

DETERMINATION THAT THE PROVIDER OF THE ON DEMAND PROGRAMME SERVICE “SPEEDY BEE” 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

Speedy Bee (“the Service”)

ATVOD REFERENCE ODPS00285

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

www.hotmaturetrisha.com
www.trishasfriends.com
www.auntietrisha.com
www.dirtydoctorsvideos.com

3. Service Provider

Mr Gary Beaumont (“the Service Provider”)

4. Introduction

- 4.1 The Service is a notified On-Demand Programme Service (“ODPS”) the content of which is described by the Service Provider as ‘R18 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

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

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

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:

- 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 2 January 2014. On 17 January 2014 ATVOD issued its preliminary view that on 2 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 Annexes 1-3 [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 26 January 2014 the service provider submitted representations to ATVOD which can be summarised as:
- 6.2
- All 'R18' trailers on www.hotmaturetrisha.com and www.trishasfriends.com have been disabled
 - 'R18' content from preview videos on www.dirtydoctorvideos.com has been removed, and there are no 'R18' equivalent stills.
 - The service provider has installed an 'Adults Only Age Verification' system <http://codecanyon.net/item/adults-only-age-verification-system/2455390>
 - Their first payment processor 'CCBill' accepts only credit cards
 - The service provider has contacted EPOCH to remove all payment options except 'credit card' payments

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 2 January 2014. Therefore ATVOD conducted a further investigation on from 19 February 2014 to 5 March 2014.

8. Further Investigation

- 8.1 ATVOD notes that parts of the Service were still accepting debit cards on 19 February 2014 and 24 February 2014 (via CCBill). As Mr Beaumont was in contact with ATVOD, he was informed of this informally in order to expedite the introduction of an effective CAC mechanism. ATVOD proceeded to investigate the service between 4-5 March 2014.

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

- 8.3 Since the date of ATVOD's Preliminary View, changes appeared to have been made to the Service so that users under the age of 18 were no longer able to access R18 equivalent material which appeared behind the 'paywall'. However, it remains ATVOD's view that at 2 January 2014 the Service was in breach of Rule 11, and that the Service continued to be in breach of Rule 11 on 5 March 2014, for the reasons set out below:

8.4 Nature of the Service and content at 2 January 2014 and 5 March 2014

2 January 2014

The Service offered subscription and free access to a range of adult videos. The ATVOD Executive found on 2 January 2014 that entering www.hotmaturetrisha.com or www.trishasfriends.com into a web browser took them to a warning page, describing the content and that you must be over 18 to enter the website. ATVOD had the option to click on ENTER or EXIT. Clicking on ENTER took ATVOD to the homepages of the websites.

The 'free tour' sections for each www.hotmaturetrisha.com and www.trishasfriends.com contained stills and trailers, some of which contained explicit images of real sexual activity. These trailers were considered to be R18 equivalent e.g.

- Vaginal intercourse is portrayed in the video 'Hot Fuck' on www.hotmaturetrisha.com
- Vaginal penetration with a sex toy is portrayed in the video 'Playing on the bed' on www.trishasfriends.com
- The trailer for 'At Home With Mrs Robinson' portrayed vaginal penetration on www.dirtydoctorsvideos.com (<http://www.dirtydoctorsvideos.com/video/at-home-with-mrs-robinson-690.html>)

Entering www.dirtydoctorsvideos.com into a web browser took the ATVOD executive directly to the homepage of the service which contained multiple free sample videos and some hardcore (R18 equivalent) stills e.g. the 'The Landlord' contained still images portraying oral genital contact.

As the free to view content made clear that further content was available to view to subscribers and/or members, on 2 January 2013, ATVOD test purchased a subscription/membership to the 'Trisha' sites (one subscription) and a separate subscription to the 'Dirty Doctors' site, both using a debit card.

The members section of Hot Mature Trisha and Trisha's Friends allowed ATVOD to browse and select videos which were considered to be R18 equivalent. The 'Dirty Doctors Videos' allowed ATVOD to select videos from categories e.g. 'anal play', 'blow jobs', 'fucking' and 'fur fetish'.

Having obtained membership, on all three sites 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 anal penetration and oral genital contact e.g. the video 'Welcome to Paradise' on www.dirtydoctorsvideos.com portrayed oral-genital contact and vaginal penetration, the video 'A Good Fucking' on www.hotmaturetrisha.com portrayed vaginal intercourse, the video 'What to do on A Saturday Afternoon' on www.trishasfriends.com portrayed oral-genital contact and vaginal penetration. Ofcom's appeal findings in relation to ODPS containing adult content⁵ confirm that 'R18' equivalent programmes may be considered television-like in this context.

Since content available on the Service included content equivalent to 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.

5 March 2014

The ATVOD executive found on 5 March 2014 that entering the following URLs www.hotmaturetrisha.com, www.trishasfriends.com again took ATVOD to a warning page. Entering www.dirtydoctorsvideos.com no longer took ATVOD directly to the web page but now took ATVOD to a warning page, describing the content and stating that you must be over 18 to enter the website. ATVOD had the option to click on ENTER or EXIT. Clicking on ENTER took ATVOD to the homepages of the websites.

The 'free tour' sections for www.trishasfriends.com still contained trailers. These trailers had been edited to obscure some explicit images of real sexual activity. However, other explicit images of real sexual activity were not adequately obscured and could still be viewed. These trailers were therefore considered to be R18 equivalent e.g.

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

- On www.trishasfriends.com the preview videos 'Naughty Nurse-Pandora' and 'Claire and Sookie' portrayed fellatio and vaginal penetration

The preview videos on www.dirtydoctorsvideos.com and www.hotmaturetrisha.com were not considered to be R18 equivalent at this time.

As the free to view content made clear that further content was available to view to subscribers and/or members, on 4 March ATVOD attempted to purchase a subscription/membership using a debit card, but was unable to do so.

During ATVOD's further investigation, Mr Beaumont confirmed that he would like the outlet <http://auntietrisha.com> added to his current ATVOD notification. The outlet did not contain any free R18 equivalent material and was part of the 'Trisha' subscription package that could only be purchased via credit card. See Annex 7.

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

8.5 Access to content at 2 January 2014 and 5 March 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 website.

i. Free access to some material – no payment

- a. On 2 January 2014 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. Between 2 January- 5 March 2014 any visitor could access a 'preview' video containing hardcore, 'R18' equivalent material.

ii. Paid access to full video catalogue – subscription – 2 January 2014

- a. Once an account had been created and a subscription paid, the full catalogue of videos could be viewed.
- b. On 2 January 2014 subscription could be paid for via one of four online payment processing services operated by EPOCH (in the case of Dirty Doctor's Videos) or an online payment processing service operated by CCBill (in the case of Hot Mature Trisha and Trisha's Friends). On 2 January 2014 ATVOD used a debit card to purchase a subscription to 'Dirty Doctor's Videos' via the 'credit card' option, and a joint subscription to the 'Trisha' sites, also via the 'credit card' option. On 19 and 24 February 2014 ATVOD purchased subscriptions to the 'Trisha' sites via the CCBill 'credit card' option. By 4 March 2014 subscription could be purchased only via Epoch, debit cards were not accepted, and payment options other than credit cards had been removed.

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. 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 used from 2 January to 24 February 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 as at 2 January also allowed users to sign up using 'PayPal', 'UKash' and 'paysafecard', UKash and Paysafecard are alternative online payment methods which allow use of cash to shop online. The UKash website states that 'consumers do not need to hold a payment card or register to use the service'. The Paysafecard website states that the card allows 'online payments without the need to enter personal information or bank or credit card details'. It would appear that a young person under eighteen would be able to use these methods to access the Service's content without being challenged by any age verification process. Although Paypal terms and conditions state 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.

8.6 It is therefore ATVOD's view that

- i. Between 2 January – 5 March 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 2 January 2014 and 24 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 2 January-5 March 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 2 January- 5 March 2014 GARY BEAUMONT 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 2 January-24 February 2014 GARY BEAUMONT 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 17 January 2014 and that those changes meant that by 4 March 2014 users under the age of 18 were no longer able to access R18 equivalent material on the Service which appeared behind the 'paywall'. However, the action taken by Mr Beaumont following receipt of ATVOD's preliminary view did not bring the Service into full compliance in relation to the free to view material, and furthermore does not alter the facts relating to the Service as it existed between 2 January and 24 February 2014.