



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Mybeat Interactive Technologies (Pty) Ltd
Information Provider (IP) (if any)	Axon Mobile
Service Type	Adult
Source of Complaints	Public
Complaint Number	#0600
Date received	20 October 2006
Code of Conduct version	4.6

Complaint

The Complaint relates to two adult SMS messages, both of which with failed to provide any notification that the reply-to number was premium-rated or vas-rated, and one of which was received after 22h00.

The Complainant states that he received the first SMS at 18h09 on 19 October and the second at 22h18 the same evening.

SP Response

The IP, responding through the SP, asserted the following:

"With regards to the sms sent at 22:18pm:

The service under question is an adult chat service via premium rated sms. Chat is defined by Wikipedia and Dictionary.com as a "conversation...". The very essence of a chat service is a conversation between two people. The service is advertised as a chat service under the description "erotic chat". Erotic implies that it is an adult service. It is well accepted that adult services run late at night (for example most

adult content on television takes place late at night). It is also well accepted that by its very nature, a conversation can take place at any hour of the day.

Thus we believe that the rule under clause 5.1.6 of the code of conduct has been satisfied namely that by using the term “erotic chat” in the advert, delivery during this period does indeed form part of the up-front description of the service.

With regards to the allegation that the sms sent has no reference that the number was premium rated:

The sms sent forms part of the chat conversation and is not an advert for a new service. The user is made aware of the price of the chat service at two distinct points. Firstly the advert, in compliance with the advertising guidelines states “R3/sms” and secondly when the user joins the service the first sms sent to his phone requests him to reply with “yes” if he accepts the terms and conditions found at <http://www.chaterotica.co.za>. Clause 8 of these terms clearly states “8. Costs of Using the Service(s) The user knows and understands that all SMS messages sent in relation to the Service are charged at premium rates(R3.00). Rates are published on this website and may change from time to time.”

Under the contact services rules in the code of conduct there is no requirement which states that the price of the service needs to be included in every chat message.

Thus, given that the sms forms part of the chat itself and it not an advert for a new or different service, the user has on two instances been made aware of the price of the use of the service and that WASPA does not require a contact service to include the price in every sms, we submit that there is no breach of WASPA rules.”

The IP provided a log of the Complainant’s interaction with the service and confirmed that it removed the Complainant from the service after the complaint was received.

Finally the IP provided an image illustrating the fact that its terms and conditions show the unsubscribe number and process.

Sections of the Code considered

2.1. An “adult service” is any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature.

5.1.6. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the up-front description of the service.

Various paragraphs from section 4.3.7 of Version 1.6 of the WASPA Advertising Rules were also consulted:

- If using SMS as the Access Channel for a Contact-type service, each request for a user to respond to a message sent to a user as part of that service must indicate the price of the reply if the price at any stage of the communication, differs at all from the initial advertised service price.
 - If using SMS as the Access Channel for a Contact-type service, and where has been no communication to a user of that service from either the general participants in that service or the controllers of the service for a minimum of ten (10) calendar days, then any further communication to that user must, at the first communication to that user after the tenth (10th) day, indicate who the service is provided by and how the user may unsubscribe from the service, and the cost thereof.
 - The cost of this unsubscribe process may not exceed a total of R1 if using SMS as the unsubscribe medium and no more than 120 seconds if using IVR or any other time-based method as the unsubscribe medium.
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Decision

From the logs it is clear that the Complainant joined the service at 16h53 on 18 October 2006. The Complainant then received a message: "WARNING this is 4 ADULTS ONLY. Reply with YES to accept the terms and conditions at <http://www.chaterotica.co.za> and chat with delicious sexy Angelina." The Complainant replied "Yes" and then sent two messages to the service at 16h58 and 16h59 respectively, receiving two replies.

The IP's service is, in the absence of continued interaction, set up to send pickup messages to the subscriber in an attempt to reinvigorate the conversation. In this case two pickup messages – "nice" and "dirty" – were sent to the Complainant at 18h09 on the 18th and 22h18 on the 19th October respectively. (It has been assumed that the reference in the Complaint to a message received at 18h09 on the 19th is incorrect.)

As regards the timing of the message sent on the 19th the Response of the IP to the effect that the use of the term "erotic chat" constitutes an up-front description of the service sufficient to engender an expectation that communications may be sent to a user after 20h00 is accepted.

It is also noteworthy that In the terms and conditions of the service found at <http://www.chaterotica.co.za/welcome.jsp> there is the following T&C:

"By entering into a chat with Angelina you understand that a conversation may occur at any time of day."

As regards the failure to indicate that the reply-to number was premium- or VAS-rated the Response of the IP to the effect that there is no obligation to include such a notification in every SMS sent to the user under cover of the service is also accepted. This is given that the price of replying by SMS was constant at R3 per SMS.

The question as to whether the T&C situated at <http://www.chaterotica.co.za/welcome.jsp> are binding on users of the service cannot be answered in the absence of sight of the relevant advertisement. In any event I do not believe that a finding in this regard is necessary given the above.

The Complaint is accordingly not upheld.

Addendum

In investigating the Complaint it became evident that there is a prima facie breach of section 5.1.4 of the Code of Conduct (“[A]ny mechanism for allowing a recipient to remove him or herself from a database must not cost more than one rand”) and section 4.3.7 of the Advertising Rules in that the charge levied for unsubscribing from the service is set as R3 when unsubscribing by SMS.

The following text appears at <http://www.chaterotica.co.za/welcome.jsp>:

“To unsubscribe:

SMS the word UNSUBSCRIBE to 35453 to tell Angelina to leave you alone.

(SMS charged at R3)”

The Adjudicator hereby requests that the WASPA Secretariat initiate a further Complaint as regards these breaches.