
- All access cost information must be placed horizontally

9.2.1.2 Position of Access Cost Text

- For each unique access number, the full and final cost of the access must be displayed immediately below, or above, or adjacent to the unique access number or Content access code in a non-serif font.
- If the ad and/or offer is on a third party web site as a graphic or display text, then the display text with pricing and contact info must be displayed on immediately below, above or to the side of the access number to show the FULL cost to consumer. This includes for example, textbased ads placed on Google-based (or similar) advertisements.

Decision

The IP has contravened the Advertising Rules and Code of Conduct of WASPA on a consistent and flagrant manner as outlined in the WMM's complaint and the attachments thereto. The contraventions started in March and April 2011. The initial

contraventions were dealt with informally with the WMM affording the IP and SP a reasonable opportunity to ensure that the IP's websites complied with the Advertising Rules and Code of Conduct. That is clear from the WMM's complaint and attachments. The IP thereafter, at least for a period seemed to comply with the agreement reached with the WMM in displaying appropriate references to the subscription services on its webpages.

Subsequent tests by the WMM on 22 September 2011 revealed that the IP was once again contravening the provisions of the Code of Conduct and Advertising Rules by not displaying the required text and references to the subscription services in accordance with the agreement reached with the WMM. The contraventions seemed to be deliberate and in flagrant disregard for the obligations of the IP and the SP.

Using the newly adopted heads up procedure the WMM entered into new negotiations with the IP and SP to make the services compliant. Within days of the agreement reached, the IP was once again contravening the Code and Advertising Rules by not displaying the required notices in the required positions on its webpages.

Although the IP and SP were both afforded an opportunity to respond to the serious complaints by the WASPA secretariat in the notice of complaint, only the IP responded by indicating that it was ensuring that the webpages would be changed (once again) to comply with the Code and Advertising Rules.

More specifically the SP did not provide any indication that in the light of the serial nature of the breaches by the IP that it was taking reasonable steps to monitor the conduct of the IP making use of its services. The WMM in her communication of 22 September 2011 requested the SP to "ensure that all these links, and any other services run by Binbit are displayed as set out by the Code of conduct". She also threatened that if transgressions occurred again, she would file a repeat offence formal complaint. The SP was therefore adequately forewarned of the seriousness of the charges and the conduct of its client. In terms of section 3.9.2 the SP "shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider."

In the light of the absence of any explanation I find that the SP was grossly negligent in failing to take reasonable steps to monitor and control the conduct of the IP even though it was aware of the conduct of the IP over a period of time and the disregard of the IP for any undertakings given.

In the complaint and attachments the WMM accuses the IP of deliberately infringing the Code of Conduct and acting in an underhanded manner by agreeing to comply and then deliberately changing the webpages again. The IP offered no explanations for the subsequent changes to their pages in contravention of the code of conduct, nor did it deny the charges that this conduct was deliberate.

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. The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made. The Code of Conduct also sets standards for advertising mobile application services.

The kind of conduct displayed by the IP and the failure of the SP to effectively address that conduct undermines the very objectives of the WASPA Code of Conduct as set out in Clause 1.2.

I find that the IP deliberately contravened the provisions of Sections 4.1.1, 4.1.2 and 11.1 of the Code of Conduct and 9.2 of the Advertising Rules

Sanctions

In view of the seriousness of these contraventions and the failure of both the IP and the SP to provide any explanation for their conduct, the following sanctions are imposed:

1. The SP must monitor the webpages of the IP on a regular basis and provide the WMM or Secretariat with monthly reports of such monitoring.
2. In the event that the IP should again contravene any of the provisions of sections 4.1.1 or 4.1.2 of the Code of Conduct or section 9 of the Advertising Rules, the SP shall suspend all services provided to the IP forthwith and inform the WASPA Secretariat of such suspension.
3. A fine of R50,000 is imposed on the SP.