

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 4 March 2010
TRIBUNAL SITTING No. 48/ CASE 1
CASE REFERENCE: 814753/CB

Information provider:	Blue Stream Mobile Limited, Bucks
Service provider:	Wireless Information Network Ltd, High Wycombe
Type of service:	WAP pay-per-page
Title:	Various
Service numbers:	89069 and 88011
Cost:	£3 - £6 per page viewed, billed in £1.50 increments
Network operator:	All Mobile Network Operators
Number of complainants:	67

THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER PARAGRAPH 8.7 OF THE CODE

BACKGROUND

PhonepayPlus received 67 complaints between March 2009 and December 2009 in relation the services operating on shortcodes 89069 and 88011. The services were WAP pay-per-page services operated by Blue Stream Mobile Limited (the Information Provider) and promoted by way of promotional WAP links sent directly to consumers' mobile phones. Examples of promotional WAP links as provided by the Information Provider were as follows: "PARIS DOWN N DIRTY!"; "DIRTY MOVIE ARCHIVE!"; "HUNKS IN UNIFORM!"; "Phwoar!"; "OLSEN twins SHOCK VID" and "FREE TOP MOBILE GAME".

All of the above promotional text message examples contained a link (consistently reported as <http://wap.mobile365.nettadulcsdefault.wnl>). If consumers chose to 'push' the links received, they were taken to a WAP landing page where they could choose to browse and download pictures and videos of an adult nature. Upon leaving the site, their viewing charges were sent to their phones by reverse-billed text message from the service shortcodes.

PhonepayPlus established that pages that were clicked and viewed varied in price between £3 and £6 and each page contained multiple items/thumbnails of material (including videos). The cost of viewing a page was applied to the consumer whether or not they had chosen to view any of content available by clicking on thumbnails within that page. As such, the consumer was charged the same amount for simply browsing a page, regardless of whether the consumer decided to view and download the content.

Consumers stated that the service pricing had not been clear and, as such, they felt misled by the service mechanics (i.e. being charged large sums for just browsing the sites without always downloading content).

The Service

There was no spend-limit on any of these services; neither per session, or overall.

The Executive was concerned that these WAP pay-per-page services allowed for consumers to be billed large amounts of money in a short space of time. This concern was further enforced by the fact that the billing process takes place once the user had ended their interaction on the WAP page; therefore, there was no knowledge of how much money has been spent until the billing text messages had all been received at a later stage.

Consumers reported costs regularly between £50-£200.

The cost of viewing a page was applied to the consumer whether or not they had chosen to view any of the available material within that page (videos/pictures). This meant that a consumer would be charged the same amount for viewing/browsing a page and not choosing to download any items as they would be for viewing a page and downloading the three items of content – both scenarios would result in charges being reverse-billed to the consumer's handset.

Pricing information was provided on each WAP page:

Video pages you click & view cost £4.50 each.

Photo pages you click & view cost £3 each.

Each page contains a minimum of 3 items.

SCROLL DOWN

& CLICK ON

'UNCLAIMED

DOWNLOAD'

TO GET YOUR

UNCLAIMED ITEMS

CLICK HERE for your unclaimed downloads

Your unclaimed content can only be downloaded from the link above.

However, the Executive noted that consumers appeared to have had particular difficulty with the wording in that they did not seem to have understood that, by clicking onto a page and choosing not to view items, they would still be charged.

The Investigation

The Executive conducted this matter as a Standard Procedure investigation in accordance with paragraph 8.5 of the Code.

The Executive issued a breach letter to the Service Provider dated 19 October 2009. The Executive received Information Provider undertaking forms on 8 October 2009. The Executive received a formal response to its breach letter from the Information Provider on 20 October 2009. A second formal investigation letter was sent on the 27 November 2009; a response to which was received on 21 December 2009.

The Tribunal made a decision on the breach raised by the Executive on 4 March 2010, having heard an Informal Representation from the Information Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

FAIRNESS (MISLEADING) (Paragraph 5.4.1a)

“Services and promotional material must not mislead, or be likely to mislead in any way.”

1. The Executive submitted that some complainants had indicated that the pricing information detailed on the WAP landing pages for these services had not offered full clarity and that, whilst some consumers expected to be charged for their use, they did not expect the charges to be anything like as high as those that were actually incurred once they had exited the services.

It submitted that many of the problems would appear to have centred on a lack of understanding in relation to the pay-per-page element.

It submitted that consumers seemed to have had particular difficulty with the wording in that they did not appear to have understood that clicking onto a WAP page but not viewing items would still result in them being charged – for example, the cost of viewing or flicking through seven landing pages (browsing), and not actually downloading or clicking on a thumbnail, would incur a charge of £21. Furthermore, consumers had not been able to see what material was on a page until they had actually clicked on it, thus seemingly depriving that consumer of any form of choice ahead of being charged £3 for that page, regardless of whether they chose to actually view any of the items that were available. It submitted that consumers may not have wished to view any items of content on the page, but were charged regardless.

The Executive also submitted that some consumers appeared to have been directed to the WAP sites by promotional wording showing the free downloadable content available and it appeared that, once in the site, consumers had browsed content without the knowledge that they would be billed for browsing.

The Executive made reference to some of the consumer complaints to support its submissions. The first five of those complaints are set out below:

- *“Consumer did click on the adult premium site found that on Orange home page he did not purchase anything just looked at a couple of pages and then started to receive messages. “i have done zero downloads just got a whole lot of charges” “ every bit of credit i put on it just takes”*
- *“Receives charges from 89069. Let her friend download a video on wap site for £2. Has been charged for an additional £6 for content accessed. They never went on to any other pages and made no other downloads.”*
- *“Receiving charges from 89069. Claims not to have viewed the content he has been charged for. He was only on one page yet he has been charged £15 in total. ‘I feel that I have been robbed!’ Not made aware of any pricing”*
- *““I only looked at about 4 pictures it shouldn't be 25 messages worth I just think it's a rip off im annoyed at that I would understand 8 or 10 pounds but not 27.”*

- *"It was an adult site 'You' something, I think I looked at one item and decided against it but I only looked at it because it said it was free that's why I went on it you see. My phone is brand new so I was just having a browse around it was adult." 25 messages received"*

The Executive submitted that, in light of the complainants, the evidence in support of its submissions and the high consumer charges in relation to the high usage, it was of the opinion that the operation of these services had misled consumers.

2. The Information Provider stated its terms clearly stated that:

*Video pages you click &
View cost £ () each. Photo
Pages you click & view cost
£ () each. Each page contains
Minimum of () items.*

It stated that these terms had already been submitted and approved following an initial case against it for the use of pay-per-view (PPV) services. It stated that, at that time, the terms were deemed to have been clear, fair and just to the consumer and no breach was upheld against it in relation to this issue.

The Information Provider referred to the Executive's submission that consumers had had difficulty with the wording and stated that its terms specified that the user was billed '*per page you click and view*' and that each page contained a minimum of three items. In order to access a new page, and thus incur further charges, the user must have clicked on '*Next Page*.' It stated that it was therefore unsure as to how users could have misinterpreted this information as suggested by the Executive's submissions.

The Information Provider referred to the Executive's submission that consumers had not been able to see what material was on a page until they had clicked on it. It stated that, within any of the site homepages there were up to, and in most cases, at least 40 different descriptive content links that a user could click on to access content. It referred to categories such as: "*Outdoor Action*", "*Candid Camera*", "*Group Action*", "*Brunettes*".

The Information Provider said it refuted the Executive's submission that the user had been deprived of any choice prior to being charged.

The Information Provider stated that the nature of the content being provided to users was 'Glamour Content'. It stated that it was of the opinion that a user interested in glamour models would not purchase a glamour magazine that was tailor-made to their likes/dislikes, but would pay an overall fee for the selection that was included. It stated that its sites were designed with the same mindset; however, it had made a conscious effort to provide as many different/unique categories of content.

It also stated that a user was never billed for accessing the homepage of any of its sites. The Information Provider said that its sites included banners/advertising for other sites that it offered, so a user could potentially browse through multiple sites, with the ability to see a vast range of different content categories, without incurring any charges.

The Information Provider made reference to the Executive's submission that some consumers appeared to have been directed to the WAP sites by promotional wording showing the free downloadable content available. It stated that, in every case where free content had been offered to the user, the free content was labeled specifically and clearly on the site homepage. It quoted the following examples "YOUR FREE VIDS" and "FREE CONTENT" as some of the labels used to highlight free content. It also stated that its sites also carried the following statement below the free content links:

"Your free content may only be downloaded from the free content link above. All other content charged per page viewed."

The Information Provider stated that it had reviewed and responded to each statement made by consumers and had given reasons as to why it felt strongly that these did not offer a factual insight to the operation/user experience of this service. Its responses to the first five of the Executive's examples were follows:

"Consumer did click on the adult premium site found that on Orange home page he did not purchase anything just looked at a couple of pages and then started to receive messages. "I have done zero downloads just got a whole lot of charges, every bit of credit i put on it just takes"

It stated that these comments were purely hearsay and could not be used as evidence unless a mobile number was provided and it was allowed to investigate and reply to the complainant. It stated that it did not feel it was fair for the Executive to make reference to users who had not given consent to divulge their mobile number.

"Receives charges from 89069. Let her friend download a video on wap site for £2. Has been charged for an additional £6 for content accessed. They never went on to any other pages and made no other downloads."

The Information Provider provided the full call and spend statistics in relation to the complainant. It stated that it believed the user had confused its site with another mobile content provider as the user had quoted the cost of an individual video was £2 and it had never promoted/advertised any content at £2.

"Receiving charges from 89069. Claims not to have viewed the content he has been charged for. He was only on one page yet he has been charged £15 in total. 'I feel that I have been robbed!' Not made aware of any pricing"

The Information Provider provided evidence to show that the consumer had, in fact, visited six pages of the site.

"I only looked at about 4 pictures it shouldn't be 25 messages worth I just think it's a rip off im annoyed at that I would understand 8 or 10 pounds but not 27."

The Information Provider provided evidence to show that the user had visited seven pages in total at a cost of £4.50 per page

"It was an adult site 'You' something, I think I looked at one item and decided against it but I only looked at it because it said it was free that's why I went on it you see. My phone is brand new so I was just having a browse around it was adult." 25 messages received"

The Information Provider provided evidence to show that the consumer had visited eight pages within the premium rate section of the site and had downloaded four videos.

The Information Provider provided similar evidence for all 11 of the complainant records it had been provided with in the original breach letter.

The Information provider summarised its position as follows:

- Users were not charged for accessing the site homepage – if users only clicked onto the WAP site and then came off, they would have incurred no charges.
- The maximum charge for viewing a pay-per-view page was £6 – this equated to four reverse-billed £1.50 service text messages. In order to be charged such large amounts as described above, users entered multiple pages.
- Users could only access one pay-per-view page at one time – a user can only access a new pay-per-view page by actively clicking the 'next' button, or returning to the site homepage and selecting a new content category.
- Users will not be billed for accessing the same content packs during a browsing session – a user was only be billed for entering new content packs within a site during a single browsing session.
- Users could return to the homepage at any time – on each chargeable page (below the 'next' button), there was a second button labeled 'home'; by clicking on this, users were automatically redirected to the site homepage, at no time were users forced to click through multiple pages.

The Information Provider stated that it noted that many of the complainant statements provided by the Executive offered a similar description of how charges had been incurred; however, when considering its above statements and the details of how the service worked, it was clear that these were not an accurate portrayal of how billing for this service had taken place.

The Information Provider stated that it had responded to every user statement in turn by providing evidence/factual information to demonstrate that the information supplied by the customer had been either inaccurate or untrue.

It asked the Executive to consider how many users had provided dramatically misinformed information. It requested that the Executive consider the exact mechanics of the service (as provided by it previously) as opposed to basing its decisions solely on information given by customers, which as it had demonstrated could be completely misleading. It also asked the Executive to recognise the number of complaints that had been included but were either not relevant to the case, were outdated, or could not be used due to lack of evidence.

3. The Tribunal considered the evidence and acknowledged that the 11 complainants submitted by the Executive and analysed by the Information Provider had contained significant factual inaccuracies and exaggerations.

The Tribunal also noted that the Information Provider's analysis showed that, in general, the number of WAP pages visited by users was significantly higher than the number of content items that had been downloaded. The Tribunal considered it was unusual that consumers were incurring charges, but then not downloading the content they had paid for, and that it was reasonable to infer from this that at least some users must have been unaware that they were being charged per page visited, rather than per video or picture downloaded

The Tribunal noted that the pricing information stated "Video pages you click and view cost £() each" and considered the use of the words 'click and view' was likely to have misled consumers into thinking that the cost of the service was per image or video actually viewed (i.e. downloaded), as opposed to per WAP page viewed. Although the pricing information did refer to charges being per 'page' clicked and viewed, the Tribunal was of the opinion that consumers might well have considered a video 'page' to be something which was accessed by clicking the thumbnail of the video, as opposed to meaning the 'menu page', which showed three thumbnails of videos which could be accessed by the user.

The Tribunal concluded that the wording used was likely to mislead consumers and therefore upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

SANCTIONS

The Tribunal's initial assessment was that, overall, the breaches taken together were **moderate**.

In determining the sanctions appropriate for the case, the Tribunal took into account the following aggravating factors:

- The cost paid by individual consumers was high;
- WAP pay-per-page services have been singled out for criticism by PhonepayPlus;
- The breach history of the Information Provider.

In mitigation, the Tribunal noted the following factors:

- The Information Provider had tried to comply with the rules by taking steps in advance to identify and mitigate risk, it had followed the requirements of its Prior Permission;
- The Information Provider co-operated with the Executive's investigation;
- The Information Provider asserted that it had made refunds to complainants.

The revenue in relation to this service was in the mid range of Band 4 (£50,000-£100,000).

Having taken into account the aggravating and mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **moderate**.

Having regard to all the circumstances of the case, including the revenue of the service, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand;
- Fine of £7,500 (there was not uplift for breach history).
- The Tribunal ordered that the Information Provider remedy the breach by seeking compliance advice in relation to this service and its promotion within two weeks from the date of publication of this adjudication, such advice to be implemented to the satisfaction of the Executive within two weeks of receipt.