

**WASPA appeals panel  
Complaint 9450**

**REPORT OF THE APPEALS PANEL**

**Date: 21 November 2011**

**Service Provider: Opera Telecom and Sybase**

**Information Provider (IP): AMV**

**Appellant: AMV**

**Complaint Number: 9450**

**Applicable versions: 9.0**

---

**1. BACKGROUND TO THE APPEAL**

1.1 This appeal concerns a complaint lodged on 6 May 2010 regarding a chat service being in breach of numerous clauses of the code.

1.2 The IP is an affiliate member and the SPs are full members of WASPA.

1.3 The complaint relates to an alleged unsolicited message of pornographic nature.

1.4 The complaints, the findings of the Adjudicator, the SP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

**2. CLAUSES OF THE CODE CONSIDERED**

2.1 The following clauses of the Code were 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.

2.2. An “**adult content service**” is any service for the provision of content which has been classified as suitable only for persons 18 years or older by an appropriate body (such as the Film and Publications Board), or content reasonably likely to be so classified.

2.11. A “**content subscription service**” includes any subscription service providing or offering access to content including, by way of example only and not limitation: sound clips, ring tones, wallpapers, images, videos, games, text or MMS content or information. This includes any subscription service which describes itself as a "club" or which otherwise allows access to content to subscribers, at a cost which includes both a subscription element and a per content item element. Services which are not considered to be content subscription services include: dating services, chat services, location based services, GSM terminal device services, corporate application services, reminder services, synchronisation applications, corporate communications applications, VOIP, etc.

2.18. A “**notification service**” is any service where there are ongoing charges for the service that are not individually authorised by the customer, but which are not subscription services, because the billing is not repeated/regular.

4.1.1. Members must have 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.

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

5.1.3. For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word '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. The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

8.1.1. Any adult service must be clearly indicated as such in any promotional material and advertisements.

8.1.2. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Explicit confirmation of a user's age must be obtained prior to the delivery of an adult content service.

8.1.4. Marketing messages (including commercial communications) may no longer be sent to a customer of an adult service if that customer has not made use of the service during the preceding three months. This is to prevent the accidental marketing of such services to children as a result of a recycled telephone number.

8.1.5. A marketing message sent to initiate or re-initiate adult services may not:

(a) include any graphical or photographic content that includes full frontal images or portrayal of intimate parts of the body; or

(b) include any words or phrases that may be considered profane, including common popular or slang terms for excretory functions, sexual activity and genitalia; or

(c) include any links to any content described in (a) or (b).

8.2.3. Adult services may not be marketed via direct communications with a customer of non-adult services, unless that customer has explicitly given permission for such marketing to take place and the customer has confirmed that they are, in fact, an adult.

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.

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.

11.2.4. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must

be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either:

- (a) contain a PIN number which is then confirmed or validated on the web page, or
- (b) contain a URL with a unique identifier, which, when clicked, validates the handset number.

11.2.6. For any subscription services that are initiated via WAP, and which are not confirmed by the customer using the validation process set out in 11.2.4, it is a requirement for the service provider who has a direct contract with the network operator to display a WAP confirmation page to the potential subscriber. This confirmation page must be displayed after the subscriber has first indicated an interest in the subscription service by clicking on a "join" or similar link.

11.3.1. The WAP confirmation page must display the following information in a clear and easy to read manner:

- (a) The name of the service
- (b) The price and frequency of billing
- (c) A phone number for customer support.

11.3.2. Where it is necessary for a consumer to confirm that their MSISDN may be made available to an application, this may be done by including the following wording on the WAP confirmation page:

11.3.3. The information listed above must be presented as text and not as an image.

11.3.4. The WAP confirmation page described above must also present a confirmation button. It must be clearly communicated to the customer on the confirmation page that clicking the confirmation button will initiate a subscription service.

11.3.5. The WAP confirmation page may not contain any marketing messages or other content that is likely to distract the customer from the required confirmation information and process.

11.3.6. The WAP confirmation page must offer all languages used in the promotional material for that service.

11.5.1. 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.

11.5.2. The reminder messages specified in 11.5.1 must adhere exactly to the following format, flow, wording and spacing:

*You are 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]. Or*

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

11.7.1. For services where the primary means of interacting with the service is via

WAP, either the format set out in 11.5.2 or the the following format must be used:

*You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if*

*applicable]. To unsubscribe, click here [WAP link].*

11.7.2. Accessing the WAP unsubscribe page specified in the above reminder message must immediately unsubscribe that user. No additional user action must be required.

11.7.3. The WAP link in the reminder message must begin with “www” to ensure that all phones recognise this as a clickable link.

11.7.4. All of the other requirements set out in section 11.5 of the Code continue to apply to services where the primary means of interacting with the service is via WAP.

12.1.1. Once a customer has subscribed to a notification service, a welcome message must immediately be sent to the customer. This welcome message must include the following information, and should not be mistaken for an advert or marketing message:

- (a) The name of the notification service;
- (b) The cost of the notification service (price per notification) and the maximum number of notifications that will be sent in any one month;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider’s telephone number.

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

12.3.2. Customers must be able to unsubscribe from any notification 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.

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

#### 13.4.2. 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. For the avoidance of doubt, this excludes notifications (covered by section 12, above) relating to permitted chat services, provided that these are notifications relating to the chat service and not conversational messages.

### **3. FINDINGS AND DECISIONS OF THE ADJUDICATOR (Please note that this extract is a verbatim copy of the Adjudicator's Report)**

3.1 The IP, an affiliate member of WASPA, promotes two different adult services from the same WAP site situated at <http://wap.mob365.net/xmxws7/dizm>. These services are:

- a) the "Barely Legal" adult content subscription service; and
- b) the "Naughty Chat" adult chat service.

3.2 The WASPA Monitor received an SMS from the IP on 2 May 2010 with a link to this WAP site. The Monitor has alleged that this SMS was unsolicited. The IP's response to this allegation is somewhat ambiguous. The IP alleges that the Monitor was sent the link in error by another service provider, Integrat, without authorisation and before the site was ready for compliance testing. The IP states that the MSISDN had already accessed the site on 29 April 2010 and had verified their age as being 18+.

3.3 However, the IP then goes on to refer to a different subscription service ("BLING").



- 3.4 The Monitor has confirmed that it did access another service on 29 April 2010, but this service was unrelated to the site and services which are the subject of this complaint.
- 3.5 Based on the foregoing, I cannot accept the IP's version that it was entitled to send the Monitor the promotional SMS on 2 May 2010, or that it had previously verified the Monitor's age as being 18+ before it provided a link to advertised adult content.
- 3.6 The IP has also acknowledged in its response that the Monitor was not redirected to an age verification page before accessing the Barely Legal content service. However, the IP has again stated that its non-compliance in this regard was due to the link being prematurely sent by Integrat to the Monitor when the site was not yet operational.
- 3.7 Unfortunately, I cannot accept the IP's version in this regard as it is clear from the Monitor's account of events that they were able to download content from the site and interact with the site in all respects as if it was a live site.
- 3.8 The Monitor has alleged that not all advertised adult content on the site is accompanied by the 18+ notification. However I am satisfied that there is reasonable and sufficient notification on the site that the content available is of an adult nature.
- 3.9 However, this does not excuse the IP's failure to obtain age verification prior to allowing users access to such content.
- 3.10 It appears from the Monitor's complaint that the Barely Legal subscription service was not initiated by them entering their mobile number on the WAP site. Instead the service was initiated via WAP, and the new provisions of section 11.2.6, read together with section 11.3 would be applicable. However, I am in agreement with Opera Telecom in this regard that this complaint was lodged against the IP prior to 1 July 2010, which is the date on which section 11.2.6 comes into operation.

- 3.11 Finally, the Monitor states that they tried to access content which referred to an erotic message and instead received an unrelated adult movie clip. This allegation has not been challenged by the IP.
- 3.12 Therefore, I find that the IP's Barely Legal adult content subscription service contravenes the following sections of the WASPA Code:
- a) Section 8.1.1 in that the SMS sent to the Monitor on 2 May 2010 did not clearly indicate that adult content was being promoted.
  - b) Section 8.1.3 in that the IP failed to take reasonable steps to ensure that only persons of 18 years of age or older have access to its adult content services.
- 3.13 The IP also failed to obtain explicit confirmation of the user's age prior to the delivery of the content.
- c) Section 8.1.5(c) in that the SMS sent to the Monitor on 2 May 2010, which initiated the IP's adult content service included a link to content described in section 8.1.5 (a) and/or (b).
  - d) Section 8.2.3 in that the Monitor had not explicitly given permission to the IP for marketing of its adult content service to take place and the Monitor had not confirmed that they were, in fact, an adult.
- 3.14 It would also appear that content chosen by a user from IP's WAP site is not always the content that is provided to the user. The service therefore contravenes section 3.3.1 and/or section 4.1.2 respectively in that the IP is offering services that it is unable to provide and is knowingly disseminating information that is false or deceptive, or that is likely to mislead users.
- 3.15 I now turn to the "Naughty Chat" adult service which the IP itself describes as a WAP- based chat portal, where users can send messages to other users using the WAP site. They have to log into the WAP site to view their inbox of received messages. SMS notifications are sent to users to inform them of

activity taking place on their chat home-page, and that they should log in to view their inbox.

- 3.16 These notifications are billed at R10 per message received.
- 3.17 The Monitor alleges once again that this adult chat service was provided without any prior age verification. I have already made a finding in this regard which applies equally to this service, i.e. the IP has contravened sections 8.1.1, 8.1.3, 8.1.5 (c) and 8.2.3.
- 3.18 This chat service is not explicitly identified as a separate subscription service on the WAP site. The IP has acknowledged that the services are not clearly distinguished from one another. It is only once a user receives two separate welcome messages after accessing the site that they are made aware that they have subscribed to two different subscription services.
- 3.19 I therefore find that the Naughty Chat service contravenes section 4.1.2 of the Code in that the users will be misled by the manner in which the two services are offered simultaneously without clear notification that the Naughty Chat service is a separate subscription service.
- 3.20 A user who accesses the site seeking adult content may inadvertently be subscribed to the chat service without intending to join this service. I therefore find that the IP has contravened section 11.2.2 of the Code.
- 3.21 The allocation of a user name (e.g. JEREMIAH285) to a user without any input from that user is also a serious concern. The IP has not provided any adequate explanation for this. I therefore find that the service contravenes section 4.1.2 in this regard also.
- 3.22 The Monitor selected a particular person to chat with using the service. However, they received a response from a completely different person, and of a completely different gender. The IP has responded to this complaint by advising that the Monitor was inadvertently added to its male database and

therefore received a message from a female. As per my previous finding, I cannot accept the IP's version in this regard.

3.23 The chat service charges users a fee every time they are notified of activity on the site. The Monitor believes this to be a prohibited service under the Code. The IP appears to argue that the service is more of a notification service than a chat service, i.e. users are charged for the notifications sent to them about activity on their chat home page.

3.24 I do not accept the IP's version in this regard and find that this is simply an artificial attempt to circumvent the provisions of section 13.4.2. A user is being billed for messages received rather than for messages sent.

3.25 Finally, when the Monitor accessed a link from a "chat alert", they were directed to a completely different chat service from a different service provider. Once again I find that the service is in contravention of sections 3.3.1 and/or 4.1.2 respectively, in that the IP is offering services that it is unable to provide and is knowingly disseminating information that is false or deceptive, or that is likely to mislead users.

3.26 The complaint is accordingly upheld.

3.27 Sanctions Imposed

3.27.1 It has been emphasised in many previous adjudications how serious contraventions of the Code are taken when adult services are involved. In particular, allowing adult services to be promoted and/or offered without prior age verification poses serious risks to minors.

3.27.2 I have taken into account the IP's quick response to the complaint and the steps that were taken by it to minimise any harm. However, I cannot ignore the IP's attempt to exonerate itself by stating that the Monitor was allowed to access the site as a result of an error on the part of its

service provider and that the site was not yet live and operational, when this clearly was not the case. The IP's response to the complaint is fraught with ambiguity and contradictions.

3.27.3 In light of the foregoing, the following sanctions are given:

3.27.3.1 The IP is ordered to terminate the Barely Legal and Naughty Chat services with immediate effect.

3.27.3.2 The IP is fined the sum of R 150 000.00.

3.27.4 These sanctions may not be suspended pending any appeal by the IP.

#### **4. GROUNDS OF APPEAL**

##### 4.1 Grounds of appeal for complaint 9450

4.1.1 The Appellant submitted detailed grounds of the complaint which will not be recanvassed in full here.

4.1.2 In its appeal it questioned the balance of proof, referred to factual errors and indicated its dissatisfaction with being held responsible for an action of alleged misconduct that was based on a test site.

4.1.3 It further stated that the Adjudicator made incorrect findings on the facts and / or the Adjudicator incorrectly applied the Code in its findings.

4.1.4 It continued that the sanctions imposed were unreasonable.

4.1.5 Some aspects of its response will be provided below:

4.1.5.1 Service mechanics of content service:

- The site was never provided to any member of the General Public.

- There was no intention for any party to subscribe, therefore the AV was not setup nor was the welcome message entered correctly.
- The service accessed by the WASPA Monitor on the 29<sup>th</sup> April (the BLiNG/Hot Cell Girls site) was the cause of the promotional SMS being sent.
- The WASPA monitor was only able to access the BLiNG site after they were provided the link by INTEGRAT.

#### 4.1.5.2 Unsolicited message

- But for the Monitor accessing the test site the Monitor would not have received the marketing message of 2<sup>nd</sup> May 2010.

#### 4.1.5.3 Chat service

- Once again the IP contended that the errors and subsequent absence of age verification occurred due to the test aspects of the site.

#### 4.1.5.4 Sanctions “Barely Legal” unreasonable

- Breaches of clauses 3.3.1, 4.1.2, 8.1.1, 8.1.3, 8.1.5, 8.2.3, and 11.2.2 all stem from the same root cause – that the Monitor was incorrectly sent a test link which precipitated a course of events that were inappropriate and unintended.
- The Service events could not be replicated by a member of the public as they had no access to the test link.
- There was no consumer harm.
- Remedial action was taken by AMV immediately on being put on notice of the problem.
- AMV conceded in its initial response that the reference to subscription service within the Barely Legal site were incorrect as it was not a subscription service and the content was remedied.

- Other recipients of the Barely Legal content have participated in other AMV Adult Services and will have confirmed their age. Given their service history and age verification there would be no breach of clauses 8.1.1, 8.1.3 or 8.2.3 in that regard.

4.1.5.5 The fine has been further inflated by the Adjudicators belief that the operation of the Naughty Chat service is ‘an artificial attempt to circumvent the provisions of section 13.4.2. This statement is without evidence and is unproven:

- The service complies fully with the provisions of clause 12 (‘Notifications Services”) of the Code.
- The service operates in a manner common among social networking services and widely accepted and appreciated by consumers.
- The service does not operate in a manner described in clause 13.4.2 of the Code and is not therefore a Prohibited Service.

4.1.5.6 The further sanction pertaining to: “The IP is ordered to terminate the Barely Legal and Naughty Chat Services with immediate effect”:

- Is both unnecessary and unreasonable.
- AMV have co-operated fully with WASPA throughout;
- AMV took pro-active and independent action with regards to suspending and modifying the services on notice of the issues raised;
- The Naughty Chat service operates in a compliant manner (subject to agreed modifications to the service delineation which are in hand)

## **5. FINDINGS OF APPEAL PANEL**

### **5.1 Version of the Code**

**5.1.1 Version 9.0 of the Code, in use from 31 March 2010 to 13 October, applies.**

5.2 Decision

5.2.1 After having read the initial complaint, the IP's response, the subsequent adjudication and the Appeal by the IP, the Appeals Panel is not convinced that the reasoning offered by the Appellant, is in itself enough evidence of the fact that the service was a test service, although some evidence in the form of email communication might allude thereto.

5.2.2 Even if the Appeals Panel does concede that the service was indeed a test service, then it still finds it difficult to concur with the Appellant in this matter that ALL, or at least most of the alleged breaches, stemmed from access by the Complainant to such alleged test environment.

5.2.3 However, the Appeal Panel does concur that if the allegations of the Complainant resulted solely from having accessed a test site, then the Appellant might have had some cause for redress.

5.2.4 There does seem to be some proof of the fact that the content site was in fact a test site as was evidenced by the email circulation provided by the Appellant.

5.2.5 However, the Panel finds it difficult to ascertain how the various SPs' services utilised could result in the breaches alleged by the Complainant if the so-called test site ran only across Integrat facilities.

5.2.6 This Panel therefore agrees with the conclusion reached by the Adjudicator in his or her decision regarding the "Barely Legal" aspect of the Complaint, although the Panel does not entirely rule out the possibility that some aspects related to a so-called test site, however difficult to ascertain or confirm from the facts and evidence provided, could have contributed to some of the breaches alleged.



5.2.7 With regard to the Naughty Chat service, the Panel noted the Appellant's dismay at the Adjudicator's interpretation and application of section 13.4.2.

5.2.8 The Panel does however want to refer the Appellant to the latter part of section 13.4.2 which states in its paragraph (a) that: "...for the avoidance of doubt, this excludes notifications (covered by section 12, above) relating to permitted chat services, provided that these **are notifications relating to the chat service** and **not conversational messages**." (Own emphasis added).

5.2.9 Therefore this Panel has no doubt that the Adjudicator did not fail in his or her interpretation of section 13.4.2 and as such concur with the decision reached by the Adjudicator.

5.2.10 With regards to the sanctions and its reasonableness, the Panel noted the Appellant's reasons offered as indicated in paragraphs 4.1.5.4 to 4.1.5.6.

5.2.11 The Panel also refers to its own reasoning under paragraph 5.2.6.

5.2.12 In light of the above, the Panel would give some benefit of doubt to the Appellant on its allegations of the test site, but due to insufficient evidence, would only grant such benefit in terms of the sanctions issued.

5.2.13 It therefore concurs with the Appellant that no damage to the public was done, that it acted swiftly and that it acted pro-active in mitigating any potential risk or harm.

## **6. The finding of the Appeals Panel is:**

6.1 The Panel finds that the Appellant raised insufficient proof to overturn the decision reached by the Adjudicator.

- 6.2 However, the Panel finds that the Appellant's subsequent actions and allegation of a test site, which is not completely unfounded, can be raised as mitigating factors in reducing the sanctions issued.
- 6.3 The fine of R 150 000-00 is overturned and the Appellant is fined R 125 000-00 of which R 100 000-00 is suspended for 1 year from having received notice hereof.
- 6.4 The R 25 000-00 must be paid to the WASPA Secretariat within 7 (seven) days after having received notice hereof.
- 6.5 The termination of the various services is upheld.

The cost of appeal is non-refundable.