

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 4 February 2010
TRIBUNAL SITTING No. 46/ CASE 1
CASE REFERENCE: 826596/AB

Information provider:	Call Republic Limited, Birmingham
Service provider:	Oxygen8 Communications Limited, Birmingham
Type of service:	Virtual chat service
Service title:	smschatwithjustlegalbabes.info
Service numbers:	89121
Cost:	£1.50 per message
Network operator:	All Mobile Network Operators
Number of complainants:	Instigated from Executive monitoring

**THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER
UNDER PARAGRAPH 8.7 OF THE CODE FOLLOWING USE OF THE EMERGENCY
PROCEDURE IN ACCORDANCE WITH PARAGRAPH 8.6 OF THE CODE**

BACKGROUND

During the course of its monitoring, the Executive found that the website smschatwithjustlegalbabes.info was operating a virtual chat service. Upon investigation of the website, the Executive observed that the first image to appear on the webpage was that of an Asian girl surrounded by a black photo frame. The Executive considered the girl to be under the age of 16.

(i) The Investigation

The Executive conducted this investigation using the Emergency Procedure in accordance with paragraph 8.6 of the Code.

The Executive contacted the Service Provider on 11 November 2009, informing it that the Emergency Procedure had been invoked. The Executive subsequently received an email from the Service Provider confirming that the service had been suspended.

The Tribunal made a decision on the breaches raised by the Executive on 4 February 2009, having heard an Informal Representation from the Information Provider's representative.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE INAPPROPRIATE PROMOTION (Paragraph 5.12)

“Service providers must use all reasonable endeavours to ensure that promotional material does not reach those for whom it, or the service which it promotes, is likely to be regarded by them as being offensive or harmful. Service providers must use all reasonable endeavours to ensure that their services are not promoted in an inappropriate way.”

1. The Executive submitted that it had found the following website promoting a virtual chat service, along with videos of a sexual nature:

smschatwithjustlegalbabes.info/watch-her-bongos.html

The Executive submitted that, on clicking on this link, the first image which appeared was that of an Asian girl, partially covering her mouth with a piece of material and smiling. It submitted that, within a very short period of time, this image was framed by a black picture frame, with the following title partially overlapping the portrait:

“SMS Chat With Just Legal Babes”

It submitted that below the image were links to sexual videos. A pop-up also appeared on the screen, portraying a naked lady on all fours, and was headed *“Younger Babes SMS”*.

The Executive submitted that, in its opinion, it was highly inappropriate to have an image of a young girl with a service that not only promoted a virtual chat service, but also displayed videos of a sexual nature. This was exacerbated by the wording used in the heading, i.e. *“...Just Legal Babes”*.

2. The Information Provider stated that it felt that the actual pop-up advert containing the SMS shortcode was, in fact, contextual with the adult nature of the host website. However, it fully agreed that the image of the young child in the photo frame displayed on the website was inappropriate.

It stated that the party responsible for both the website in question and for the use of that particular image was the customer to whom it had provided the shortcode. It stated that it had had no knowledge of the website, nor any control over its content. In order to support this response, it provided information obtained from the ‘WHO IS’ internet registration information service, which demonstrated that the website was registered and maintained by a third party customer.

It stated that, upon contracting with the Information Provider, the customer had agreed to the Information Provider’s terms and conditions, which clearly set out the obligations in relation to complying with the Code. Furthermore, at the point of supply to the customer, a copy of the Code was supplied via email. The Information Provider stated that, within that same confirmation email, it had also reminded the customer of his responsibilities when marketing the service and clearly informed him that any self-produced marketing material must be forwarded to it for pre-approval, prior to being released into the public domain. It stated that the customer had failed to fulfil his obligations on all fronts and, as such, the Information Provider had terminated the account with immediate effect on 11 December 2009.

In conclusion, the Information Provider stated that it felt that it had acted responsibly, prior to releasing the service to its customer. It stated that it had had no knowledge whatsoever of the inappropriate marketing taking place and, upon notification by the Executive, had taken all possible steps to quickly rectify the situation.

3. The Tribunal considered the evidence and noted that the Information Provider had admitted the breach. The Tribunal found that the virtual chat service, being adult in nature, had been promoted in an inappropriate manner by its use of the image of the young girl (826596_AppendixA). The Tribunal therefore upheld a breach of paragraph 5.12 of the Code.

Decision: UPHELD

**ALLEGED BREACH TWO
VIRTUAL CHAT SERVICES (APPROPRIATE USER) & AVAILABILITY OF ‘STOP’
COMMAND (Paragraphs 7.3.2a and d)**

“a Service providers must take all reasonable steps to ensure that the participant in any virtual chat service is an authorised user and that nobody under the age of 18 uses virtual chat services.

“d In the case of virtual chat services, the ‘STOP’ command must be available and consumers must be fully informed before entering the service.”

1. **Paragraph 7.3.2a**

The Executive submitted that it had monitored the service operating on shortcode 89121 using two different monitoring phones and, on both occasions, after sending the trigger word ‘Cherry18’ to the shortcode, it had received the following text message:

“Hi there! To chat to me you need to confirm you are 18, please respond with YES to continue. X”

The Executive stated that it had sent the response ‘Yes’, which had, in turn, entered it into the virtual chat service. The Executive stated that it had used wording, such as ‘Cant wait to leave school...’, ‘Im a horny 16 year old...’, ‘Im a bad boy bunking of school’ and ‘Do u like 16 yr old boys?’, but, despite these, it had continued to receive text messages of a sexual nature.

Paragraph 7.3.2d

The Executive submitted that this provision of the Code required service/information providers to ensure that users were fully informed about the ‘STOP’ command before entering the service. The Executive submitted that the website did not mention the ‘STOP’ command at all.

The Executive also submitted that, when the trigger word ‘Cherry18’ was sent to shortcode 89121, the first text message received was:

“Hi there! To chat to me you need to confirm you are 18, please respond with YES to continue. X”

It submitted that this and, in fact, any further text messages received, had failed to contain this information.

2. **Paragraph 7.3.2a**

The Information Provider stated that it had no control over the actual text content or operation of the SMS virtual chat service. This responsibility had been undertaken by a third party content provider with whom its Network Operator, Oxygen8 Communications, had contracted to provide the text chat service. It stated it was given assurances that this managed service would be compliant with the Code at all times.

During the Informal Representation, the Information Provider confirmed that there were no live operators for this service and all responses to the Executive’s text messages had been provided by a computer. It maintained that a live operator would have cut off the service as soon as it became evident that the user was claiming to be under 18 years old.

Paragraph 7.3.2d

The Information Provider stated that it accepted responsibility for the breach in relation to the failure to fully inform consumers about the 'STOP' command in the promotional material. It stated that this had been due to an administrative error on its part, in which the cost information for a £1.50 per minute fixed-line telephone service was mistakenly placed on the artwork promoting the SMS service.

The Information Provider stated that it had felt that a breach of paragraph 7.3.2 should only be partly upheld, and on the basis of the failure to highlight the 'STOP' command; not on the basis of outbound text messages over which it had had no direct control over and for which its supplier had formally accepted responsibility.

It also asked the Tribunal to take into account that, as the SMS service in question was neither subscription-based, nor a direct marketing service, the failure to highlight the 'STOP' command would not have resulted in any actual financial loss to a consumer. It added that the virtual chat service was based upon a reverse-billed 'pay-as-you-go' mechanism. Thereby, a consumer would only receive a single reverse-billed text message in reply to their own message. As such, upon a customer sending their final text (and receiving a reply), the service would then have stopped and would not be re-activated, unless the consumer initiated this by sending another text. Therefore, there was no actual need for the consumer to use the 'STOP' command in order to prevent further billing.

3. The Tribunal considered the evidence and concluded that, in relation to the breach raised under paragraph 7.3.2a of the Code, the Information Provider had not taken all reasonable steps to ensure that no person under the age of 18 years old used the service. The Tribunal considered that merely requiring a user to send a text confirming they were over 18 years old was insufficient to satisfy the requirement of the Code. The Tribunal upheld a breach of paragraph 7.3.2a of the Code.

In relation to the breach raised under paragraph 7.3.2d of the Code, the Tribunal noted that the Information Provider had admitted the breach and concluded that users had not been informed of the 'STOP' command. The Tribunal upheld a breach of paragraph 7.3.2d of the Code.

Decision: UPHELD

ALLEGED BREACH THREE PRICING INFORMATION (COST) (Paragraph 5.7.1)

"Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge."

1. The Executive submitted that on the pop-up box titled 'Younger Babes SMS Text Cherry18 to 89121' pricing was located in the small print and was stated as follows:

"£1.50 per minute + network rate..."

The Executive submitted that elements of this service were also promoted on a 0982 fixed line number. The pricing, which appeared in the pop-up promoting the shortcode, related to the fixed-line element stated, and not the shortcode service.

It was the opinion of the Executive that the pricing information, therefore, failed to clearly or straightforwardly inform users of the cost of using the service via SMS.

2. The Information Provider stated that, as the artwork for the pop-up advert (including cost information) had been supplied by it to the customer, it accepted responsibility for any breach of the guidelines as a result of the wording of the advert.

It stated that this was due to an administrative error in which the cost information for a £1.50 per minute telephone service was mistakenly placed on the artwork for the advert promoting the SMS service in question.

However, in mitigation, it believed that consumers would not have been placed at a financial disadvantage by the fact the advert stated the service cost as “£1.50 per minute + network rates”, rather than “£1.50 per text + network rates”. It hoped that the Tribunal would acknowledge this as an extremely minor issue caused by genuine human error, rather than any deliberate attempt to mislead consumers.

The Information Provider added that, as the service did not receive any text messages from members of the public for the duration of its promotion, there was no actual financial loss incurred by consumers.

3. The Tribunal considered the evidence and concluded that the pricing information offered on the website was in relation to a fixed-line, and not the shortcode, service. The Tribunal therefore found that users had not been informed clearly or straightforwardly of the cost of the shortcode service. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

SANCTIONS

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

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

- The behaviour of the Information Provider was reckless in relation to its failure to ensure adequate due diligence and ongoing monitoring of the service.
- The service was harmful to the child whose image was used in association with an adult service.

In mitigation, the Tribunal noted the following factor:

- The Information Provider co-operated with the Executive.

The Tribunal noted that the breaches had been caused by a third party, but did not accept that this party was beyond the control of the Information Provider.

The service generated no revenue, other than that generated by the Executive’s monitoring exercise (lower range of Band 6 (£1 - £5,000)).

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

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;
- £10,000 fine.