



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Mybeat Interactive Technologies (Pty) Ltd
Information Provider (IP) (if any)	Axon Wireless CC ("Angelina" Brand)
Service Type	Adult/Contact, Subscription
Source of Complaints	Secretariat
Complaint Number	#0972
Date received	25 January 2006
Code of Conduct version	4.6 ¹

Complaint

This Complaint was lodged by the WASPA Secretariat on the instructions of the adjudicator delivering the Report in respect of Complaint #0600².

The detailed complaint reads as follows:

"In the adjudicator's report for complaint #0600, he writes:

'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)"

¹ The original Complaint in this matter was filed under #0600 on 20 October 2006 at which time version 4.6 of the WASPA Code of Conduct was in force

² available from <http://www.waspa.org.za/code/download/0600.pdf>

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

SP Response

The SP delivered a considered Response.

According to this Response the following sections of the Code of Conduct are relevant to this matter:

- Code of conduct 2.9 A “commercial message” is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.”
- Code of conduct 5.1.4. “Any mechanism for allowing a recipient to remove him or herself from a database must not cost more than one rand.”
- Code of conduct 2.11. A “contact and dating” service is any service intended to enable people previously unacquainted with each other to make initial contact and arrange to meet in person.”

The further Response is set out in full below:

“Our service is a “contact and dating” service, allowing users to engage in a conversation i.e. a sequence of sms chat messages. We premium rate each sms at R3 on the sms MO (mobile originated) model.

We submit that there is a gap or grey area in the code of conduct when looking at the concept of being removed from a database and a “contact and dating” service. Most contact and dating services that run via premium sms are rated at more than R1 per sms (typically from R2 up to R20 per sms) and are billed via the MO model (mobile originated). MO billing means that the customer is billed on the mobile originating leg. When a user replies to a chat message with the command “stop” for example, the reply sms is billed at the rate at which the operator has rated it. In our case it is R3 per sms. It is physically impossible, on the MO billing model, to change the rating of the price of the sms based on the command received. So no

matter what the user replies with, whether it be a stop command or anything else, the sms will be charged at the MO rate – in our case R3.

We have spoken to CODECOM and have requested that this grey area be work shopped and an adequate solution be found, because as an sms chat provider we are technically limited by the nature of MO billing to change the rating of the reply message based on the content of the message.

Furthermore, we submit that an sms sent to a subscriber forming part of the chat service (i.e. the message that is the “chat”) is not a commercial message as defined, and thus clause 5.1.4 does not apply – hence the grey area. Our rationale is that a commercial message clearly stipulates that the message must be designed to promote the sale or demand of goods or services. We submit that a chat message is the “goods or service” itself and is not a promotion of such.

We submit that given the wording of the code and the nature of MO billing we are not in breach of the code of conduct, or alternatively if we are found to be in breach of the code then we are in breach in a way that it unavoidable i.e. if we run a sms chat service on the MO model at a rate above R1 then we are by default in breach. Given that 100% of the sms chat industry use the MO model at a rate higher than R1, we submit it cannot be the spirit of the code to render all of these services in breach and we propose that CODECOM work with the players to find an adequate solution.”

Sections of the Code considered

The following sections of version 4.6 of the WASPA Code of Conduct were considered:

2.8. A “**commercial message**” is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.

5.1. Sending of commercial communications

.....

5.1.4. Any mechanism for allowing a recipient to remove him or herself from a database must not cost more than one rand.

Decision

The Adjudicator has verified the response of the SP insofar as the technical allegations and the approach to the Code of Conduct Committee are concerned. The Adjudicator is furthermore now aware that an amendment to the Code of Conduct has been proposed to cater for situations such as the instant matter. As the Adjudicator understands it this amendment will require SP's in this situation to provide an alternative short code which will facilitate unsubscribe requests at a cost of R1 or less.

The defence based on technological possibilities is accepted.

The Adjudicator cannot, however, agree with the interpretative argument that "an sms sent to a subscriber forming part of the chat service (i.e. the message that is the "chat") is not a commercial message as defined, and thus clause 5.1.4 does not apply". While the message may indeed partly constitute the goods or services it is also a paid-for communication which has as its rationale, at least to some degree, the promotion of further participation in the service. This is particularly true of the "pick-up" messages which formed the subject of Complaint #0600.

The SP is in breach of section 5.1.4 of the WASPA Code of Conduct but, given the failure of Version 4.6 of the Code to specifically cater for this situation and the approach and outcome thereof of the SP to the Code of Conduct Committee, no sanction is imposed.

