

WASPA appeals panel

Complaint 6986

REPORT OF THE APPEALS PANEL

Date: 27 October 2010

Service Provider: Integrat

Appellant and Information Provider (IP): Mobile Toe

Complaint Number: 6986

Applicable versions: 7.4

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 7 July 2009, by the WASPA Media Monitor against Integrat (Pty) Ltd, the Service Provider (SP) and Mobile Toe, the Information Provider (IP).

1.2 The SP is a South African company and full member of WASPA. The IP is a member of WASPA. The IP alone is appealing against the sanctions imposed.

1.3 The complaint relate to a web IQ quiz provided by the IP which was selling a content subscription service. The Monitor raised breaches of sections 3.3.1, 11.1.1, 11.1.2 & 11.1.8 of the WASPA Code of Conduct.

1.4 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 The complaint relates to alleged breaches of the following sections of the WASPA Code:

2.1.1 Section 3.3.1

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

2.1.2 Section 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.

2.1.3 Section 11.1.2

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.

2.1.4 Section 11.1.8

Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number

2.2 The Monitor also raised Section 5.3.1 of the WASPA Advertising rules:

One is not allowed to abbreviate the word subscription in any way e.g.: Subs, or Sub or Subscr. In the welcome message the Service provider uses the word unsub. Whilst it is not featured in the abbreviations block in the Ad Rules, the fact that

SUBSCRIPTION may not be abbreviated, would only mean that the same would apply for UNSUBSCRIBE.

2.3 In this appeal, the panel will be guided also, by the general provisions and purpose of the Code:

2.3.1 1.2 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.

2.3.2 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.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

The Adjudication was lengthy and will not be repeated in full here, save to quote the sections most relevant to this appeal.

In this regard, the Adjudicator stated:

- In summary the WASPA member is found to have breached sections 4.1.1, 11.1.1 and 11.1.2 of the WASPA Code of Conduct as well as sections 9.2.16 and 9.3.15 of the WASPA Advertising Rules.
- The Adjudicator considered the following as mitigating factors:
 - 15.1. the remedial action taken by the WASPA member including the payment of a refund;
 - 15.2. the fact that there were, albeit non-compliant, indicators that the service was a subscription service.

- 16. The fact that the impact on consumers who subscribed to the service would have been aware of such subscription almost immediately through the observance of the requirements of section 11.1.8 of the Code (and therefore had the opportunity to opt out) is regarded as neither mitigating nor aggravating. Such consumer would still have been out of pocket the initial R50 – a considerable sum - as well as the cost of unsubscribing and the member should not benefit in the assessment of sanctions merely through compliance with the Code.
- 17. The Adjudicator also noted the seriousness with which offences relating to subscription services are regarded and the damage to the industry which flows from conduct such as that undertaken by the member in this matter. The Adjudicator is of the view that it is not acceptable that blatantly non-compliant services such as that offered by the member continue to be offered to South African consumers notwithstanding the length of time with which the basic compliance obligations have been in place. The member has been previously found guilty of breaches of the same sections of the Code and Advertising Rules with which it has been found to be non-compliant in this matter and it appears that sanctions previously imposed have not proved to be a sufficient incentive to compliance.

3.2 Sanctions

The following sanctions were given:

- The member is fined the sum of R150 000, payable in full to the WASPA Secretariat within five working days of receipt of invoice therefore from the WASPA Secretariat.
- The member is required to terminate the subscription of and refund in full all consumers who subscribed to the service.

- Such refund is to be affected within ten (10) days of receipt of notification of this Adjudication and proof of the refunds is to be provided to the WASPA Secretariat.
- The member is further ordered to send an SMS to all such subscribers explaining that the termination and refund has been ordered by WASPA. Such SMS should not contain any marketing material and must, at a minimum state the words “refund ordered by WASPA www.waspa.org.za” as well as setting out the name and contact number of the member.
- Although it appears that the promotion for the service no longer exists in the form complained about, in the event that it remains current the member is ordered to terminate it immediately.
- These sanctions are imposed in respect of the cumulative effect of all breaches.
- The sanctions set out in paragraph 18.2 above shall not be suspended by the operation of section 13.3.15 of the Code in the event that this Adjudication is appealed.
- The IP is fined an amount of R 150 000.00;
- The IP is ordered to refund all subscribers to the service in full;
- The IP must notify all subscribers within 7 (seven) days of it receiving notice of this adjudication report that they are entitled to a full refund;
- The IP must immediately cease any further advertising of its services which do not comply with clause 11.1.2 of the code.

4. GROUNDS OF APPEAL

4.1 Grounds of appeal

The IP's grounds for appeal are recorded (that is copied exactly as submitted, errors included) and paragraphed as follow:

1/ Unfairness: of the system

It is very disheartening for any SP or IP to receive an escalated WASPA complaint as it almost certainly means a 'conviction'. Even more so with lodging an appeal against that selfsame WASPA conviction. We raise the fairness of a system where there is no transparency, the adjudicators (or judges) are not named and the system that pays the adjudicators are the self same body who benefits from a 'conviction' in terms of monetary and other gain.

2/ Prominence and explicitness as a subscription service

While we understand the adjudicators comments, we do ask for leniency in judgement in this regard as we did not intentionally or otherwise attempt to mislead in anyway and did meet many points of the code. The end user must have known at multiple points in the process that this was a subscription service. We did not try and hide it (as many competitors in the market have). While the phrase at the top may not have included the word "service" due to an oversight, we challenge how anyone could misread the actual intention of it being a subscription service - "IQ improvement tips subscription" and "R50/week". It is obvious this is a subscription service. The "/week" part further indicates this is NOT a once off purchase.

We notice from the screen shots too, the terms and conditions which are part of the site are not shown or referenced by the adjudicator. These seem to be cut off in the screenshots but are integral. Here again it is noted explicitly that this IS a subscription service. The pricing details are again fully disclosed and mentioned even to the point of being bolded.

In addition to all the site indicators (including the actual use of the word 'subscription'), the user is clearly informed of the subscription and cost in the PIN message which is sent to their phone. This must be read and action taken based on this message in order for the end user to subscribe to the service. It is impossible for the end user to otherwise sign up to the service.

**Enter pin 4449! U'll b subscribed to mind50p from Mobile Toe @ R50.00/week.
Help? Call 0822350400, VAS rates apply. To unsubscribe sms STOP to 31990.**

Finally, after joining up, the user is again informed of the costs –

**Uve subscribed to IQ!U'll get ur link 4 unlimited access 2 Optical Brain Teasers
weekly @R50/SMS. Send STOP mind50p to 31990 2 unsub.call 0822350488
4help**

As can be clearly seen we do attempt at multiple points to explicitly state this is a subscription service. Obviously there is still a need to sensitively deal with this aspect from a marketing perspective and nowhere do sites make price points the main focus of their marketing material in the online or offline space. For example, lawyers would not explicitly at every meeting provide a rate sheet to clients reminding them that every minute is chargeable; likewise, on a leading ecommerce site such as Amazon no-where is the price of the item larger than the item screenshot and description, neither is it bannered across the screen multiple times as much as the IP does throughout their ‘sales process’.

We have been severely punished for attempting to comply and received an exceptionally harsh punishment which may be more applicable to an IP who did not have any such indicators in their service.

3/ Legitimacy of quizzes

While we know now WASPA’s stance on quizzes, it is only after much debate between WASPA, IP and SP, and an adjudication that this was clarified. It must be noted there were many quizzes in the market at the same time this service was available further complicating our understanding.

The code was ambiguous to us in whether this actually entailed bundling. Version 7.0 of the code for example did not explicitly prohibit quizzes and although Version 7.4 used the word ‘quiz’ in the bundling clause 11.1.2 it was still unclear, confusing and left open to interpretation.

From Version 7.4 of the code - “11.1.2. 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.”

What is an entry into a quiz? Stating plainly “Quizzes may not be used as a means to attain subscribers” would be clearer and be more explicitly understood or it could be reworded “...may not be an entry *via* a competition or quiz” . The phrase as it stands - “entry into a competition or quiz” has a completely different meaning.

4/ Alleged discrepancy in pricing

The cost of the service is R50 per week as noted - across the site; in the pin message; and in the subscription message. There is no discrepancy. Even though this may not have read as eloquently as it could have in the SMS, “...weekly at R50/SMS” means the same as one SMS per week (which in turn means the same as R50 weekly or R50/week). The user is not paying any more than they expected to and as was stated elsewhere. They were not jeopardized in any way or misled.

5/ Delay in adjudication

We note that the case was lodged according to the website on 7 July 2009, yet the complaint only adjudicated over 9 months later on 12 March 2010. This is grossly unfair, unreasonable and prejudicial especially as the market trends, changes and views of services have changed so dramatically during this time. If the complaint was reviewed at an earlier stage for the same infraction, the result may have been different and sanctions may have been less aggressive. See sanctions imposed with regards to complaint number 7197 and 4868. Based on the adjudication of these cases and the immediate action we always take after the judgements are released, we could have avoided guilt of the same infractions multiple times and hence avoided two such similar complaints arising .

It must also be noted the IP is forced to answer complaints or send replies according to a strict WASPA mandated timeline (generally 5 or 10 days), whereas WASPA themselves are not held to account to any timelines. A judgement after 9 months is an unreasonably long time especially in light of the fluid nature of the markets and severity with which punishments are made and as can be seen by multiple judgements of substantially similar things this has unfairly jeopardized us.

6/ Due diligence of the member

We feel it important to mention that we have acted in good faith, many times approaching and interacting with WASPA in relation to our services asking advice and sending through examples so as to ensure we are working within the guidelines. The following examples illustrate our desire and willingness to act fairly and honestly:

Attachment 1 - On 15 July Integrat responds to a detailed query on IQ services from the IP.

Attachment 2 - On 17 June the IP confirms that their websites were amended and Integrat adds further revisions which need to be made to the product to improve clarity.

Attachments 3 and 4 - The IP also corresponded with WASPA with regards to the compliance of their services.

Attachment 5 – Integrat corresponds regarding PIN method (IP had converted to an MO service based on the understanding of the code)

Attachment 6 – IP communications between WASPA fostering closer communications.

It is clear from these e-mails our commitment to the code even to the point of implementing MO service due to misinterpretation of and/or vagueness of the Code of Conduct (WASPA does admit that the Code was ambiguous at the time with regards to this.)

7/ Severity of the sanctions

We note our services have not raised many formal complaints with WASPA (in fact this complaint was not an end user one but raised by the WASPA monitor meaning end users were most likely satisfied with the service) and we have acted speedily and efficiently in matters brought to our attention.

At no time have we acted dishonestly or intentionally attempted to mislead either WASPA or the end users. We have attempted at all times to make changes in line with WASPAs suggestions to the point of encouraged communication between WASPA and ourselves on all levels sending through web sites and email to gain clarification and arranging teleconferences to work closer together (as can be confirmed by various communications between ourselves and the WASPA secretariat and Lorraine Hartzer and Ilonka Gray).

Further our speedy action has been noted by WASPA in other instances in implementing changes and it is unfair to say that “sanctions previously imposed have

not proved to be a sufficient incentive to compliance". We do not need further incentive to comply and already have in many instances and as can be proven that all sites have fully revised in line with compliance requirements even before any judgements were released.

The adjudicator states "the seriousness with which offences relating to subscription services are regarded and the damage to the industry which flows from conduct such as that undertaken by the member in this matter ..." is unfair and implies we have acted in bad faith and maliciously in offering our services. If this was indeed the case and this view was held by all at WASPA including the monitor who lodged this, WASPA would have been required to invoke section 13.7 Emergency Procedure.

It is clear by the timeline of the complaint and length in adjudicating it that the breach was actually not viewed serious enough in nature to warrant such an emergency procedure and hence the prejudice shown and sanctions imposed by the Adjudicator must be viewed as excessive and non-proportionate to the alleged breach.

Summary

We feel this adjudication is harsh in a number of ways and we request that the above points be submitted as mitigating factors in the adjudication.

We have at all times attempted to act in good faith and in accordance with a fair interpretation of the WASPA code of conduct and request leniency be applied in the adjudication and a review taken to lowering the sanctions and placing us on probation in this regard.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 The complaint was made on 7 July 2009. Version 7.4 of the Code, in use from 17 June 2009 to 13 October 2009, applies.

5.2 Issues of procedure

5.2.1 The Appeal raises a number of concerns with WASPA procedures, most notably:

- The slow processing of complaints;
- The equity of having the body that makes the decision the same body that benefits.

5.2.2 It is not the intention of the Appeals Panel to deal with these concerns in detail, as this is not the correct forum for such concerns. An appeal is lodged and decided on the merits of any particular matter in relation to the Code. The IP is advised to raise these concerns with WASPA directly.

5.3 Finding

5.3.1 It would appear from the Appeal documents that the IP is only appealing the penalty of R 150 000,00 as part of the sanctions imposed by the Adjudicator. In doing so, it raises issues relating to the merits of the decision.

5.3.2 The Appeals Panel will therefore only deliberate on the penalty imposed, but will similarly have regard to the merits of the matter in considering the appropriateness of the sanction.

5.3.3 The core of this complaint relates to the use of a quiz in terms of section 11.1.2 in the relevant version of the Code:

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.

5.3.4 The IP has submitted that the Code and the position of WASPA were unclear at the time of this advertisement. Version 7.4 of the Code, as cited above, was the prevailing rule at the time. While it is noted that this version of the Code was fairly new at the time of the complaint, it is also noted that, as the IP has itself raised, it followed a period of debate and confusion on this issue. The IP should therefore have been aware of the new provisions. The Appeals Panel

strongly disagrees with the allegation that the Code is in any way unclear on this point. The IP's submission on the sentence construction being ambiguous is rejected, and the Appeals Panel finds it to be somewhat disingenuous. The rule is clearly stated: 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.

- 5.3.5 We agree with the IP's submission that the consumer would have known about the subscription service at multiple points of the process. It would appear, however, that the IP is somewhat missing the point. The consumer would be aware that there is a subscription service from lines such as "Get IQ and IQ improvement tips subscription to your cell for only R50/week." What is not clear, as pointed out by the WASPA monitor's initial report, is that by pursuing the IQ test to its conclusion, you will inevitably have to join the subscription service.
- 5.3.6 It is accepted that the SMS received by the consumer prior to joining the service is clear that they will now be subscribing. This reads: Enter pin 4449! U'll b subscribed to mind50p from Mobile Toe @ R50.00/week. Help? Call 0822350400, VAS rates apply. To unsubscribe sms STOP to 31990." It is accepted that at this point the consumer could back out of the subscription service. It is, however, very late in the process for the consumer to realise that they will not get the results of the IQ test without subscribing. The quiz is used as a hook to lure the consumer into joining the service. The Appeals Panel is of the opinion that this is exactly the situation that the Code seeks to prevent.
- 5.3.7 The Appeals Panel is of the opinion that this is a blatant breach of the relevant section of the Code, and that the points raised in the appeal documents do nothing to mitigate this finding.
- 5.3.8 According to section 13.3.11 of the WASPA Code of Conduct an adjudicator, when determining any appropriate sanctions, must take into consideration:
 - 5.3.8.1 any previous successful complaints made against the member;

5.3.8.2 any previous successful complaints of a similar nature.

5.3.9 As per WASPA records in its complaints search directory, Mobile Toe has only had 4 previous formal complaints, of which one was partially upheld, two were upheld and one was dismissed. None of the upheld adjudications relates to section 11.1.2 in its relevant format, as they pre-date Version 7.4 of the Code.

5.3.10 Two of the complaints do, however, involve hefty fines. Both these decisions, however, have appeals pending.

5.3.11 In a recent Appeal, this panel reduced a fine of R150 000,00 for a breach of section 11.1.2. (Appeal of matter number 6842). In that matter, however, the IP took responsibility for the breach and removed the offending advertising after only one day.

5.3.12 In contrast, in this matter the IP appears to underestimate the serious nature of the breach. It only removed the material on receipt of the complaint.

5.3.13 It would appear from the refund report that only 17 consumers in fact responded to this campaign. The actual harm caused is therefore not extensive.

5.3.14 The only other mitigating factor in this matter is the relatively clean record of the IP, and the fact that they appear to have subsequently corrected this problem in their advertising as there are no subsequent relevant upheld complaints.

5.3.15 It is recorded that a fine of R150 000,00 is a large fine. However, the breach was a blatant one.

5.3.16 After reviewing all the relevant material pertaining to this case and having regard to the mitigating circumstances, the Appeal's Panel finds that the sanction imposed was possibly excessive.

5.3.17 This decision is based on:

- 5.3.17.1 The IP's previous record;
- 5.3.17.2 The actual harm caused;
- 5.3.17.3 Subsequent conduct of the IP.

5.3.18 The appeal is therefore partially upheld and the outright fine of R 150 000,00 is overturned.

5.3.19 However, as has been repeated, the breach was a serious offence. The Appeals Panel is also disturbed by the lack of responsibility taken by the IP and the disingenuous approach to the merits of this matter.

5.3.20 **Therefore, the IP is fined R 150 000,00 of which R 100 000,00 is suspended for 6 months from the date of notice hereof, and R 50 000,00 made payable to the WASPA Secretariat within seven (7) days notice hereof.**

5.3.21 The suspended portion of the fine will be triggered by any breach by Mobile Toe of any part of section 11.2 of the current Code (Subscription process) or the equivalent section in the event that there is a Code revision in the next 6 months.

5.3.22 The cost of appeal is non-refundable.