

DETERMINATION THAT THE PROVIDER OF THE ON DEMAND PROGRAMME SERVICE “HARDGLAM” 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

Hardglam (“the Service”)

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

www.hardglam.com
www.bigobjectsluts.com
www.hardcoremachines.com
www.onlycfnm.com
www.slutsincostumes.com
www.ukfacesittingsluts.com
www.ukfootsluts.com
www.ukhardcorefucking.com
www.ukhardcorelesbians.com
www.uknylonsluts.com
www.ukpantiesluts.com
www.smokeymouths.com
www.ukstockingsluts.com
www.watersportssluts.com

3. Service Provider

James Farey (“the Service Provider”)

4. Introduction

- 4.1 The Service is in ATVOD’s view an On Demand Programme Service (“ODPS”) which offers adult content. It is the subject of a concurrent ATVOD Determination that the Service Provider is in breach of the 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 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”

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

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>

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 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

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.

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 between 25-27 February 2014. On 20 March 2014 ATVOD issued its preliminary view that on between 25-27 February 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 ANNEXES 1-14 [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 March the service provider submitted representations by email to ATVOD as follows: "[M]y websites do not offer on demand so I really do not see why I need to pay you anything at all.....Members pay a monthly fee to access my members area which they have been doing for 7 years without having to pay anyone."

7. Further Assessment

7.1 ATVOD notes that the service provider's representations disputed the fact that the Service is an ODPS operating in breach of Rule 11 as set out in ATVOD's

preliminary view. Therefore ATVOD conducted a further investigation between 3-4 April 2014.

8. Further Investigation

8.1 Video capture evidence of the service at the time of ATVOD's further investigation is set out in ANNEXES 15-28 [NOT PUBLISHED].

8.2 The Service appeared to be the same in all material respects as when accessed between 25-27 February 2014 as described below:

8.3 Nature of the Service and content between 25 February and 4 April 2014

The Service offered subscription and free access to a range of adult videos. The ATVOD Executive found between 25-27 February 2014 that entering each of the addresses above into a browser took them to the homepages of the websites. Each homepage contained still images which were video links; each of these links could be clicked on to view a trailer. Each site contained a selection of trailers and still images on its homepage. Each of the websites had one or more trailers which were considered to be R18 equivalent e.g.

- The homepage for www.ukhardcorefucking.com contained a trailer which portrayed vaginal penetration and oral genital contact
- The homepage for www.watersportssluts.com contained a trailer which portrayed females urinating
- The homepage for www.hardcoremachines.com contained a trailer which portrayed vaginal penetration with a machine.

The still images associated with the videos were also considered to be R18 equivalent.

As the free to view content made clear that further content was available to view to subscribers and/or members, between 25-27 February 2014 ATVOD test purchased a subscription/membership using a debit card on www.hardglam.com which allowed access to all 14 sites (as listed above). SEE ANNEX 29 [NOT PUBLISHED].

ATVOD also did a test purchase on 3 April 2014, where the sign up process was the same as at 25-27 February. SEE ANNEX 30 [NOT PUBLISHED].

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, oral genital contact and strong fetish material. Ofcom's appeal findings in relation to ODPS containing adult content⁵ confirm that 'R18' equivalent programmes may be considered television-like in this context. Examples included:

- The member's area for www.watersportssluts.com contained videos which portrayed female masturbation and urination. The video titled 'Both girls create a pool of piss and kiss' portrayed two females kissing and urinating.

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

The video also portrayed a female licking the other female's urine. This material was considered to be R18 equivalent or beyond.

- The member's area for www.ukhardcorefucking.com contained the video 'Keisha Kane and Elizabeth Michelle sharing is caring'-this video portrayed sexual activity between two females and a male, the sexual activity included vaginal penetration and oral-genital contact. This material was considered to be R18 equivalent.
- The member's area for www.hardcoremachines.com contained the video 'Keisha Kane loves to get fucked in doggy, getting her pussy pounded by every inch of the cock' this video portrayed vaginal penetration with a machine. This material was considered to be R18 equivalent.

Since content available on the Service included content equivalent to or stronger than that rated 'R18' by the BBFC 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.

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

8.4 Access to content between 25 February 2014 and 4 April 2014

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 368E (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. Furthermore, any visitor could access 'preview' videos containing hardcore, 'R18' equivalent material.

ii. 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 one of eight online payment processing services. On **25 February 2014** and **3 April 2014** ATVOD used a debit card to purchase a subscription via the 'credit card' option operated by Epoch. The other seven options included; Pay by SMS Billing, Pay by Phone (US Only), Pay by US only check, Pay by EU bank account, Euro Bank Debit (Germany, Netherlands, Austria only), Pay by Paypal and Pay by post. Upon clicking on the 'Pay by Phone US Only' option it appeared that this service was not available at the time of ATVOD's investigation.

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) above without restriction.
- 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.
 - b. The payment process used by the Service Provider also featured a US 'online check' service, which did not require a credit card. It appears that any young person with a bank account in the US could access all of the Service's content without being challenged by any age verification process.
 - c. The payment process used by EPOCH also offered payment via Paypal. Although Paypal's terms and conditions stated that users are required to be eighteen or over, no evidence is required to prove that a user is eighteen or over. Therefore, ATVOD does not consider this to be an adequate age verification system.
 - d. The service also offered payment via EU bank account, which did not require proof of age. It appears that any young person with a bank account in the EU could obtain a subscription and access all of the Service's content without being challenged by any age verification process.
 - e. The Service also offered payment via SMS Billing-it appears that any young person could use this payment option without providing proof of age.
 - f. The service also offered payment via Euro Bank debit (Germany, Netherlands and Austria only) it appeared any young person in Germany, Netherlands and Austria could obtain a subscription and access all of the Service's content without being challenged by any age verification process.
 - g. The service also offered payment via 'Post' making payment via cheque and posting it to the UK address provided-it appears that any young person could send a cheque and pay by post and gain access to all of the Service's content without being challenged by any age verification process.

8.5 It is therefore ATVOD's view that

- i. Between 25 February 2014 and 4 April 2014 a person under the age of eighteen could easily access free-to-view 'R18' equivalent material, including still images and video, unprotected by any form of CAC System or age verification
- ii. Between 25 February 2014 and 4 April 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 25 February 2014 and 4 April 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 25 February 2014 and 4 April 2014 Mr Farey 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 25 February 2014 and 4 April 2014 Mr Farey 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.*".