



REPORT OF THE ADJUDICATOR

Complaint reference number:	15849
WASPA member(s):	FROGGIE (IP) / Mira Networks (SP) (0011)
Membership number(s):	(IP) (1194) / (SP) (0011)
Complainant:	Monitor
Type of complaint:	Non-functioning
Date complaint was lodged:	2011-12-07
Date of the alleged offence:	2011-11-23
Relevant version of the Code:	11.6
Clauses considered:	3.3.1, 4.1.1, 4.1.6, 11.1.2, 11.5.1, 14.9.4, 14.9.6 & 14.9.7
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	N/A

Related cases considered:

Complaint

A complaint was lodged by the WASPA Monitor against the IP after various issues raised in the Monitor's Heads Up concerning the IP's Guitar web campaign, were apparently disregarded. The Monitor felt particularly strong about the fact that an instruction to take the service off-line was ignored.

Subsequent to the IP's later response, the Monitor issued the following statement:

"Please note there were technical errors that were unforeseen during the process of testing, and serves as a mitigating factor. However, Froggie, following many reminders from ourselves and Mira, did not make changes to any of their webcampaigns as requested, nor did they disable the webcampaigns as requested. This was directly breaching the Code of Conduct."

Information provider's response

A verbatim copy of the IP's response is provided below:

"The design changes mentioned were made to include samples of additional content available and made sure T&C's and details of the subscription service were clearly indicated and clickboxes were removed. These changes were sent on 2nd of December.

When we were first addressed on these matters on the 22nd we were not aware of the fact that we only had 2 days to fulfil the "Heads Up" requests nor that they had to be answered formally.

On the Monday the 5th of December we saw the replies of the test on the 2nd of December sent in the afternoon and removed the campaigns from the online advertiser networks in South Africa (www.creafi.com) to stop users accessing the banner advertisements.

Today on the 7th of December we removed the pages from the internet. Firstly we didn't realise this was your original request to take the offline completely, and secondly we left them online, but obviously not advertised, with the aim to test and resolve the subscriptions problems.

The problems we are having with the subscriptions seem to be coming from the new Vodacom Double Opt in rules and the fact we are not receiving the subscription confirmations from Mira networks. As these aren't being received none of the subscriptions on Vodacom were being activated. Thus no welcome messages were being sent out nor any billed messages. We are still analysing the logs along with Mira to see where the glitch lies.

I would like to apologise for the latency in replying to these matters, although we recently had a number of public holidays here in Spain, it doesn't excuse the situation, but please take that fact into consideration."

In a later response the IP further stated:

"Mira have confirmed that there were technical errors on the Vodacom MESH system, thus causing the subscription problems we had when you tested our landing pages."

Sections of the Code considered

14.9.4. In addition to the informal and formal complaints process, the Media Monitor may also make 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.

14.9.6. 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.

3.3.1. Members will not offer or promise services that they are unable to provide.

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.

4.1.6. Where a customer is asked to confirm that they have read the terms and conditions of a service by means of a tick-box, this may not be ticked by default, but must require the customer to specifically click on the box to tick it.

11.1.2. An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed, except as provided for in 11.1.

11.5.1. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message should not be mistaken for an advert or marketing message. The customer may not be charged for this message.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the IP's subsequent response.

The WASPA Code of Conduct contain some clauses of which the aim it is to facilitate members with a so-called "Heads Up" when, and ONLY when it seems feasible for the member concerned to provide a prompt remedy to the problem identified by the Monitor.

The Heads Up process therefore only serves as a mechanism whereby flaws identified by the Monitor, can be brought to the attention of the member, if in the Monitor's own discretion it seems feasible that a quick, or prompt resolve would follow suit.

The Heads Up process should therefore not be seen as right, but rather as a privilege.

Following such argument, it would only seem feasible and just, that when afforded the opportunity of a Heads Up, members should embrace the opportunity and strive to find a prompt resolve.

In light of the above, it does then seem rather naive that the IP, and to a lesser extent the SP in this matter, proclaimed its ignorance in terms of the Heads Up process by stating that:

"When we were first addressed on these matters on the 22nd we were not aware of the fact that we only had 2 days to fulfil the "Heads Up" requests nor that they had to be answered formally."

Such statement is a clear indication of the fact that the IP has not familiarised itself with the WASPA Code of Conduct.

The Code in its introduction states that:

"This document is a code of practice governing the members of the South African Wireless Application Service Providers' Association (WASPA). It is binding on all

members and contains accepted procedures to be followed in the event of a complaint lodged against any WASPA member.”

Part of these accepted procedures to be followed are highlighted in section 14.9.6 which states that:

“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.”

The IP failed to respond accordingly and when it eventually did respond, aligning itself with section 4.1.6, 11.1.2 and 11.5.1, it still failed to adhere to the Monitor's request by failing to disable its service.

The Adjudicator is therefore of the opinion that the IP failed to utilise its privileged position of having had access to a “Heads Up” by not providing a timely response.

Even though it did manage to change some of the elements of its original campaign, such changes only happened two weeks after the initial “Heads Up”.

The IP's claim of public holidays in Spain does not render a two – four week remediation effort valid and shall not be considered as a mitigating factor.

The Adjudicator has however familiarised him / herself with the submissions made on behalf of the SP with regards to the technicalities as well as the Monitor's subsequent response thereto, which does seem to explain, albeit not justify the IP's technical difficulties experienced.

What is however neither explainable nor justifiable is the IP's complete lack of communication in the form of a proper response to the Heads Up and its subsequent ignorance of the Monitor's request in not taking the campaign off-line.

The IP's claim that it removed the banners from the online advertiser's networks might indicate a misunderstanding on behalf of the IP as to what the intention of the Monitor was, but a further analysis by the Adjudicator of the Monitor's wording, seems to indicate otherwise: **“If not fixed today, please disable this service.”**

The IP clearly failed to adhere to the instruction, therefore rendering its service in breach of section 3.1.1 and 4.1.1.

The Complaint is upheld.

Sanctions

Refer to Adjudication 15847 for appropriate sanctioning.