

IN THE PHONEPAYPLUS ORAL HEARING TRIBUNAL

IN THE MATTER OF:

PEEKABOO TV LIMITED (“Peekaboo”)

- and -

PHONEPAYPLUS LIMITED

**ADJUDICATION BY CONSENT
 (“CONSENT ORDER”)**

Introduction

1. This consent order shall relate to the matter under PhonepayPlus case reference 05942, and the oral hearing listed for determination on 5th December 2012. The oral hearing was requested by Peekaboo in respect of the above case.
2. This consent order is made following acceptance by Peekaboo of liability for the breaches set out in the Statement of Case herein. This order further sets out the agreement of both parties as regards the sanctions to be imposed on Peekaboo and the administrative charge to be paid.
3. The agreed sanctions and administrative charge have been approved by a legally qualified member of the Code Compliance Panel pursuant to paragraph 3.16(d) of Annex 2 to the twelfth edition of the PhonepayPlus Code of Practice.

Sanctions

4. The sanctions hereby agreed by the parties are as follows:-
 - (i) £40,000 fine;
 - (ii) Formal Reprimand;
 - (iii) To seek and implement compliance advice regarding the services which were the subject of the investigation, and all related promotional material, to the satisfaction of the Executive if those services are to be run again; and,

- (iv) Refunds to be made to all complainants who make a valid claim.

Administrative Charges

5. Peekaboo shall pay the legal and administrative charges incurred by PhonepayPlus in relation to this case in the sum of £12,500.

Payment of fine and administrative charges

6. The fine and administrative charges are to be paid within 14 days of this Order.

Oral Hearing date

7. The oral hearing date of 5th December 2012 is vacated.



David Cockburn (Chair)
On behalf of the Oral Hearing Tribunal
23 November 2012

PEEKABOO TV LIMITED (“Peekaboo”)

- and -

PHONEPAYPLUS LIMITED

STATEMENT OF CASE FOR THE EXECUTIVE

Introduction

1. This case concerns a large number of complaints (204) received about a service (the “Service”) operating on shortcodes 89292 (garnering 19 complaints), 89996 (garnering 78 complaints) and 89300 (garnering the remaining 107).
2. The Service was operated by Peekaboo as a Level 2 provider in relation to shortcodes 89300, 89996 and 89292, and gave the consumer the opportunity to view adult videos. However, the complaints show that a number of consumers were charged in a manner that they had not envisaged.
3. It is the Executive’s contention that the weight of complainants, along with its own monitoring, demonstrates a number of breaches of the twelfth edition of the Code of Practice (the “Code”) have occurred in relation to the Service.
4. From September 2011 until February 2012 (when Peekaboo agreed to voluntarily suspend the Service), Peekaboo made £1,342,716 in revenue

across the three shortcodes, broken down as: £904,395 in respect of shortcode 89300, £380,351 for shortcode 89996 and £67,970 for shortcode 89292. It is the Executive's contention that, because of these breaches of the Code, Peekaboo substantially augmented the income it would otherwise have made.

5. It is the Executive's case that the breaches are very serious and require a sanction which is commensurate and proportionate to the harm caused.

The Service

6. The Executive's case rests on the Service being experienced by way of a smartphone.

The promotion

7. The Service appeared to be promoted by two main methods: promotional text messages containing a link to a pay-per-page website, and, paid for results (known as a 'sponsored link') within search engines such as Google when certain words were searched for.
8. If the word "sex" was searched for in Google, a number of sponsored links would appear alongside the regular, unsponsored, results of the search. It appears that if a prominent (e.g. the first or second) sponsored link was clicked then an error message would be received and this would appear to herald the end of the user experience in relation to the Service.
9. However, the appearance of the error message appeared to herald not the end of the user experience but the searcher then being sent a promotional text message for the Service.
10. On the Executive's monitoring, this text message stated the following:

“(Free msg) Here’s ur Free bookmark to UK’s Best Amateur Vids, CLICK HERE – <http://v-hot.co/s/a?172927>”

11. Upon clicking the link in this message the user would be taken to a ‘landing page’. Whilst it appears that the landing page differed in details experienced by different users, there were two key features. Firstly, the landing page contained a number of thumbnail images which were links to adult videos. Secondly, the landing page contained the following pricing information:

“Link to free vids at bottom of site. Premium vids/pics just £3 each + network data charges

HELP:08444457707”

12. Alternatively, the landing page promoted a variant of the Service entitled ‘Fuckbook’, on shortcode 89300 (the “Variant Service”). The Variant Service also allowed users to ‘rate’ women appearing in the pornographic videos on offer. The pricing information in respect of this aspect of the Service was given as follows:

“It costs £1.50 to rate a girl. It costs £3 to download a video.”

and

“Rating a girl costs £1.50 each time (excluding your standard Network operator charges).”

13. Further, the Variant Service stated:

“It costs nothing to browse the site (operator data charges may apply).”

14. It appears that promotional text messages were also sent as a result of a consumer accessing a website on their phone when an error message was not received and, perhaps, the landing page was viewed.

The user experience following arrival on the landing page

15. In the case of services operated on shortcodes 89996 and 89292, where a user clicked on a thumbnail the video did not start playing instead the thumbnail reappeared, ready for the video to be played, and a link appeared at the bottom of the screen stating “Next Harder Vids”.
16. Clicking onto this link would take the user onto another thumbnail promotion for another video.
17. Each time a user clicked on the ‘Next Harder Vids’ link they incurred a charge for watching the video *whether they had watched the video or not*.

The Breaches

Outcome 2.3: Fairness

“That consumers of premium rate services are treated fairly and equitably.”

Paragraph 2.3.2

18. Paragraph 2.3.2 of the Code provides:

“Premium rate services must not mislead or be likely to mislead in any way.”

19. The Service was, contrary to this paragraph, misleading in that the pricing information does not make clear that browsing a thumbnail *without watching the video that it linked to* would incur a charge.

20. The words ‘Next Harder Vid’ clearly imply a capability to browse. Browsing is not an activity that normally would incur a charge. Therefore, if browsing is to

be a paid for part of any service, there must be *clear and explicit wording* stating that the normal state of affairs has been displaced. If not, such a charging mechanism is inherently misleading.

21. Therefore, paragraph 2.3.2 of the Code has been breached.

Paragraph 2.3.3

22. Paragraph 2.3.3 of the Code provides:

“Consumers must not be charged for premium rate services without their consent. Level 2 providers must be able to provide evidence which establishes that consent.”

23. Following on from the rationale behind the raising of the breach of paragraph 2.3.1; the Service involved charging for the utilisation of a browsing mechanic (the Next Harder Vid link). In the absence of clear and explicit wording that merely browsing *without viewing any content* would incur a charge there cannot be valid consent

24. Therefore, paragraph 2.3.3 of the Code has been breached.

Paragraph 2.3.6

25. Paragraph 2.3.6 of the Code provides:

“Level 2 providers must take reasonable and prompt steps to identify excessive use of its service or services by any consumer and to inform the relevant consumer of that usage.”

26. An analysis of the complaints demonstrates that a significant number of complainants received charges of hundreds of pounds.

27. This demonstrates, in itself, that high bills were being incurred without the knowledge of the user (regardless of whether that user was consenting to receiving the Service or not). It is the Executive's submission that such amounts indicated excessive use and should have prompted Peekaboo to inform the relevant user of that usage.

28. Therefore, paragraph 2.3.3 of the Code has been breached.

29. This breach is compounded in its seriousness because many consumers who had not consented to using the Service and incurring charges would have been alerted to their use before very high bills had been incurred. This failure has significantly increased revenue accruing to Peekaboo.

Outcome 2.4: Privacy

"That premium rate services do not cause the unreasonable invasion of consumers' privacy."

Paragraph 2.4.3

30. Paragraph 2.4.3 of the Code provides:

"Level 2 providers must ensure that consumers' personal information is not collected without their consent or passed to any other person other than for the sole purpose of facilitating a refund to a consumer."

31. The definition of 'Personal information' at paragraph 5.3.25 of the Code includes telephone numbers.

32. It is clear that the mere visiting of a website (whether content was viewed on that website or not) resulted in the sending of promotional text messages by Peekaboo to consumers.

33. It follows from this fact that consumers' personal information was collected without consent for marketing purposes (and not for the purpose of facilitating refunds).

34. Therefore, paragraph 2.4.3 has been breached.

Sanctions

35. It is the Executive's case that these breaches together are very serious for the following reasons:

- (i) The Service involved high individual call charges and very high revenue in a short period of time.
- (ii) For those consumers that did not think they were going to be charged for clicking on a link that provided no content (the "Next Harder Vid" link), the Service provided no valuable service at all and did not have any content but nonetheless incurred charges, some of which were very high indeed.
- (iii) There was a very clear ambiguity in the browsing mechanic of the Service which made the danger of breaches of the Code and consequent consumer harm very real.
- (iv) Had Peekaboo taken a more compliant approach towards paragraph 2.3.6 of the Code (along with showing more concern about compliance with the Code and consumer safety in the operation of the Service generally) then both the amount of consumer harm caused and the revenue gained would have been much lower.
- (v) The number of complaints regarding the Service was very high. In reality it is likely that the number of consumers who have

been charged wrongly is significantly higher. This is particularly so given the adult nature of the Service (and that limited user involvement is seemingly required in order to incur the wrongful charges) and the disinclination of many consumers to complain about such services.

- (vi) On a balance of probabilities Peekaboo has either been reckless or wilful in its disregard of the Code.
- (vii) As a result of this recklessness or wilfulness, it has gained a very large amount of revenue.

36. It is for these reasons that the Executive seeks the following sanctions which it submits are wholly commensurate and proportionate to this case.

- (i) A formal reprimand;
- (ii) A £65,000 fine; and,
- (iii) Claims for refunds to be paid by Peekaboo for the full amount spent by complainants except where there is good cause to believe that such claims are not valid.

Bates Wells and Braithwaite London LLP

9 October 2012