



Wireless Application Service Providers' Association

Adjudicator's Report

Complaint number	30995, 30996, 30999
Cited WASPA members	Xplosion Limited (1156)
Notifiable WASPA members	Opera Telecom (Pty) Ltd (Oxygen8)
Source of the complaint	Media monitor
Complaint short description	Non compliant advertising and process for adult subscription service.
Date complaint lodged	11 July 2016
Date of alleged breach	21 and 23 June 2016
Applicable version of the Code	14.4
Clauses of the Code cited	4.2, 5.4, 5.5, 8.2, 8.7, 12.1, 12.2, 12.4, 12.5, 15.6, 15.9, 15.9, 15.10, 22.3, 22.5
Related complaints considered	26211, 26420

Fines imposed	R 15 000
Is this report notable?	No
Summary of notability	. <i>na</i>

Background

Matter 30995, 30996 and 30999 are, for all intents and purposes, the same complaint. The only difference in the matters appears to be the manner in which the Monitor accessed the material. These matters should rightly have been treated as one complaint *ab initio*, and I will do so for this ruling to avoid issues of so-called double jeopardy.

The matters were originally referred to an Emergency Panel. However, as Vodacom had already suspended the service on 29 June 2016 (after the Monitor's investigation but before lodging of the complaints) the urgency was mitigated.

Complaints

The complaints included a great deal of background as to the Media Monitor's new evidence collection process, and acceptable standards as well as possible breaches.

What is relevant is the actual potential breaches picked up in these matters.

In matter 30995 the complaint is summarised verbatim as follows:

On or about the 21st of June 2016 at about 00:59 the user visited 'www.pornhub.com'. The user clicked on a green 'Watch / Download' banner advert {00:31}.

This banner advert was non-compliant:

- No subscription reference;
- No pricing information displayed;
- No 18+ reference.

The user was directed to a page with a black background containing a play button in the middle. The user clicked on the button and was directed to the Vodacom network hosted confirmation page {00:46}. As this action triggered the confirmation step, the page was in essence a landing page.

The landing page is non-compliant:

- No 18+ reference;
- No subscription reference immediately adjacent to the call to action button;
- No pricing and frequency of billing reference immediately adjacent to the call to action button;
- Minimum terms and conditions not displayed – call centre number and URL where the full terms and conditions can be accessed.

The network hosted confirmation page prompts the user to accept or decline the request to join the Sexxymob subscription service at R6/day. The user does not at any point explicitly/manually agree to join the service by clicking on the 'Subscribe' button, however, the subscription is automatically activated and the user is directed to the Sexxymob subscription service home page.

The confirmation step has been automated. Although the Vodacom network hosted confirmation page is displayed to the user, it automatically after a few seconds redirects the user to the service homepage and triggers activation of the subscription service and billing of the MSISDN without any action (positive or negative) taken by the user. This subscription is activated in the background without the user's knowledge or consent, by means of JavaScript SOP bypassing.

The subscription service homepage briefly (less than a second) displayed terms and conditions before the content fully loaded. The top notification regarding pricing is ambiguous, and contains additional charges not communicated with the user on any advertising material or the network hosted confirmation page.

The user receives a Welcome Message which confirms subscription to the Sexxymob service {01:07}. The user checks the airtime balance and R6.00 has been deducted for the subscription charge.

Matter 30996 and 30999 are for all intents and purposes the same complaint.

Member's response

The Member submitted the same response in all the matters, essentially laying the blame for the breaches at the door of an unnamed affiliate marketer.

The response enumerated the following remedial steps:

- That affiliates MUST from now on only use approved banners;
 - An i-frame block on the pages;
 - A refund to all affected users;
 - All pages updated to reflect R6 subscription fee.
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Clauses

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

5.4. Members must have honest and fair dealings with their customers.

5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

8.2. For a subscription service, the "pricing information" consists of the word "subscription" and the cost to the customer and frequency of the billing for the service. The cost and frequency portion of the pricing information must follow the following format, with no abbreviations allowed: "RX/day", "RX/week", or "RX/month" (or RX.XX if the price includes cents). For services billed at an interval other than daily, weekly or monthly, the required format is "RX every [time period]", with no abbreviations permitted when specifying the time period. Examples of pricing information: "Subscription R5/week", "R1.50/day subscription", "RX every three days", "RX every two weeks".

8.7. Pricing information must not be misleading. The price must be the full retail price of the

service, including VAT. There must not be any hidden costs over and above the price included in the pricing information.

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

12.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated. It must not be a requirement that the viewer of an advert has additional software installed in order to see pricing information in the advert.

12.4. For any web page advertising a service for which there is not a subsequent confirmation step containing a link to the terms and conditions, the minimum terms and conditions for the use of the service must be clearly displayed.

12.5. The minimum terms and conditions displayed on any web page must include at least the following information:

(a) a customer support number, and

(b) a link to a web page where the full terms and conditions for the service are available.

15.6. Once a customer has joined a subscription service, neither the amount and frequency of the billing nor the frequency of the service may be increased without the customer's explicit permission.

15.9. The confirmation step for any subscription service must require an explicit response from the customer of that service. The confirmation step may not be performed in an automated manner in such a way that the process is hidden from the customer.

15.10. For all subscription services initiated via a web page, there must be an additional specific confirmation step before the customer is billed. This confirmation step must be provided in one of three ways:

(i) The customer's mobile carrier may implement the confirmation step.

(ii) The member can provide the customer with a "confirmation page".

(iii) The member can send a "confirmation message" to the customer. The customer must not be charged for the confirmation message.

22.3. Any adult service must be clearly indicated as such in any promotional material and advertisement, and must contain the words "18+ only".

22.5. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Reasonable steps may include the customer confirming his or her age prior to or as part of initiating the service.

Decision

The Member in this matter does not deny that the clauses were breached, but submits that the breaches were the actions of a third party affiliate.

Given this, I am not charged with the question of whether the cited clauses relating to the content and process are breached – it is common cause that this is the case.

It is also now a well-established principle in WASPA decisions that WASPA members are responsible for the actions of affiliate marketers.

In matter 26211, the Appeal Panel was charged with a situation where an affiliate marketer has committed an act that the WASP immediately acknowledges as wrong, but seeks to mitigate because of the fact that it was an affiliate marketer. In that matter, the Panel said:

At the core of this complaint is the very pertinent question of how much supervision and control a WASP is expected to exercise where it chooses to advertise and promote its websites and services using third parties and affiliate advertising networks in light of the overarching requirements of clauses 4.2, 5.4 and 5.5 of the Code.

In outsourcing advertising and promotion for its services to an affiliate who, it would appear, was either expressly or tacitly permitted by the member to use further third parties without needing to run either the identity of those parties by the member or the content of the material being used to promote the member's websites and services, the Appellant took a risk of the advertising for its services being misleading, deceptive and unfair. The Appellant itself states that, "Often, in these cases, the promotions are delivered on blind networks, and Advertisers are unaware of who the publishers are to maintain business interests". In other words, because the affiliate "delivers" the advertising, the WASP does not concern itself with the details of the actual advertising itself.

Clause 1.2 of the Code makes it clear that an objective of the Code is to ensure that members operate in accordance with ethical and reasonable business practices. This objective is codified into express obligations in clauses 4.2 and 5.4 of the Code which stipulate that:

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

5.4. Members must have honest and fair dealings with their customers.

Misleading and deceptive advertising is not fair. It appears that in this matter it is not contested that the actions of Payripo.com were not acceptable, were grossly misleading and prejudicial to members of the public.

This Panel does not consider that it is professional to simply allow unchecked use of advertising by unidentified affiliates who the member appears to know often publishes advertising using “blind” networks consisting of other persons who do not comply with the Code and who do not need to seek the Principal’s approval on campaigns and strategies.

This Panel therefore upholds the finding that the Appellant has breached clauses 4.2 and 5.4 of the Code.

In matter 26420, the Appeal panel reached the same conclusion via a slightly different route:

The Panel notes that it is common cause that the material in question, alerting consumers to a virus, was unacceptably misleading.

On the question of liability, the Panel notes that one need look no further than the Code, which states:

3.6. Members must ensure that any customer who is not a member of WASPA, but is providing services covered by this Code of Conduct, provides those services in a manner consistent with the requirements of this Code of Conduct.

3.7. A member is liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member’s liability for any breaches.

We can therefore accept that the Appellant is liable for the conduct of its affiliates, whether directly or indirectly employed.

The only remaining question is whether the Appellant took reasonable steps to ensure that the affiliates complied with the Code. The Appellant set out a number of processes that it has in place, all of which indicate a concern around this type of behaviour and a monitoring thereof.

However, it remains that the Appellant allows affiliates to run campaigns that are not signed off and are by unidentified publishers. In contracting to an affiliate who it would appear used further third parties without needing to run either the identity of the party by the Appellant or the content of the material by the Appellant, the Appellant took a risk. It would appear in these cases that because the Advertiser “delivers”, the WASP does not concern itself with the details of the transaction.

This Panel is of the opinion that this is not the reasonable level of care envisaged by Clause 3.7. More pertinently, this is not behaviour that is consistent with the following clause:

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

The Panel notes for the guidance of the Appellant and other WASP's that it considers the contractual resolution of these issues – which appear to be the current trend in both complaints and appeals – to be simple. If a WASP requires all campaigns to be signed off, and an Affiliate fails to do so, that affiliate is in breach of contract. In the current environment, it is simply not reasonable for a WASP to allow unapproved campaigns to run. It is simply unacceptable for WASPs to hide behind the unauthorised behaviour of unidentified affiliates.

The Panel also notes that, as the Adjudicator pointed out, if the Appellant has indeed put good contractual protections in place, the fine will be recoverable from the Affiliate who appears to be the party most directly responsible for the campaign.

As in matter 26211, Clauses 4.2 and 5.4 are currently before me.

The precedent above is clear that the Member cannot simply “blame” the affiliate marketer. In allowing an affiliate marketer to run unapproved campaigns, they took a risk and must be liable for the fallout of that risk. **I find that the behaviour of the Member was therefore in breach of Clause 4.2 in that such behaviour is unprofessional.**

The member have not taken us into their confidence as to the identity of the affiliate, nor have they shown any pro-active steps that were taken in respect of affiliate marketing arrangements – whether contractual or supervisory. The service was terminated not at the instance of the Member but at the instance of Vodacom. That being said, they appear to have taken appropriate remedial steps. They have also correctly submitted that this is the first time that they have been brought before WASPA on any complaint, a factor that counts in their favour.

Given this, the sanction is as follows:

- **To effect cancellations and refunds to affected subscribers if not already done;**

- **A fine of R15 000, a lower fine than is usually applied in these cases.**