

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 27 May 2010

TRIBUNAL SITTING No. 54/ CASE 1

CASE REFERENCE: 829989

Service provider:	Wireless Information Network Ltd, High Wycombe
Information provider:	Bulletin.net (UK) Limited, London
Type of service:	Adult video download service
Title:	'rudetubex.com' and 'funtubes.com'
Service numbers:	89069 and all other shortcodes
Cost:	£3 per month (two messages charged at £1.50 each)
Network operator:	All Mobile Network Operators
Number of complainants:	31

THIS CASE WAS BROUGHT AGAINST THE SERVICE PROVIDER UNDER PARAGRAPH 8.5 OF THE CODE

BACKGROUND

Between 30 October 2009 and 6 March 2010, PhonepayPlus received 20 complaints in relation to the service operating on shortcode 89069 and all other shortcodes on which this service was available. The service was called 'rudetubex.com' and provided adult video content on a website. Users would enter their mobile phone number into the website and receive a text message with a password that enabled the subsequent viewing of videos of an adult nature on the website. The Executive noted that the Information Provider, Bulletin.net (UK) Limited ('Bulletin') contracted with Wireless Information Network Ltd and was, in turn, owned by and making direct revenue payments to a company called Fun Telecom Limited ('Fun Telecom').

The Service Provider confirmed that the Information Provider ceased the operation of the 'rudetubex.com' service on 5 January 2010 as a result of the investigation. PhonepayPlus subsequently received 11 complaints in relation to a similar service called 'funtubes.com', operating on shortcode 89069 and all other shortcodes on which this service was available.

Complainants using either the 'rudetubex.com' or the 'funtubes.com' service stated that they had received unsolicited chargeable text messages.

PhonepayPlus examined consumer complaints and monitored the 'funtubes.com' service. During the course of its investigation, PhonepayPlus identified issues relating to technical quality, pricing information and in relation to the subscription initiation message.

Details of the parties

Wireless Information Network Ltd ('WIN') acted as the Service Provider for both the 'rudetubex.com' and 'funtubes.co.uk' services. The Information Provider, Bulletin.net (UK) Limited ('Bulletin') contracted with WIN. Bulletin is owned by and makes direct revenue payments to a company called Fun Telecom Limited ('Fun Telecom').

Monitoring

The service was accessed via either of two websites: 'tubetubex.com' or 'funtubes.co.uk' (Appendix A). The user could then enter a mobile phone number into the required field (Appendix B) and would receive the following text message:

'Free Msg: U R subscribed to FunTubes.co.uk 4 £3 per Month U will be sent a new password every two weeks 4 web access helpline 08431102500 Fun Telecom Ltd'

The Executive was then able to revisit the website, enter the same mobile phone number and view the adult content. The adult content consisted of approximately 20 videos that lasted between 15 and 30 seconds. The Executive noted that the content did not change during the course of the investigation.

The Executive was unable to monitor the 'rudetubex.com' service as it was suspended on 5 January 2010. Screenshots of the 'rudetubex.com' service mobile phone entry page on both the web and on mobile were supplied by the Service Provider (Appendix C).

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 10 May 2010. The Executive received a response to the breaches raised in the letter on 19 May 2010, with additional responses being supplied on 25 May 2010.

The Tribunal made a decision on the alleged breaches raised by the Executive on 27 May 2010, having heard an Informal Representation from both the Service Provider and the company Fun Telecom' on behalf of the Information Provider.

During the Informal Representation, Fun Telecom on behalf of the Information Provider, stated that it had 'cut and pasted' information across to form its complainant message logs that it had provided to the Executive as evidence. Fun Telecom stated that the discrepancies, highlighted by the Tribunal, between the complainant message logs supplied by Fun Telecom on behalf of the Information Provider and those supplied by WIN had been due to human error.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

ADEQUATE TECHNICAL QUALITY (Paragraph 3.3.3)

"Service providers must use all reasonable endeavours to ensure that all of their services are of an adequate technical quality."

1. The Executive submitted that, during its monitoring exercise, it received a text message that read as follows:

'Free Msg: U R subscribed to FunTubes.co.uk 4 £3 per Month U will be sent a new password every two weeks 4 web access helpline 08431102500 Fun Telecom Ltd'

It submitted that the monitoring phone continued to receive the same text messages although a charge was never incurred. The Executive noted that the text message

had stated that a new password would be sent by the service every two weeks; however, the handset never received a password.

The Executive submitted that it was of the opinion that there was a technical problem with the service as it had not operated in accordance with the stated instructions.

It submitted that its case was further demonstrated by the complainant message logs that indicated that some users had experienced the receipt of a free first text message, while other users had received a first text message that was chargeable. The Executive submitted that it appeared that the service had not operated consistently and this had exacerbated the confusion and concern caused to complainants.

2. The Service Provider stated that it had confirmed that, due to technical issues, the Information Provider had sent 86 unsolicited billed text messages that had caused the service to act in an inconsistent manner.

It stated that there had been no malicious intent and, once the problem had been identified, the Information Provider had attempted to contact all affected users.

3. The Tribunal considered the evidence and concluded that the Executive's difficulties with the service during its monitoring had been caused by the voluntary suspension of the service. The service had been voluntarily suspended by the Service Provider/Information Provider as a result of the investigation and, as such, the Executive had not received a new password as stated in the free text message. The Tribunal also considered that the inadequate billing mechanic had been addressed in the other alleged breaches. The Tribunal did not uphold a breach of paragraph 3.3.3 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH TWO LEGALITY (Paragraph 5.2)

“Services and promotional material must comply with the law. They must not contain anything which is in breach of the law, nor omit anything which the law requires. Services and promotional material must not facilitate or encourage anything which is in any way unlawful.”

1. The Executive submitted that, under Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ('the Regulations'), it is an offence to send unsolicited promotions using electronic mail (including text messages) for direct marketing purposes, unless (1) the recipient has specifically consented to receiving such promotions, or (2) the recipient's details were obtained whilst purchasing a similar or related product or service to that now being promoted and the recipient was given the opportunity, when his details were collected, to opt out (without charge) of receiving further communications, and is given the same opportunity in each subsequent communication (this is known as the 'soft opt-in').

The Executive submitted that, of the 20 complaints received in relation to the 'rudetubex.com' service, 18 complainants specifically stated that they had not registered to this service and the first they had heard of this service was on receipt of unsolicited text message(s).

It submitted that, of the 11 complaints received in relation to the 'funtubes.com' service, eight complainants specifically stated that they had not registered to this service and the first they had heard of this service was on receipt of unsolicited text message(s).

The Executive submitted that both the 'rudetubex.com' and 'funtubes.com' services enabled users to view explicit adult videos. It submitted that a large proportion of the complainants indicated that they had been distressed in receiving these text messages, particularly due to the nature of the service. The Executive made reference to consumer complainants, a sample of which stated as follows:

"...This service was not requested and I object most strongly at having this type of material sent to my phone..."

"...I did not reply to the first message because I had not requested it and I did not want to pay to text a reply. I don't believe that people should have to reply to texts they have not requested in order to prevent being charged.

I am offended by receiving texts of this nature. They could have been sent to a child..."

"...My complaint is I have been charged for incoming texts from this number which I have not asked for AND DID NOT KNOW ABOUT UNTIL RECEIVING THE FIRST TEXT ON 20 DEC 09.

wEBSITE STATES PROMOTIONAL TEXTS -WHY SHOULD YOU PAY FOR PROMOTIONAL TEXTS AND WHY SHOULD YOU HAVE TO PAY TO STOP THE TEXTS..."

The Executive submitted that, in light of the complaints above, it was of the opinion that the receipt of these text messages had been unsolicited.

Design of the model

The Executive submitted that the service model allowed users to enter any mobile phone number and, as such, a mobile phone number other than that of the user could be entered either purposefully or in error. The Executive submitted that in either of these scenarios the first text message received (free or chargeable) would have been the first time that such recipients would have heard of the service, thereby rendering the text message unsolicited.

Message logs

The Executive submitted that the message logs had demonstrated that some users had sent the trigger word 'Tube' to shortcode 89069; however, other message logs had not indicated a user text message opt-in.

Comment on behalf of Fun Telecom Limited (owners of the Information Provider)

A representative of Fun Telecom Limited had stated that: *"Our initial findings indicate that there were 181 MSISDN's (mobile phone numbers[sic]) uploaded within the system that were OPT-IN only. Out of these, 86 have resulted in a message or MT(service text message[sic]) to the client."*

2. The Service Provider made reference to its previous response and stated that technical issues had caused unsolicited messages to be sent

3. The Tribunal considered the evidence and concluded that, on the balance of probabilities, the complainants' evidence had been persuasive and had indicated that complainants had not entered their mobile phone number into the website before receiving the promotional text messages. The Tribunal did not consider that evidence that a mobile number entered on to a website was sufficient evidence of valid opt-in. It found that, given the procedure of a double opt-in now in operation, there had previously been a higher risk that consumers who had not opted-in to the service via the website could receive unsolicited text messages, which had clearly been the case on this occasion. The Tribunal upheld a breach of paragraph 5.2 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 some of the complainant message logs indicated that the first text message received had read as follows:

*"RUDETUBEX MSG: Hot new Videos uploaded today! 18+only-goto 'rudetubex.com'
Or text STOP to 89069 cc-08431102500"*

The Executive submitted that these were chargeable text messages and, in the case of it being an unsolicited text message, it would have been the first time recipients would have heard of this service. The Executive made reference to five mobile phone numbers that received a first text message at a charge.

The Executive submitted that it was of the opinion that there was no pricing in this text message and, having not seen the service website, users had not been fully informed of the cost of the service prior to incurring a cost.

2. The Service Provider stated that technical issues had caused the unsolicited reverse-billed text messages to be sent to consumers.

It stated that pricing had been clearly stated on the website and usually consumers would have been informed of the cost of the service before incurring a charge.

It made reference to the mobile phone numbers and message logs referenced by the Executive and stated that these were the message logs that had been supplied by the Service Provider.

The Service Provider made reference to a comment by Fun Telecom on behalf of the Information Provider, that it had not contracted with the Service Provider to send all of the service text messages and, as such, the message logs provided by the Service Provider only showed the billed text messages sent out via the Service Provider's gateway.

Furthermore, the Executive was asked to refer to the message logs supplied by Fun Telecom Limited, on behalf of the Information Provider, that showed all traffic to the mobile numbers. It stated that the message logs it had provided indicated that the first text messages received by the users had been free text messages advising of pricing information.

3. The Tribunal considered the evidence and concluded that, on the balance of probabilities, it was satisfied that some complainants had not visited the website prior to receiving service text messages. The Tribunal considered that the message logs provided by the Fun Telecom, on behalf of the Information Provider, were not reliable as they had been reconstructed after the event and did not contain accurate information. The Tribunal was satisfied that consumers had not been informed of the cost of using the service prior to incurring a charge. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

**ALLEGED BREACH FOUR
SUBSCRIPTION – INITIAL MESSAGE (Paragraph 7.12.4a-f)**

“Users must be sent a free initial subscription message containing the following information before receiving the premium rate service:

- a. *name of service,*
- b. *confirmation that the service is subscription-based,*
- c. *what the billing period is (e.g. per day, per week or per month) or, if there is no applicable billing period, the frequency of messages being sent,*
- d. *the charges for the service and how they will or can arise,*
- e. *how to leave the service,*
- f. *service provider contact details.”*

1. The Executive submitted that some of the complainant message logs indicated that the first text message received had read as follows:

*“RUDETUBEX MSG: Hot new Videos uploaded today! 18+only-goto ‘rudetubex.com’
Or text STOP to 89069 cc-08431102500”*

The Executive submitted that these were chargeable text messages and, in the case of it being an unsolicited text message, would have been the first time the recipients would have heard of this service. The Executive made reference to five mobile phone numbers that received a first text message at a charge.

The Executive submitted that it was of the opinion that these users did not receive a free initial subscription text message and the first text message received by the complainants above had been at a cost.

2. The Service Provider stated that technical issues had caused the unsolicited reverse-billed text messages to be sent to consumers and, as such, affected consumers received a billing text message before receiving an initial subscription text message.

It stated that users who had subscribed by texting the keyword ‘TUBE’ to shortcode 89069 had received a free initial subscription text message with the information required that read as follows:

“Free Msg:U R subscribed to FunTubes.co.uk 4 £3 per Month U will be sent a new password every two weeks 4 web access helpline 08431102500 FunTelecom Ltd”

It made reference to the mobile phone numbers and message logs referenced by the Executive and stated that these were the message logs that had been supplied by the Service Provider.

The Service Provider made reference to a comment by Fun Telecom on behalf of the Information Provider, that it had not contracted with the Service Provider to send all of the service text messages and, as such, the message logs provided by the Service Provider only showed the billed text messages sent out via the Service Provider's gateway.

Furthermore, the Executive was asked to refer to the message logs supplied by Fun Telecom Limited, on behalf of the Information Provider, that showed all traffic to the mobile numbers. It stated that the message logs it had provided indicated that the first text messages received by the users had been free text messages advising of pricing information.

3. The Tribunal considered the evidence and noted that the message logs provided by Fun Telecom Limited, on behalf of the Information Provider, did not contain accurate or reliable information and did not show that consumers had texted the keyword. Furthermore, the message logs did not show that there had been a free initial subscription text message stating that the free trial period had ended. The Tribunal also noted that, during the Informal Representation, Fun Telecom on behalf of the Information Provider, had stated that the message logs had been 'cut and pasted' from other records. The Tribunal concluded that it preferred the complainants' evidence that indicated that the free initial subscription text messages had not been sent. The Tribunal upheld a breach of paragraph 7.12.4a-f 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 Service Provider had been careless in sending chargeable billing text messages to consumers that had not subscribed to the service.
- The Tribunal considered that the information provided to the Executive during the course of the investigation had been inadequate (leading to a change in the Service Provider's explanation of the issues late into proceedings). Furthermore, the information provided to the Executive in the form of the message logs had been incomplete and unreliable. The Tribunal considered that these factors combined had aggravated the breaches raised.
- The breach history of the Service Provider.

In mitigation, the Tribunal noted the following factors:

- The Tribunal noted that the Service Provider had taken some steps to co-operate with PhonepayPlus.
- The Service Provider/Information Provider asserted to have offered to make refunds to users.

The revenue in relation to this service was in the low range of Band 3 (£100,000-£250,000).

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;
- Fine of £50,000 (compromising £40,000 in respect of the upheld breaches and a breach history uplift of £10,000);
- The Tribunal ordered that the Service Provider seek compliance advice on all services and future services and related promotional material in relation to this Information Provider and Fun Telecom Limited within two weeks of the publication of this decision. Compliance advice is to be implemented to the satisfaction of the Executive within two weeks of receipt;
- The Tribunal commented that it expected claims for refunds to continue to be paid by the Service Provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.