

DETERMINATION THAT THE PROVIDER OF THE ON DEMAND PROGRAMME SERVICE “MADAME CARAMEL” WAS IN BREACH OF ATVOD’S RULE 11 AND THEREBY CONTRAVENED SECTION 368E (2) OF THE COMMUNICATIONS ACT 2003 (“THE ACT”)

1. Summary of determination

- i. BREACH OF RULE 11 (Harmful Material: protection of under-18’s) in relation to free-to-view material: ESTABLISHED BY ATVOD INQUIRY
- ii. BREACH OF RULE 11 (Harmful Material: protection of under-18’s) in relation to subscription material: ESTABLISHED BY ATVOD INQUIRY

Each breach constitutes an infringement of the statutory requirement set out in section 368E (2) of the Communications Act 2003 (“the Act”) which states that *“If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it.”*

2. Service

Madame Caramel (“the Service”)

ATVOD REFERENCE ODPS00293

In this Determination we refer to the service made available through the following outlets:

www.madamecaramel.com
www.clips4sale.com/21346

3. Service Provider

Madame Caramel (“the Service Provider”)

4. Introduction

- 4.2 The Service is a notified On-Demand Programme Service (“ODPS”) the content of which is described by the Service Provider as adult fetish videos.

5. Initial assessment

- 5.1 In view of the fact that the Service is an ODPS and is therefore covered by the ATVOD Rules & Guidance¹, the ATVOD Executive considered that the Service raised issues under Rule 11. ATVOD’s Guidance on this rule describes material likely to fall within its scope, and the types of access control required to protect under-eighteens from exposure to such content. At the material time the ATVOD guidance to service providers in relation to the rule was as follows:

¹ http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.0_May_2012.pdf

“Rule 11: Harmful Material: Protection of Under-18s

If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it.

GUIDANCE: In its response² to the Ofcom report on Sexually Explicit Material and Video On Demand Services³, Government stated that it intended to address this issue comprehensively in the 2011 Communications Review of the current regulatory framework to support the communications sector. Government further stated that there is a good case that the existing Regulations require a precautionary approach and requested that Ofcom and ATVOD take any steps necessary in the interim period to ensure that children remain adequately protected under the ATVOD Rules, in the knowledge that Government could bring forward further Regulations in the short term if it proved necessary to support this position.

In light of this, and given the importance of protecting children and young people from harmful content, ATVOD has confirmed its precautionary approach to its interpretation of the wording of the Act and service providers should have this in mind when applying Rule 11 to the content of their services for the purpose of ensuring compliance. Ofcom has made clear that it supports ATVOD’s precautionary approach.

In considering any particular case, ATVOD’s approach in the first instance will be to determine whether the content in question falls within the high statutory test contained in this requirement.

Clearly, content that is illegal (e.g. criminally obscene or indecent) may not be included in an on-demand programme service since the provision of such material is unlawful.

Content whose broadcast complies with the Ofcom Broadcasting Code, or that has been classified by the BBFC in any category except ‘R18’, would not be considered material that “might seriously impair” and would not therefore be subject to the requirements of Rule 11.

However, adopting a precautionary approach, ATVOD’s guidance is that “material which might seriously impair the physical, mental or moral development of minors” when provided as part of an on-demand programme service may include content that has been classified ‘R18’ by the BBFC, or material equivalent⁴ to content classified in that category.

Therefore ‘R18’ material or ‘R18’-equivalent content should only be made available in on-demand programme services in a manner which secures that persons under the

² <http://www.culture.gov.uk/images/publications/EVletter-to-ed-richards-3aug2011.pdf.pdf>

³ <http://stakeholders.ofcom.org.uk/binaries/internet/explicit-material-vod.pdf>

⁴ Where this Determination refers to “‘R18’- equivalent” content this should be taken to include content which goes beyond that classified ‘R18’ by the BBFC. Note that content which is in breach of the Obscene Publications Act or other UK legislation may not be included in an on-demand programme service.

age of eighteen will not normally see or hear it. Service providers should also be aware that the provision of 'R18' material or 'R18'-equivalent content in a manner which allows children to access it may constitute a criminal offence under the Obscene Publications Act 1959 & 1964. See the relevant section of the Crown Prosecution Service Legal Guidance to Prosecutors at http://www.cps.gov.uk/legal/l_to_o/obscene_publications/).

'Material which might seriously impair the physical, mental or moral development of persons under the age of eighteen' may also include the types of material listed below. (This is not intended to be an exhaustive list and is open to review from time to time.):

- *content which is illegal, e.g. criminally obscene or indecent;*
- *content which promotes illegal or harmful activity;*
- *highly sexualised portrayals of children ;*
- *pornographic content which:*
 - *is likely to encourage an interest in sexually abusive activity, for example through the simulation or description of acts of paedophilia, incest or non-consensual sexual activity,*
 - *involves an act which may cause lasting physical harm,*
 - *involves an act of penetration by any object associated with violence or likely to cause physical harm, or*
 - *involves strong physical or verbal abuse.*
- *sexual violence which endorses or eroticises the behaviour with insufficient contextual justification;*
- *portrayals of sadistic violence or torture with insufficient contextual justification;*
- *graphic images of real injury, violence or death presented with insufficient contextual justification.*

Provided the material is not illegal, content which ATVOD considers falls under this Rule (i.e. 'material which might seriously impair the physical, mental or moral development of persons under the age of eighteen') may be made available in an on demand programme service provided access is controlled in a manner which secures that persons under eighteen 'will not normally see or hear' such material.

ATVOD's provisional interpretation of this requirement is that there should be in place an effective Content Access Control System ("CAC System") which verifies that the user is aged eighteen or over at the point of registration or access by the mandatory use of technical tools for age verification and, if age verification does not take place each time the user returns to the service, controls further access to such content when the user returns to the service by the use of mandatory security controls such as passwords or PIN numbers.

Technical tools which may be acceptable for age verification purposes include:

- *Confirmation of credit card ownership or other form of payment where mandatory proof that the holder is eighteen or over is required prior to issue.*
- *A reputable personal digital identity management service which uses checks on an independent and reliable database, such as the electoral roll.*
- *Other comparable proof of account ownership which effectively verifies age.*

Where they are required, CAC Systems must be fit for purpose and effectively managed so as to ensure that in ATVOD's opinion persons under the age of eighteen will not normally see or hear material which "might seriously impair". ATVOD will consider the adequacy and effectiveness of CAC Systems on a case by case basis and keep them under review in the context of on-demand programme services.

As regards who is responsible for any required CAC Systems, including ensuring they are operating effectively, ATVOD's 'Guidance on who needs to notify' explains how to determine the person with 'editorial responsibility' for the on demand programme service."

Importantly, the Guidance included the following footnote in relation to CAC Systems:

"ATVOD will not regard confirmation of ownership of a Debit, Solo or Electron card or any other card where the card holder is not required to be 18 or over to be verification that a user of a service is aged 18 or over."

- 5.2 After its initial assessment of the Service the ATVOD Executive considered that the Service raised issues under Rule 11 and subsequently conducted a full investigation on 21 October 2013. On 25 November 2013 ATVOD issued its preliminary view that on 21 October 2013 the Service Provider was in breach of Rule 11 (Harmful Material: Protection of the Under-18's) in relation to the Service . Video capture evidence of the Service at the time of ATVOD's initial investigation is set out in ANNEX 1 (www.madamecaramel.com) [NOT PUBLISHED], ANNEX 2 [NOT PUBLISHED] and ANNEX 3 (purchased clip from www.clips4sale.com/21346 and preview videos) [NOT PUBLISHED].
- 5.3 In accordance with ATVOD's published procedures, the provider of the service was given 10 working days in which to make written representations to ATVOD.

6. Provider Representations

- 6.1 Between 4-23 December 2013 a number of email exchanges took place between the service provider and ATVOD as follows:
- 6.2 In an email sent to ATVOD on 12 December 2013 the Service provider stated:

"I have now deleted all the material that you deem inappropriate from my website and deleted and disabled all previews from both sites (Madame Caramel and Clips4sale) put a verification page and talking to CCBill so they can all accept credit cards instead of debit cards."

On 23 December 2013, in an email sent to ATVOD the Service Provider stated:

"After lots of waiting and consideration ccbill will make my account only take credit cards now we just waiting for all clients to ben informed and chang their membership so it doesnt cause any problems to the recently subscribers but process should take at least 2 weeks.

Now clips4sale advise them that they spoke with their lawyers in the UK because many other producers have the same problem and said that nothing can be done. So therefore I decided to keep my membership site and continue deleting all that is deemed to be inappropriate as advised per your letter and from now on only shoot soft BDSM."

7. Further Assessment

7.1 ATVOD notes that

The service provider's representations did not dispute the key facts set out in ATVOD's preliminary view or the preliminary finding that the service had been operating in breach of Rule 11 on 21 October 2013

Therefore ATVOD conducted a further investigation on 20 February 2014

8. Further Investigation

8.1 Video capture evidence of the service at the time of ATVOD's further investigation is set out in ANNEX 4 (www.madamecaramel.com) [NOT PUBLISHED] and ANNEX 5 (purchased clip from www.clips4sale.com/21346) [NOT PUBLISHED].

8.2 Since the date of ATVOD's Preliminary View, the following changes appear to have been made to the Service:

Preview videos are no longer available on the outlet www.madamecaramel.com
Preview videos are no longer available on the outlet www.clips4sale.com/21346

8.3 ATVOD notes that although these changes affected the nature of the service at 20 February 2014 they do not alter the facts relating to the service as it stood at 21 October 2013. ATVOD therefore sets out below the nature of the service at both its original and further investigations.

8.4 Nature of the Service and content between 21 October 2013 and 20 February 2014

Across this period the Service offered access to a range of adult fetish videos.

21 October 2013

The ATVOD executive found on 21 October 2013 that entering the URL www.madamecaramel.com into a browser took them to a page which contained a warning; 'If you are not legally able to view adult material pertaining to BDSM, click EXIT. You may only ENTER if you are of legal age to view adult material regarding female supremacy, domination and BDSM in your country of residence'. Above this ATVOD could select from six tabs: 'Members updates', 'Join now', 'Private Session's and 'Contact', 'News' 'Femdom Retreat' and 'Links'. Clicking on the 'Members Updates' tab took ATVOD to a page where still images which appeared to be taken from videos, could be viewed. Scrolling down this page, ATVOD could click on 'next page', which displayed sample videos, clicking on the 'next page' link a few times took ATVOD to pages where further sample videos could be viewed e.g.

- The sample video titled 'Private Rubber Clinic Part 1' lasted for approximately 30 seconds and portrayed strong fetish material e.g. a female mistress inserting

needles into a male's penis (showing blood) whilst the male was strapped onto a bed.

- The video 'Private Practice with Miss Deviant' portrayed two female mistresses and their male 'slave', the fetish activity included a female mistress inserting her fist inside a male slaves' anus.
- The video 'Using the Butler' portrayed Madame Caramel urinating into a male slave's mouth.

One still image was present on the homepage which was considered to be R18. This image was available under the Member's update for 22 October 2013 'Madame Caramel in Evil Nurse', this image portrayed an instrument inserted into a female's genitals.

On 21 October 2013, clicking on the 'clips4sale' link took ATVOD to another version of the service which was available on the 'Clips4sale' platform. This version of the service could also be accessed by entering the URL www.clips4sale.com/21346 into a browser. A warning was displayed stating that users accessing the service are required to be 18 years of age or older. ATVOD could click on 'Enter' or 'Leave'. Clicking on 'Enter' took ATVOD to the homepage for this outlet. The homepage contained videos which could be clicked on for short previews. There were 25 pages of videos. The preview for the video 'Cock Wash' portrays Madame Caramel urinating onto a male's genitals. This video was considered to be R18 equivalent or beyond. Rotating still images were also available which were considered to be R18 equivalent.

As the free to view content on both sites made clear that further content was available to view to subscribers and/or members, on 18 October 2013, ATVOD test purchased a subscription to the main site using a debit card, and on 23 October 2013 purchased an individual video from the clips4sale site. See ANNEX 6 [NOT PUBLISHED].

ATVOD was able to view videos which resembled television programmes on adult linear services. Programmes were 'R18' equivalent (hard-core or strong fetish content appearing in a work the primary purpose of which is sexual arousal or stimulation) or on some occasion stronger containing, for example, explicit sight of strong fetish material which mainly focused on male humiliation techniques. On www.madamecaramel.com the video 'Double Slags' portrayed two females using a dildo at the same time portraying anal penetration. The individual clip 'Evil Nurse' portrays fetish activity in which a ball shaped instrument is used for vaginal penetration.

Ofcom's appeal findings in relation to ODPS containing adult content⁵ confirm that programmes which are more explicit than would be permitted in a UK television broadcast service may be considered television-like in this context. Since content available on the Service included content equivalent to that rated 'R18' by the BBFC and material which would not be classified by the BBFC in any category including R18, its provision falls within the scope of Rule 11. Specifically, ATVOD was satisfied that the content met the high statutory test of material which might "*seriously impair the physical, mental or moral development of persons under the age of*

⁵ <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/DemandAdult.pdf>
<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Climax3Uncut.pdf>

eighteen”, and that ATVOD’s precautionary approach meant an effective CAC System was required.

20 February 2014

Entering the URL www.madamecaramel.com into a browser on 20 February 2014, took ATVOD to a page which required the user to ‘select’ if they were 18/over and agree to this before entering the homepage. The homepage contained 6 tabs, but the ‘Member’s update’ tab which was available on 21 October 2013 had been removed and therefore the preview videos which were available on 21 October 2013 (as above) could no longer be accessed. Instead, the tab titled ‘Watch me’ was available which contained a preview video of Madame Caramel-this video was not considered to be R18 equivalent. In addition to this it appeared that R18 equivalent still images had also been removed and could not be viewed on 20 February 2014.

When accessing the clips4sale store on 20 February 2014, preview videos were not available on the outlet, however rotating images portraying R18 equivalent material could still be viewed. E.g. the rotating images for the video ‘Fucking Machines Everywhere’ portrayed vaginal penetration. See ANNEX 7 [NOT PUBLISHED].

As the free to view content on both sites made clear that further content was available to view to subscribers and/or members, on 20 February 2014, ATVOD test purchased a subscription/membership / individual video using a debit card for further investigation purposes. See ANNEX 8 [NOT PUBLISHED].

The video content available on both sites was ‘R18’ level content as described above at 21 October 2013, and did not appear to have changed in nature since that time.

ATVOD therefore considered how a consumer could access the material and what, if any, CAC Systems were in place.

8.5 Access to content between 21 October 2013 and 20 February 2014

As described above, the Service offered initial ‘conditions’ asking users to confirm or accept that they were at least eighteen years of age by virtue of accessing the service/.

i. Free access to material– no payment

- a. Between 21 October and 20 February 2014 any visitor to the Service could access here stills on the clips4sale store (<http://clips4sale.com/21346>) containing hardcore, ‘R18’ equivalent images, as described above. Section 368 (E) (2) of the Act refers to “***material which might seriously impair the physical, mental or moral development of persons under the age of eighteen***” and draws no distinction between a still and a moving image: the inclusion of such a still image within an ODPS is therefore subject to the same restrictions as those applying to video/ moving images.
- b. On 21 October 2013 a visitor to either the clips4sale site or the Madame Caramel site could access ‘preview’ videos containing hardcore, ‘R18’ equivalent material or stronger.

ii. Paid access to full video catalogue www.madamecaramel.com – subscription

- a. Once an account had been created and a subscription paid, the full catalogue of videos could be viewed.
- b. Subscription could be paid for via one of two online payment processing services, operated by CC Bill. On 21 October 2013 and 20 February 2014 ATVOD used a debit card to purchase a subscription via the 'credit card' option. On 21 October 2013 on-screen text also stated: "For alternative forms of payment including postal order, cheque and Paypal, please contact Madame Caramel to organise", however this text did not appear to be present when purchasing a subscription on 20 February 2014.

iii. Paid access to individual videos on www.clips4sale/21346

- a. Programmes could be purchased individually via an online payment processor, USA E Pay. On 23 October 2013 and 20 February 2014 ATVOD used a debit card to purchase a clip via the 'credit card' option. Two other options were available- Clip Cash and So Fort.

ATVOD then considered whether a person under the age of eighteen could have easily accessed any of the 'R18' equivalent material provided by the Service.

- i. In relation to free access described above, no age verification system was in place and any minor with access to an internet connection could view the material described at i (a) and (b). ATVOD does not consider a voluntary declaration such as that included on the homepage to constitute a CAC System verifying that the user is aged eighteen or over.
- ii. In relation to paid access, the payment system did not constitute a CAC System verifying that the user was aged eighteen or over at the time of registration/subscription, because:
 - a. The payment process used by the Service Provider and operated by CCBill and USA E Pay accepted debit card payments, and no further age verification measures were in place. Since a debit card can be held by a person under the age of eighteen, ATVOD has made clear in guidance that possession of such a card cannot be regarded as confirming age. Any young person with a debit card could access all of the Service's content without being challenged by any age verification process.
 - b. The 'Clip Cash' payment process used by the Service Provider used a pre-paid card. The Clip Cash website states that a customer can 'reload [their] card with all major credit cards or mail in a check, cash or money order'. It appeared that any young person with cash or a bank account in could pay for content on the Service without being challenged by any age verification process.
 - c. The 'Sofort' payment process used by the Service Provider facilitated payment from online bank accounts in ten EU countries including the UK. Again it appeared that nay young person with a bank account in the specified countries could pay for content on the Service without being challenged by any age verification process.

8.6 It is therefore ATVOD's view that

- i. Between 21 October 2013 and 20 February 2014 a person under the age of eighteen could easily access free-to-view 'R18' equivalent material, including still images, unprotected by any form of CAC System or age verification. Prior to 21 December 2013 the Service Provider removed R18 equivalent video material from the Service, however R18 equivalent still images remained free to view on the outlet <http://clips4sale.com/21346> throughout the period 21 October 2013-20 February 2014
- ii. Between 21 October 2013 and 20 February 2014 the Service Provider did not have in place an effective CAC System which verified that the user was aged eighteen or over at the point of registration or access by the mandatory use of technical tools for age verification. Specifically, the "paywall" which can be constructed to exclude under-eighteens from accessing potentially harmful material, could be easily circumvented by minors and could therefore not be regarded as being effective in securing that such persons will not normally see or hear the relevant paid-for material, which included still images and video content.

9. Determination

9.1 ATVOD's view is that between 21 October 2013 and 20 February 2014 the Service included material which might seriously impair the physical, mental or moral development of persons under the age of eighteen and that such material was made available in a manner which failed to secure that persons under the age of eighteen would not normally see or hear it.

9.2 ATVOD's Determination is that

Between 21 October 2013 and 20 February 2014 Madame Caramel was in breach of Rule 11 in relation to free-to-view material on the Service. This breach constitutes an infringement of the statutory requirement set out in section 368E (2) of the Communications Act 2003 ("the Act") which states that "*If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it.*".

Between 21 October 2013 and 20 February 2014 Madame Caramel was in breach of Rule 11 in relation to paid access to material on the Service. This breach constitutes an infringement of the statutory requirement set out in section 368E (2) of the Communications Act 2003 ("the Act") which states that "*If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it.*".

9.3 ATVOD acknowledges that changes were made to the service following the issue of ATVOD's preliminary view on 25 November 2013. Those changes meant that R18 equivalent material (video and still images) was no longer free to view on the outlet www.madamecaramel.com and that R18 equivalent preview videos were no longer

available free to view on the outlet <http://clips4sale.com/21346> . However, the action taken by MADAME CAMEL following receipt of ATVOD's Preliminary View did not bring the Service into full compliance, either in relation to the free to view material or paid material. Furthermore, the action taken does not alter the facts relating to the Service as it existed on 21 October 2013.