

**DETERMINATION THAT THE PROVIDER OF “SHEBANG TV” IS IN BREACH OF ATVOD’S RULES 1 & 4 AND THEREBY HAS CONTRAVENED SECTION 368BA (REQUIREMENT TO NOTIFY AN ON-DEMAND PROGRAMME SERVICE) AND SECTION 368D(3)(ZA) (REQUIREMENT TO PAY A FEE) OF THE COMMUNICATIONS ACT 2003**

**1. Summary of final determination**

- i. BREACH OF RULE 1 (Requirement to notify a service): ESTABLISHED BY ATVOD INQUIRY. This breach constitutes an infringement of the statutory requirements set out in section 368BA of the Communications Act 2003 (“the Act”).
- ii. BREACH OF RULE 4 (Requirement to pay a fee): ESTABLISHED BY ATVOD INQUIRY. This breach constitutes an infringement of the statutory requirements set out in section 368D(3)(za) of the Communications Act 2003 (“the Act”).

**2. Service**

SheBang TV (“the Service”)

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

<http://shebang.tv>

<http://clips4sale.com/shebang-live-shows>

**3. Service Provider**

Digital One Media Limited (“the Service Provider”)

**4. Background**

- 4.1 The Audiovisual Media Services Regulations 2010 came into force on 18 March 2010, introducing additional provisions into the Act in relation to video on-demand services. Section 368BA of the Act requires that every provider of an On-Demand Programme Service (“ODPS”), as defined in section 368A of the Act, must notify the appropriate regulatory authority of its intention to provide the service. For an ODPS which was already being provided on 18 March 2010, notification should have been made before 30 April 2010. For an ODPS beginning after 18 March 2010, notification should have been made before the service began. Section 368D(3)(za) requires that a provider of an ODPS must pay to the appropriate regulatory authority such fee as that authority may require under section 368NA of the Act.
- 4.2 The Authority for Television On Demand (“ATVOD”) has been designated as the appropriate regulatory authority for editorial content in an ODPS and also for

determining whether the provider of an ODPS has complied with its obligation to notify<sup>1</sup>.

## **5. Introduction**

5.1 ATVOD wrote to the Service Provider on 15 January 2013 informing them of the statutory obligation to notify provision of an ODPS, and setting out the statutory criteria which define an ODPS. We advised them to refer to ATVOD's 'Guidance on who needs to notify' which is available on our website ([www.atvod.co.uk](http://www.atvod.co.uk)) and to seek legal advice if appropriate.

## **6. Initial Assessment**

6.1 After its initial assessment of the Service the ATVOD Executive considered that the Service raised issues under Rules 1 and 4 and subsequently conducted a full investigation on 14 July 2014 and 6-8 October 2014. Having applied the statutory criteria to the Service, ATVOD wrote to the Service Provider on 9 October 2014 stating that we had come to a preliminary view that the Service was an ODPS in respect of which a notification has not been given and in respect of which a fee has not been paid, and that ATVOD's preliminary view was that the Service Provider was in contravention of sections 368BA (Requirement to notify an ODPS) and 368D(3)(za) (Requirement to pay a fee) of the Act. Video capture evidence of the service at the time of ATVOD's initial investigation is set out in ANNEXES 1-3 [NOT PUBLISHED].

6.2 In accordance with our powers under section 368BB(1) of the Act, we invited the Service Provider to make representations within 10 working days.

## **7. Provider Representations**

7.1 Between 14 October - 28 October 2014 the Service Provider engaged in telephone calls with ATVOD staff and the representations can be as summarised as below:

- Service provider did not dispute responsibility for the Service
- Service Provider listed various changes he will make to the Service in relation to ATVOD's Rule 11 and expressed that once these changes have been made a notification to ATVOD will follow.

ATVOD staff informed the Service Provider that if he agrees that he is providing an ODPS, he should notify the Service to ATVOD to ensure compliance with ATVOD's Rule 1 & 4, and that this can still be done whilst making his Service compliance with Rule 11.

## **8. Further Assessment**

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/amended-designation.pdf>

- 8.1 ATVOD notes that the service provider's representations did not dispute the key facts set out in ATVOD's preliminary view that the service had been operating in breach of Rules 1 and 4 on 9 October 2014.

Therefore ATVOD conducted a further investigation between 11-12 November 2014.

## **9. Further Investigation**

- 9.1 Video capture evidence of the service at the time of ATVOD's further investigation is set out in ANNEXES 4-6 [NOT PUBLISHED].

- 9.2 The Service appeared to be the same in all material respects as when accessed on 14 July 2014 and 6-8 October 2014 as described below with the exception of 'padlock' images appearing in front of thumbnails to obscure still images of hard-core activity.

### **9.3 Application of s368A(1) at the relevant dates 14 July, 6-8 October and 11-12 November 2014**

Having applied the statutory criteria to the service named above ("the Service"), ATVOD has determined that the Service is an ODPS in respect of which a notification has not been given and in respect of which a fee has not been paid, in contravention of sections 368BA (Requirement to notify an ODPS) and 368D(3)(za) (Requirement to pay a fee) of the Act. This is because the Service fulfils each of the relevant criteria set out in section 368A(1) of the Act as follows:

- (a) *its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;*

#### **Are there TV-like programmes?**

The Service does contain programmes the form and content of which are comparable to that of programmes normally included in television programme services. The site contains catch-up recordings of live shows, ranging from 15 to 30 minutes in duration. Although the programmes did not feature credits to cast and crew, in this regard they are directly comparable with programmes shown on some broadcast adult channels, for example XXXCESS. The programmes on the Service consist of sexual activity portrayed in various settings. They display relatively high production values, with strong elements of staging and professional lighting creating a TV like experience. Indeed, these programmes derive from programmes originally aired in a linear context.

The programmes feature 'hard-core' pornographic material - Ofcom's appeal findings in relation to ODPS containing adult content confirm that R18 equivalent programmes may be considered television like in this context.

Typical examples included the following:

*Harmony, Loulou & Jonny Cockfill 6 July 2014*

This programme lasted for 25 minutes and 14 seconds and portrayed oral-genital contact and vaginal intercourse between two females and a male.

*Tina Kay & Monty Cash Clip 6 5 July 2014*

This programme lasted for 21 minutes and 38 seconds. The video portrayed oral-genital contact and vaginal intercourse between a male and female.

*T wins Bonnie (clips4sale store)*

This programme lasted for 8 minutes and 55 seconds. The video portrayed vaginal penetration and oral-genital contact between two females. The screen had the 'www.shebang.tv' logo displayed on the bottom right.

Is there a service with the provision of these TV-like programmes as its principal purpose?

It is ATVOD's view that the Service comprises the whole of the website. The website as a whole has a consistent look and feel throughout, with strong thematic links between different types of content on each site. There appears to be a single homepage offering access to various types of material.

ATVOD believes the principal purpose of the Service is the provision of TV like videos as described above. Video content is prominent on the Service, with a trailer which plays automatically on the homepage. The tagline at the top of the homepage reads 'Interact with porn-stars daily, over 6394 hours of exclusive video, watch live & on demand over 200 active models.' The site also advertises that all videos are available in HD.

One of the primary benefits of a subscription to the Service was access to a large amount of videos. There are several subscription options available to users, with emphasis on 'on demand' video content. For example the 'standard' subscriptions allow access to live shows but the 'platinum' subscriptions allow access to live shows and live recordings.

ATVOD acknowledges that photos and live shows are also available on the Service. However, there is a substantial video on demand offering, which is separately catalogued and indexed (e.g. into categories such as 'anal' and 'fisting') providing a standalone viewing experience, that is not ancillary to any other offerings on the site. The video on demand content is available to users at all times with a subscription whereas the live shows are scheduled and can only be viewed on certain days and times and are not as frequent as the on demand content.

The presence of the clips4sale store as an outlet for the service also emphasises the significance of the video offering. With approximately 30 videos, the primary benefit of this store is access to videos which appear to be the live show recordings.

*(b) access to it is on-demand;*

Programmes on the Service can be watched at a time of the viewer's choosing and are received by the viewer by means of an electronic communications network.

*(c) there is a person who has editorial responsibility for it;*

The programmes on the Service have been selected and organised into a coherent catalogue of viewing options with a distinct editorial proposition.

*(d) it is made available by that person for use by members of the public; and*

The Service is made available on the open internet. Anyone with access to the internet / and who obtains the necessary subscription can view the programmes.

*(e) that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive.*

The '2257 Compliance Statement' on the website lists Digital One Media, this company has its registered office address at 29 Leather Lane, London, EC1N 7TE. We also note that previously the 2257 compliance statement also listed 29 Leather Lane, London, EC1N 7TE. ATVOD also notes that the 'Terms' page lists the UK address PO Box 12106, Epping, CM16 9EE as keeping the 18 USC 2257 Compliance Statement records. Furthermore the 'Affiliate Terms' page lists that the any agreement will be '...construed in accordance with, governed in all respects by, the laws of the United Kingdom'.

## **10. Determination**

10.1 ATVOD's view is that between the relevant dates: 14 July, 6-8 October and 11-12 November 2014 the Service was an ODPS in respect of which a notification was not given, and in respect of which a fee was not paid.

### **10.2 ATVOD's Determination is therefore that**

Between the relevant dates (14 July, 6-8 October and 11-12 November 2014) **DIGITAL ONE MEDIA was in breach of Rule 1 in relation to the Service.** This breach constitutes an infringement of the statutory requirement set out in section 368BA (Requirement to notify an ODPS)

Between the relevant dates (14 July, 6-8 October and 11-12 November 2014) **DIGITAL ONE MEDIA was in breach of Rule 4 in relation to the Service.** This breach constitutes an infringement of the statutory requirement set out in section 368D(3)(za)(Requirement to pay a fee) of the Act.