



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Sybase 365
Information Provider (IP) (if any)	AMV Holding Limited
Service Type	Content
Source of Complaints	Public
Complaint Number	4613
Date received	30 July 2008
Code of Conduct version	5.7

Complaint

The Complainant requested that he be unsubscribed from a service provided by the IP through the SP.

SP Response

The IP lodged the following formal response:

“On the 30th April 2008 the user accessed our mobile content site through an advertisement on an affiliates website.

While browsing the internet on their **Nokia6230i** cellphone the user responded to an advert for our Naughty Celebrity WAP site.

The site states that:

Pay only for what you order!

Pics, Vids R30 each

The user has then purchased the following item (I have highlighted this in bold) by selecting the item and accessing the download page where a user can then download their item directly to their handset.

2008-04-30 20:56:34	SA WAP AD Naughty Celeb [707]	Nurse Police [77269]
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As a result the user was sent a billing confirmation on 31931:

This is a billing confirmation for yr content access. See portal for terms.

On the 6th May the user accessed our mobile content site through an advertisement on an affiliates website.

While browsing the internet on their **Nokia6230i** cellphone the user responded to an advert for our Pleasure Palace WAP site.

The site states that:

Click here for your FREE item!

Free Sexy Video Terms: Your FREE sexy videos must be downloaded from the link above.

This is a 100 percent no obligation free video pack. No questions asked!

18+ only. This WAP menu is charged at R30 per page viewed (3 Videos per page, R10 per video). All videos on each page may be downloaded inclusive of this price.

The user then proceeded to access the following billable pages within the site:

2008-05-06 20:09:13	SA WAP Ad Pleasure Palace [1379]	SA_Celeb_Wallpapers
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As a result the user was sent billing confirmations on 31931:

This is a billing confirmation for yr content access. See portal for terms.

On the 25th May the user returned to the same Pleasure Palace site to access further content:

2008-05-25 10:48:09	SA WAP Ad Pleasure Palace [1379]	SA_Barenaked
2008-05-25 10:50:17	SA WAP Ad Pleasure Palace [1379]	SA_Lingerie_Babes
2008-05-25 10:51:32	SA WAP Ad Pleasure	SA_Lingerie_Babes

	Palace [1379]	
2008-05-25 10:52:00	SA WAP Ad Pleasure Palace [1379]	SA_Lingerie_Babes
2008-05-25 10:52:46	SA WAP Ad Pleasure Palace [1379]	SA_Lingerie_Babes
2008-05-25 10:53:33	SA WAP Ad Pleasure Palace [1379]	SA_Lingerie_Babes
2008-05-25 10:54:49	SA WAP Ad Pleasure Palace [1379]	Theika on Kitchen Table [77326]
2008-05-25 10:59:58	SA WAP Ad Pleasure Palace [1379]	SA_Celeb_Wallpapers

As a result the user was sent further billing confirmations on 31931:

This is a billing confirmation for yr content access. See portal for terms.

We have now ensured the number has been removed from all future messages.”

Further investigation

As a result of the large volume of complaints raised against the IP involving contested billing, the Adjudicator requested that the IP provide screenshots showing:

- The original SMS with link sent to subscribers
- All steps thereafter including all WAP pages which are accessed in order to be subscribed and billed
- Billing confirmations messages.

The IP provided the following information:

“The customer responded to our mobile content site through an advertisement on an affiliates website. The customer was therefore not sent an SMS until they had accessed our site.

The user accessed two WAP sites, Naughty Celeb 707 and Pleasure Palace 1379. I have attached copies of both of these sites for your reference.

The billing messages sent to the customer were as follows:

/This is a billing confirmation for yr content access. See portal for terms./”

Sections of the Code considered

The following sections of version 5.7 of the WASPA Code of Conduct were considered:

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

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

13.3.15. Unless otherwise specified in the adjudicator's report, any sanctions will be considered suspended if an appeal is lodged, until the appeal process is completed.

13.3.16. If no appeal is lodged, or if the adjudicator has specified certain sanctions as not being suspended pending an appeal, the failure of any member to comply with any sanction imposed upon it will itself amount to a breach of the Code and may result in further sanctions being imposed.

13.5. Information provider notices

13.5.1. If the adjudicator has determined that an information provider is operating in breach of the Code of Conduct, and the adjudicator is of the reasonable opinion that the information provider may persist in such breach, whether through the member against whom the complaint was lodged or another member, the adjudicator may instruct the secretariat to issue a notice to WASPA's members.

13.5.2. The notice referred to in 13.5.1. must clearly identify the information provider and the relevant breach or breaches of the Code of Conduct, and must specify a date from which the notice applies.

13.5.3. Any member permitting the information provider to operate in breach of the Code of Conduct (in the same or substantially similar manner to that identified in the notice referred to in 13.5.1), after the date specified in the notice, will be automatically in breach of the same part or parts of the Code of Conduct as the information provider. Such members will be subject to sanctions determined by the adjudicator in accordance with section 13.4, read in conjunction with section 13.3.11.

Decision

Screenshots of the Naughty Celebrity and Pleasure Palace WAP sites are attached to this Adjudication.

The Complainant was clearly mistaken in believing that he had been subscribed to a service offered by the IP when in fact he had been charged for viewing content on a site offered by the IP.

There were three separate sets of transactions.

On **30 April 2008** the Complainant responded to an advert and arrived at the IP's WAP site which stated:

Pay only for what you order!

Pics, Vids R30 each.

The IP in its Response then states that the Complainant "purchased" content by "accessing the download page where a user can then download their item directly to their handset". The IP then sent a billing confirmation - *This is a billing confirmation for yr content access. See portal for terms* - to the Complainant.

On **6 May 2008** the Complainant visited the IP's mobile content site which contained the following text:

Click here for your FREE item!

Free Sexy Video Terms: Your FREE sexy videos must be downloaded from the link above.

This is a 100 percent no obligation free video pack. No questions asked!

18+ only. This WAP menu is charged at R30 per page viewed (3 Videos per page, R10 per video). All videos on each page may be downloaded inclusive of this price.

Per the IP the Complainant "then proceeded to access the following billable pages within the site" and a billing confirmation identical to the previous one was sent to the Complainant.

On **25 May 2008** the Complainant visited the same site as visited on 6 May, viewing a number of content items. A billing confirmation was sent as above.

The Adjudicator is of the view that the pricing and billing methods employed by the IP are misleading and are in breach of sections 4.1.1 & 4.1.2 of the WASPA Code of Conduct.

The central issue is that users are billed not for downloading content but for accessing pages from which content can be downloaded. This is certainly contrary to the standard practises employed in South Africa and as a result the employment of such a model would require an information or service provider to be extremely clear in communicating this fact.

Leaving aside whether billing in this manner is an acceptable practise at all, if, moreover, the IP is going to charge R30 for accessing each of these pages then this needs to be made absolutely explicit and brought to the direct attention of the user.

The volume of complaints regarding the pricing and billing practises of this IP would appear to indicate that this has not occurred.

The breach appears most blatantly from the access which occurred on 30th April 2008 where the Complainant was informed that he would only pay for what he ordered. It was not made clear to the Complainant that by "ordered" the IP actually meant "accessed the download page from which a user can then download their item directly to their handset".

The Adjudicator has taken the further step of reviewing all matters involving the IP and is of the opinion that the complaints laid indicate that there is widespread confusion amongst the public regarding the manner in which its service operates. There are at least 14 pending complaints which have not been resolved in the informal resolution process

Fundamentally the practice employed by the IP deprives consumers of any choice prior to being billed. A user has no idea what videos will be displayed on any particular page, may not wish to download same but is nevertheless charged R30.

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.

The IP falls short in this regard and is found to have breached sections 4.1.1 & 4.1.2. The service is provided does not constitute fair dealing with consumers and the manner in which users incur charges is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

In determining the appropriate sanctions the Adjudicator had reference to

- the large number of complaints laid against the IP in respect of contested billing and
- the existence of previous breaches with regard to practises employed by the IP.

In the Adjudication under Complaint 4486 the same IP received the following sanction:

“AMV is fined R 10 000,00. This fine is payable to the WASPA Secretariat within five (5) days of notification hereof. AMV is also ordered to refund the Complainant 50% for content downloaded within five (5) days of notification hereof.”

In the Adjudication under Complaint 4488 the same IP received the following sanction:

“AMV is fined R 10 000,00. This fine is payable to the WASPA Secretariat within five (5) days of notification hereof. AMV is also ordered to refund the Complainant 50% for content downloaded within five (5) days of notification hereof.”

In the Adjudication under Complaint 4499 the same IP received the following sanction for a breach of section 4.1.2 of the WASPA Code of Conduct:

“The SP is fined R 5 000-00. This amount has to be paid within 5 (five) working days to the WASPA Secretariat from the date of adjudication. The SP is further instructed to refund the Complainant in full within 5 (five) working days from the date of adjudication and to ensure its compliance with sections 4.1.2 and 6.2.11 in all current and future advertisements.”

The Adjudicator further had reference to the Advisory Note for Adjudicators circulated by the WASPA Management Committee on 17 October 2008, and which states, inter alia:

“2: WASPA Mancom Resolution of 18 August 2008 on Suspensions:

The Mancom believes that where widespread consumer harm is evident from the continuation of a particular service, or continued provision of services by a seemingly delinquent Information Provider, or the continued provision of service overall by a seemingly delinquent WASP, where there are obvious and consistent breaches of the Code, *prima facie* evidence of fraudulent behavior, as well as potential consumer harm, that immediate suspension should be recommended by Adjudicators.

As such, the Mancom has resolved to advise all Adjudicators that they should, where appropriate and considering the factors outline in this Advisory Note, consider recommending to the Mobile Network Operators (MNOs) in their adjudications the immediate suspension of any services, associated shortcodes, Information Providers, or WASPs found to have egregiously, consistently, and manifestly breached the WASP Code Of Conduct.

A recommendation of suspension may be recommended in addition to any financial sanction, corrective actions, and/or refunds, or withholding of, or total confiscation of

revenue due to a WASP (and to the Information Provider) by the MNO that may be considered necessary by an Adjudicator.”

The Advisory Note then sets out a non-exhaustive list of criteria which can be taken into account as “additionally persuasive” in suspending a service, short code, IP or WASP before stating the following in respect of the suspension of services and Information Providers.

“a) Suspension of Specific Services:

Specific services run by a specific Information Provider/WASP rather than the whole bouquet of services offered by Information Providers and/or their WASPs may be considered for suspension.

This may take the form of suspending any new and continued billing whatsoever on a particular shortcode (and service-specific keyword associated with that shortcode) as well as suspension of any advertising of the specific, infringing service.

No other member of WASPA would be allowed to supply services to that Information Provider for that service.”

“c) Suspension Of Information Providers:

Suspension Of Information Providers and all their services rather than their WASPs may be considered for suspension where there are obvious and consistent breaches of the Code, *prima facie* evidence of fraudulent behavior, as well as potential consumer harm.

Suspension would imply that the Information Provider may not continue advertising any service, and that no OBS/EBB billing may take place. In the case of a PSMS where the PSMS is not shared amongst other Information Providers, the PSMS shortcode itself may be suspended, even if other services not under consideration in the instant adjudication are being suspended.”

No other member of WASPA would be allowed to supply services to that Information Provider.”

The Adjudicator is of the opinion that

- there is evidence of repeated infringements of section 4.1.2 of the WASPA Code of Conduct; and
- there is evidence of consumer harm on an ongoing basis.

In the circumstances the following sanction is imposed:

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1. The IP is ordered to refund the Complainant in full for all costs billed as a result of the interactions listed by it in its Response.

The following sanctions are imposed in respect of this Complainant as well as Complainants

- 4594
 - 4630
 - 4650
 - 4654
 - 4658
 - 4680
 - 4681
 - 4885
2. The IP is fined R250 000 in respect of the breaches of sections 4.1.1 & 4.1.2 of the WASPA Code of Conduct.
 3. So as to obviate further harm to consumers, any WAP site provided by the IP which employs a billing per view rather than per download billing methodology is suspended from date of notification of the IP of this Adjudication. This includes, but is not limited to, the Pleasure Palace, Naughty Celebrities, Play on, See Me, Babehouse, Wild Vids & Hot and Horny sites.
 4. The following is contemplated by the suspension of service:
 - 4.1. the suspension of any advertising of the service; and
 - 4.2. the cessation of billing relating to the service.
 5. In order to give effect to such suspension the WASPA Secretariat is requested to send a notification under section 13.5 of the WASPA Code of Conduct to all other WASPA members notifying them that any services provided to the IP with regard to the WAP sites and related services set out above will constitute an offence under the WASPA Code of Conduct.
 6. The Adjudicator wishes to place on record his view that the breaches of the Code are serious and that any further breaches of the same nature involving a failure to make pricing and billing clear and to obtain the user's confirmation thereto where required should lead to the suspension of the IP.

It is further ordered that the sanction listed in item 3 (read with 4 and 5) shall not be suspended by the lodging of an appeal against all or part of this Adjudication by the IP.