

DETERMINATION THAT THE PROVIDER OF THE ON DEMAND PROGRAMME SERVICE “BRA BUSTERS OF BRITAIN” 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: COMPLAINT UPHELD
- ii. BREACH OF RULE 11 (Harmful Material: protection of under-18’s) in relation to subscription material: COMPLAINT UPHELD

The 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

Bra Busters of Britain (“the Service”)

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

www.brabustersofbritain.com

3. Service Provider

MDY Trading Ltd (“the Service Provider”)

4. Introduction

- 4.1 The Service was the subject of a complaint submitted to ATVOD regarding potential breaches of Rule 11. Potential breaches relating to Rule 1 and Rule 4 are dealt with in a separate Determination.
- 4.2 The Service is in ATVOD’s view an On Demand Programme Service (“ODPS”) which offers adult content. It is the subject of a current ATVOD investigation to establish whether the Service Provider has been in breach of its statutory duty to notify the Service to ATVOD as an ODPS.

5. Initial assessment

- 5.1 In view of the fact that ATVOD considers that the Service is an ODPS and is therefore covered by the ATVOD Rules & Guidance¹, the ATVOD Executive

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

considered that the Service may raise 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:

"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.

² <http://www.culture.gov.uk/images/publications/EVletter-to-ed-richards-3aug2011pdf.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

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 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:

the Obscene Publications Act or other UK legislation may not be included in an on-demand programme service.

- *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 13 January 2014. On 17 January 2014 ATVOD issued its preliminary view that on 13 January 2014 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 [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 On 21 January 2014 the service provider submitted representations to ATVOD. Those relating to Rule 11 are as follows:
- *"As for content that is harmful to persons under the age of 18, there was no footage that shows anything other than ladies enjoying themselves. There are far worse videos to see for free in non-controlled websites"*
 - *"We have removed all video content."*

7. Further Assessment

- 7.1 ATVOD notes that the service provider's representations disputed 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 13 January 2014

Therefore ATVOD conducted a further investigation on 5 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 2 [NOT PUBLISHED].
- 8.2 Since the date of ATVOD's Preliminary View, the following changes appear to have been made to the Service:

All video content has been removed.

Therefore, the Service has changed and is longer in breach as it appears to no longer constitute an ODPS. However, it remains ATVOD's view that at 13 January 2014 the Service was in breach of Rule 11, for the reasons set out below:

8.3 Nature of the Service and content at 13 January 2014

The Service offered subscription access to a range of adult videos. The ATVOD Executive found on 13 January 2014 that entering the address above into a web browser took them to an initial page which stated 'this site contains material suitable for an adult audience only' and required ATVOD to 'agree that you are over 18 years old' by clicking on 'enter' rather than 'leave'. Clicking on 'enter' took ATVOD to the homepage of the Service. This page contained 'recent gallery updates' and 'recent video updates' with still images of topless females, exposing their breasts. ATVOD could click on the 'Updates', 'Babes', 'Join' and 'Member login' tabs. The 'Babes' tab contained further still images of the featured models. The home page contained still images under the title 'Recent Gallery Updates' including an image posted on 24 December 2013 'Amber Lee' portrayed a female entering a dildo into her vagina.

As the free to view content made clear that further content was available to view to subscribers and/or members, on 13 January 2014 ATVOD test purchased a subscription/membership using a debit card.

Having obtained membership ATVOD could view videos which resembled television programmes on adult linear services. Video content was 'R18' equivalent (hard-core or strong fetish content appearing in a work the primary purpose of which is sexual arousal or stimulation) containing, for example, explicit sight of clearly un-simulated sexual activity including vaginal penetration with dildos and oral genital contact. Ofcom's appeal findings in relation to ODPS containing adult content⁵ confirm that 'R18' equivalent programmes may be considered television-like in this context.

Although the Service Provider's representations suggest there was "no footage that shows anything other than ladies enjoying themselves", content available on the Service did include content equivalent to that rated 'R18' by the BBFC. Therefore 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 eighteen*", and that ATVOD's precautionary approach meant an effective CAC System was required. This is true regardless of the existence (or otherwise) of equivalent or 'worse' videos on non-regulated websites, as referred to in the Service Provider's representations.

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

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

8.4 Access to content at 13 January 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 some material – no payment

- a. Any visitor to the sites comprising the Service could access here stills 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. Paid access to full video catalogue – 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 an online payment processing service operated by CC Bill. On 13 January 2014 ATVOD used a debit card to purchase a subscription via a 'credit card' option.

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. On 13 January 2014 a person under the age of eighteen could easily access free-to-view 'R18' equivalent material including a still image, unprotected by any form of CAC System or age verification.
- 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 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.

8.5 It is therefore ATVOD's view that

- i. On 13 January 2014 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 material, which included still images and video content.

9. Determination

9.2 ATVOD’s view is that on 13 January 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.

9.1 ATVOD’s Determination is that

On 13 January 2014 MDY TRADING LTD 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.”*

On 13 January 2014 MDY TRADING LTD 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.”*

9.1 ATVOD acknowledges that changes were made to the service following the issue of ATVOD’s preliminary view on 17 January 2014 and that those changes appear to have brought the service into compliance with Rule 11 on or before 21 January 2014. However, the action taken by MDY Trading following receipt of ATVOD’s preliminary view does not alter the facts relating to the Service as it existed on 13 January 2014.