



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Sybase 365
Information Provider (IP) (if any)	Mobile Gate
Service Type	Subscription service
Source of Complaints	Dating Buzz (ref: J Endersby)
Complaint Number	6371
Date received	5 May 2009
Code of Conduct version	7.0

Complaint

The complainant operates an online dating website: www.matchmaker.co.za in South Africa.

The IP operates a subscription virtual dating service in South Africa.

The complainant states that it has received a number of complaints from its members regarding an advert which appears on the complainant's website. The advert depicts a pretty girl with an invitation to send her an email. Members who respond to the advert receive a reply via the complainant's website allegedly from the same girl with a request for the member's mobile number so that further communication can take place via SMS.

If the member provides their mobile number, they subsequently receive a further message along the lines of “***i will sms you love i have to finish cooking for now dont worry i will contact you. amyza***”.

The member then receives an SMS shortly thereafter containing the same username from the complainant’s website along the lines of: “***Hi J, its Amyza from MATCHMAKE I want to chat to you on maybemeet.me! TXT YES TO CONNECT NOW! For help 08009811229, 2endtxtstopR10msgR60sub***”.

The complainant has confirmed that its Matchmaker service and website have no association with the IP. Many of the complainant’s users have accused it of running a scam and, in some cases, have threatened legal action. The complainant alleges that its reputation is being damaged in the process.

Members who respond to the service then receive a number of subsequent SMS’s allegedly from the same girl. In some instances, the messages contain questions aimed at starting a conversation. However a number of members have complained that they often receive the same message on consecutive days.

The complainant alleges that members do not receive any notification via SMS or otherwise that they have been subscribed to the IP’s chat subscription service.

The complainant also states that a number of its users have wanted to call “the girl” but receive a standard excuse that her dad set up the phone to only receive SMS’s and not to take calls because she had been previously stalked by someone. The complainant alleges that this is a blatant attempt to mislead the member into believing that they are not chatting on a virtual operator chat service.

The complainant alleges that members subscribed to the IP’s service have received bills as high as R10 000 and has provided some examples of member numbers and the amounts billed.

The complainant has requested that the IP’s service is shut down and that possible refunding of amounts paid by members should be investigated.

Emergency Panel Notice

The complaint was referred to an emergency panel hearing on 12 May 2009. After reviewing the available information, the emergency panel concluded that there was evidence of *prima facie* breaches of clauses 3.1.1 and 3.1.2 of the WASPA Code of Conduct.

Based on the information provided by the complainant and the IP, the panel was not able to identify the specific service which was alleged to be operating in breach of the abovementioned clauses. Consequently the panel made the following order:

1. The IP was ordered to immediately terminate all its services offered in South Africa;
2. The IP was ordered to immediately cease all billing for services offered in South Africa;
3. The SP was ordered to suspend all services offered to the IP in South Africa;
4. The SP was ordered to retain all customer billing and transaction records for services offered by the IP in South Africa and make these available to the adjudicator who reviews this complaint, if so requested;
5. The WASPA Secretariat was requested to issue an information provider notice in terms of section 13.5 of the WASPA Code of Conduct prohibiting any WASPA member from offering services on behalf of the IP; and
6. These orders would apply until the conclusion of the formal adjudication process for this complaint.

SP's response

The IP provided an initial response to the complaint prior to the emergency panel hearing. This response was taken into account by the panellists prior to them passing the abovementioned order.

The IP states that it operates a virtual dating service (Operator Chat). Users are directed to the IP's website: Www.Southafrican-singles-online.com, which is alleged to provide notice of the pricing for the service on the front page and in the site's terms and conditions.

A user is requested to choose a "club" on the site by entering his phone number on the website. The user then receives a message containing an opt-in request by using the keyword "YES". Amongst the different club names used by the IP on its website, **"Matchmake"** is one such name.

Once a user has completed the steps to subscribe, they are sent a confirmatory message announcing that they are subscribed to the service, the cost thereof and clear instructions on how to opt out.

The IP also states that if the total cost of the service exceeds R300 in any month, it sends the customer a notification message.

The IP states that its service has no relationship with any dating site and that intends to stay independent.

After the emergency panel ruling was handed down, the IP submitted a further response to the complaint which will be considered along with its previous response.

The IP firstly alleges that due process was not followed in the termination of the IP's South African Chat Code without further consultation or request for urgent remedy from the IP.

The IP goes on to state that it uses dating sites as part of its advertising campaign to advertise its fantasy chat services. It argues that it does not, under any circumstances, send CEMs of an unsolicited nature and tenders proof of opt-in confirmations for each and every one of its subscribers.

The IP then describes the nature of the service operating from the complainant's website at www.matchmaker.co.za, and quotes extracts from the terms and conditions for the service.

The IP alleges that a user who provides their mobile phone number through the Matchmaker.co.za service is soliciting communication for the purpose of interacting with other members. It is an express condition of using the Matchmaker.co.za services that misuse of the service, being other than “flirting fun” is at the user’s own risk.

The IP therefore believes that a user who provides their mobile phone number through this service is soliciting the communication for the purpose of continuing with the virtual operator chat service offered by the IP. The opening SMS is in keeping with the initial communications between the website user and the IP’s client and cannot be said to be unsolicited.

The IP offered its full cooperation but requested WASPA to immediately lift the suspension of its services.

Sections of the Code considered

Section 2: Definitions

Section 2.10:

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.

Section 2.23:

A “**subscription service**” is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

Section 3.1: Professional and lawful conduct

Section 3.1.1:

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

Section 3.1.2:

Members are committed to lawful conduct at all times.

*Section 4: Customer relations***Section 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.

Section 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.

*Section 6: Pricing of services***Section 6.2.9:**

During any calendar month, if the total cost of any service exceeds R200 for that month:

- (a) Where the WASP is in control of the billing (e.g. an OBS), an additional communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.
- (b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they have reached this limit.

Section 6.2.10:

During any calendar month, when the total cost of any service reaches R400, and when it reaches any multiple of R200 thereafter, an additional notification must be sent to the customer notifying them of the total cost incurred for that service so far.

Section 6.2.11:

The member providing the service must keep a record of the confirmation provided by the customer (for 6.2.9 (a)) or the notification sent to the customer (for 6.2.9 (b)).

Section 10: Contact and dating services

Section 10.1.1:

Contact and dating services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.

Section 10.1.2:

Providers of contact and dating services must warn users of the service of the risks involved when contact information is given out to other individuals and must give clear advice on sensible precautions to take when meeting people through such services.

Section 10.1.3:

Providers of contact and dating services must ensure that customers' contact information is duly protected and not publicly available.

Section 10.1.4:

Providers of contact and dating services must obtain explicit consent from a customer prior to making his or her contact information available to third parties.

Section 10.1.5:

Promotional material for contact and dating services must make clear any restrictions on the location, gender and age range of callers to the service.

Section 10.2.1:

Members must take reasonable steps to ensure that users of contact and dating services are authorised by the bill-payer to use that service.

Section 10.2.2:

Providers of contact and dating services must take reasonable steps to ensure that no children use the services.

Section 10.3.1:

When so requested by a customer, the provider of a contact and dating service must ensure that the customer's details are removed from the service at the earliest opportunity and in all cases within 24 hours.

Section 11: Subscription services

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.

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.

Section 11.1.3:

An advert for a subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed.

Section 11.1.4:

Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

Section 11.1.5:

Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

Section 11.1.6:

Subscription services with different billing frequencies should not have a subscription mechanism likely to cause a customer to accidentally subscribe to a more frequent service.

Section 11.1.7:

Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

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.

Section 11.1.9:

Once a customer has subscribed to a subscription service, neither the amount and frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

Section 11.1.10:

Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing]. Help? Call [call centre number + "(VAS)" if applicable]. To unsubscribe, [unsubscribe instructions].

Section 11.2.1:

A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter.

Section 11.2.2:

The reminder messages specified in 11.2.1 must adhere exactly to the following format, flow, wording and spacing:

12U r subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

Section 11.2.3:

The entire reminder message must be sent in a single SMS, may not contain any line breaks or carriage returns and may not include any additional characters other than those specified in 11.2.2.

Section 11.2.4:

The content/service description must be text describing the content, promotion or service (e.g. "tones" or "poems"). This text must not be worded in a way that attempts to deceive or mislead the customer from the purpose of the reminder which is to inform the user that they are subscribed to a service.

Section 11.2.5:

The cost of service and frequency of billing must use the format "RX/day", "RX/week" or "RX/ month" (or RX.XX if the price includes cents). No abbreviations of "day", "week" or "month" may be used.

Section 11.2.7:

Members must test reminder messages on a range of phones to ensure that all characters and lines are displayed identically.

Section 11.5.1:

Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

Section 11.5.2:

Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.

Section 11.5.3:

The 'STOP' request described above must be charged at the lowest tariffed rate available (with the exception of reverse billed rates).

Section 11.5.4:

For services where the primary means of interacting with the service is via USSD or WAP, and for which the reminder message set out in clause 11.3.1. or 11.4.1. is used, clause 11.5.2. does not apply.

Section 11.5.5:

Members must ensure that the termination mechanism is functional and accessible at all times.

Section 11.5.8:

If a consumer lodges a request with WASPA to be unsubscribed from a subscription service, the WASPA member concerned must honour that request within two working days (48 hours) of that request being passed on by WASPA.

Section 11.6.1:

Members must register all subscription services with WASPA, by providing the following information:

- (a) the name of the service;
- (b) the shortcode or access method (e.g. WAP) the service uses;
- (c) the price and frequency of billing for that service;
- (d) the customer support number associated with the service; and
- (e) unsubscribe instructions for the service.

Section 12.3: Prohibited services

Section 12.3.1:

No WASPA member may provide a service described in this section or facilitate the provision of such a service by an Information Provider.

Section 12.3.2:

Prohibited services:

(a) Chat services where a customer is billed for receiving a message rather than being billed for sending a message. "Chat services" includes any service where facilities are provided for any form of conversation or dialogue between the customer and other customers of the service, between the customer and a software application, or between the customer and staff of the chat service provider.

Decision

The complainant operates a contact and dating service in South Africa from its associate website at www.matchmaker.co.za. Visitors and users of the site intend to make initial contact and arrange to meet other persons with whom they were previously unacquainted.

This service must be distinguished from an adult or fantasy virtual chat service where a user communicates with an operator either in the form of a person or, as appears to be the case with the IP's offering, a software application.

Visitors and users of the complainant's website who view the IP's advert/promotion are initially led to believe that they are making contact with a real-life person in the form of an attractive girl whose picture is depicted on the site for the purposes of making contact and entertaining the possibility of arranging a date. However, after the initial introductory messages have been exchanged, the true nature of the interaction is then disclosed and the user is invited to opt-in to join the IP's subscription service.

[Note: I have been unable to access the complainant's or the IP's websites to view the IP's advert and service offerings.]

The promotion of the IP's service

In my view, the promotional or marketing tactics being employed by the IP on the complainant's website are dishonest, misleading and deceptive. Although the IP does later disclose the true nature of the interaction with the fictional pretty girl depicted on the complainant's website, the initial contact between the user and the "girl" is aimed at misleading and/or deceiving the user into believing that they are interacting with a fellow member of the site.

At no time is the "girl" seriously intending to meet the user and/or arrange any kind of actual contact other than via the service offered by the IP. The IP has tried, in an indirect manner, to argue that the true nature of the complainant's offering on the website is to provide a platform for simple flirting. I must respectfully disagree with the IP in this regard.

I therefore find that the IP's promotion of its virtual chat service on the complainant's website contravenes section 4.1.1 of the WASPA Code.

Even if it could be successfully argued by the IP that its marketing tactics are not dishonest, misleading or deceptive, they must be regarded as being unprofessional within the context of section 3.1.1 of the WASPA Code of Conduct and the spirit of the Code as a whole.

Contact and dating services are used by a large number of people who are looking for love and friendship and these types of services are open to abuse. This is evident from the terms and conditions of the complainant's website which have been quoted by the IP in its response. While users are warned to use such services with care and caution, this does not absolve service providers who offer services in this realm to conduct themselves in a professional manner. I do not believe that the IP has done so.

I therefore find that the IP's promotion of its virtual chat service contravenes section 3.1.1 of the WASPA Code.

The promotional material on the complainant's website for the IP's subscription service does not prominently and explicitly identify the services as "subscription services". It is only once the user has visited the IP's website or when the notification message is received that they become aware of the fact that the chat service is subscription based.

The IP has therefore also contravened section 11.1.1 of the Code.

Based on the evidence before me, I am satisfied that users are given the opportunity, either through the IP's website or in response to the IP's notification message and opt-in process to subscribe to the IP's service. Such persons are not automatically subscribed to the service and the IP has not contravened the Code in this regard.

However, I have mentioned previously that users of the complainant's website have the intention of using the site and/or the complainant's contact and dating service to meet real persons. While there may be evidence that these same persons have opted-in to subscribe to the IP's virtual chat service, their request to do so cannot be regarded as an independent transaction.

The IP has contravened section 11.1.2 of the Code.

I have also noted that the amounts that have been billed to subscribers do appear to be excessive and this aspect requires further investigation. Unfortunately there is no direct evidence of overbilling or any other irregular billing practices before me at this time and I am therefore unable to take this matter further. Subscribers to the IP's service who are aggrieved by the amounts billed to their accounts should lodge their own complaints in this regard and provide sufficient evidence to support their claims for compensation.

Sanction

1. The IP is fined an amount of R50 000.00.

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2. The IP is ordered to cease all promotions and/or advertising of its virtual chat services in the form and manner it has employed on the complainant's website, on the complainant's website and/or any other website which offers contact and dating services to members of the public;
 3. The IP is formally warned not, in future, to promote, advertise or market its virtual chat services in any manner or form which contravenes the WASPA Code of Conduct.
 4. The suspension of the IP's services in South Africa is hereby uplifted.
 5. The prohibition against the SP from providing any services to the IP is hereby uplifted.
 6. The information provider notice issued by WASPA to its members in respect of the IP's services should be cancelled.