

Ofcom Content Sanctions Committee

Consideration of	Playboy TV UK/Benelux Limited
For	Programme Code breaches in showing R18 version material in breach of sections 1.1 and 1.4(d) of Ofcom's Programme Code (and taking into account breaches of section 1.4 (c) of the Programme Code in relation to encrypted and unencrypted promotional material transmitted before 21:00 on 30 April and 2 May 2004 respectively)
On	1 May 2004
Decision to Fine	£25,000

Summary of Decision

For the reasons given in full in the Decision set out below, Ofcom found as follows:

- 1** Playboy TV UK/Benelux Limited ("Playboy TV UK") is licensed by Ofcom to run the satellite service Playboy TV. It transmits adult material, encrypted and available only to subscribers. It also transmits promotional material, free to air.
- 2** On 1 May 2004 at 00:08, Playboy TV UK broadcast encrypted material of an R18 version film in breach of the absolute prohibition in Ofcom's (ex-ITC) Programme Code ("the Code"). Section 1.4 (d) of the Code states, in relation to feature films and other acquired material, that "No 'R18' version should be transmitted at any time". Section 1.1 is the general

requirement for broadcasters not to offend. Playboy TV UK admitted that the material transmitted was an 'R18' version and that the breaches were serious. Ofcom had recorded the breaches of the Programme Code. The matter was also referred to Ofcom's Content Sanctions Committee ("the Committee") for consideration of a statutory sanction. The Committee heard representations from Playboy TV UK before deciding whether to impose a sanction.

- 3 Ofcom viewed the Code breaches as serious. The rule prohibiting the broadcast of 'R18' version material is an absolute. The material was not borderline, but very clearly breached the Code. Playboy TV UK admitted it was of a standard that is prohibited under the Code for transmission at any time, whether encrypted or not. According to Playboy TV UK the compliance failure was the result of human error. However, the Committee believed it also indicated a failure in Playboy TV UK's management to institute adequate training and operational procedures necessary to avoid such breaches of the Code.
- 4 The Committee took into account as aggravating the seriousness of the Code breaches relating to the R18 material, the fact that these breaches occurred on just one of several separate occasions over a period of three days (from 30 April to 2 May 2004) when Playboy TV UK committed other breaches of the Code. On 30 April, it had broadcast images in pre-watershed promotional and other material, which though encrypted, were of an 18 standard (equivalent to BBFC 18 certificate standard), in breach of section 1.4 (c) of the Code which provides that this material should only be broadcast after 10pm. On 2 May, Playboy TV UK also broadcast promotional material on a free to air (unencrypted) basis at 20:21 which was more explicit than would be acceptable under the Code, also in breach of section 1.4 (c).
- 5 The free to air material was, in particular, insufficiently protective of the interests of children. Any broadcaster licensed to transmit adult encrypted material which is restricted to subscribers but has free to air promotions, has an obligation to ensure that no sexually explicit material is shown even inadvertently in free to air promotions. For the avoidance of doubt, Ofcom wishes to make it clear that any such infringement is not to be tolerated.

- 6 Ofcom took into account as mitigating the breaches Playboy TV UK's frank admission that it had breached the Code and the contrition it expressed and the fact that all but one of the breaches occurred under encryption. The Committee also noted Playboy TV UK's acceptance that it was appropriate to consider a financial penalty in respect of these breaches.
- 7 Taking all these matters into account, the Committee determined that the Code breaches in respect of the R18 material were so serious that a sanction by way of a financial penalty was necessary. It concluded that in view of the seriousness of the infringement and taking into account all the circumstances, an appropriate fine was £25,000 payable to Ofcom for forwarding to The Treasury.

Decision

The need to consider sanctions

- 1 Playboy TV UK Benelux Ltd ("Playboy TV UK") is licensed by Ofcom to run the service known as Playboy TV as a television service transmitting adult material in encrypted form to subscribers. Ofcom has a statutory duty to set standards in its Code. The licence requires Playboy TV UK to comply with the Code. It must therefore ensure that no R18 version material is included in its service at any time.
- 2 On 1 May 2004 at 00:08, Playboy TV UK broadcast under encryption, R18 version material which is prohibited under the Code. It showed extremely graphic images of real sexual activity including close-ups of genital penetration.
- 3 Playboy TV UK readily admitted that this material as broadcast that evening infringed Ofcom's Programme Code in force at the time under the Communications Act 2003, section 319 and Schedule 18, paragraph 43 and in particular, the provisions of that Code, sections 1.1 (The General Requirement for Taste and Decency) and 1.4 (d) (Prohibition of "R18" material).

- 4 Ofcom accordingly found Playboy TV UK in breach of the Code and referred the matter for consideration of sanctions to the Ofcom Content Sanctions Committee (“the Committee”).
- 5 The Ofcom Content Sanctions Committee met to hear the submissions of Playboy TV UK before considering whether to impose sanctions on it for breaching the relevant Programme Code.

Relevant considerations

- 6 The Committee regards the admitted breaches of the Code as serious given the breaches were in relation to material that carries an absolute prohibition in the Code. The material, though not extreme in nature, was not a borderline example of what could or could not be broadcast in the UK, but a very clear breach of the relevant provisions of the Code.
- 7 The Committee noted Playboy TV UK’s representations that the transmission of this material was inadvertent rather than deliberate, had been admitted straightaway, was due to human error at a time when the channel was running two systems concurrently – they were transferring from an analogue tape based system to a digital playout system - and would not, if at all possible, be repeated. Playboy TV UK asked Ofcom to note that the transmission of the R18 version was after midnight and under (PIN) encryption and consequently there would have been minimal harm or offence caused. The Committee equally noted the assurances given on behalf of Playboy TV UK that they had not profited from the breach, had taken it extremely seriously and that a new digital compliance system was being put in place which would avoid, so far as possible, any recurrence of such a breach. The Committee was not able to determine whether the transmission of the material was deliberate. But even if it was not, the broadcaster was certainly negligent in permitting such a serious breach and should be sanctioned.
- 8 Having heard Playboy TV UK’s submissions, the Committee concludes that the cause of the confusion was the broadcaster’s lack of appropriate compliance procedures. This was evidenced by a failure to undertake an effective scheme of reviewing material as and when it was being broadcast so that the error was immediately detected and immediately

corrected. The Committee was further concerned, as acknowledged by Playboy TV UK, that the breaches occurred less than two weeks after the channel was specifically reminded, by Ofcom, of the boundaries in which they had to operate.

- 9** Moreover, these were not the only breaches that occurred around that time. On 30 April 2004, Playboy TV UK transmitted pre-watershed promotional and other material under encryption that was of an “18 (BBFC) standard” in breach of the Code. On 2 May 2005, Playboy TV UK broadcast free to air (unencrypted) and pre-watershed, promotional material that was also of an “18 (BBFC) standard”. The transmission of this material very clearly breached the Code and gave the Committee further cause for concern. In particular, the free-to-air (unencrypted) promotional material was far too graphic and sexually explicit to be acceptable, pre-watershed, under the Code. Ofcom has a statutory duty pursuant to the Communications Act 2003, section 319 to set standards calculated to secure that persons under the age of 18 are protected, as well as having regard, where relevant, to likely audience expectations. Such clear infringements are not to be tolerated and the Committee was entitled to take these additional infringements into account as an aggravating circumstance relevant in considering what level of statutory sanction should be imposed for the infringements on 1 May 2004. Ofcom’s Outline Procedures for Statutory Sanctions in Content Cases (a copy of which was sent to Playboy UK TV before the hearing), clearly states that Ofcom will impose a statutory sanction not only if it believes that a broadcaster has deliberately or seriously breached the terms of its licence conditions or Ofcom’s statutory Codes, but also if Ofcom believes that it has done so repeatedly.
- 10** The Committee accepts and also takes into account the contrition expressed on behalf of Playboy TV UK and its representations as to the steps it was taking to improve its compliance systems including taking on additional staff. However, Playboy TV UK’s representations were not entirely clear about exactly how many new staff were available to conduct compliance work.
- 11** Moreover, the Committee noted that no mention of the Code was made at the hearing when Playboy TV UK was describing its training programme

for improved compliance systems. The Committee remains concerned that Playboy TV UK may still lack full and formal compliance training routines and effective procedures to prevent, or failing that, to detect and correct mistakes being made that occur through human error.

Appropriate sanction

- 12** Taking all of the above considerations into account, including Playboy TV UK's admission of each of these breaches and its acceptance that the breaches relating to the R18 version material were sufficiently serious to merit consideration of a financial penalty, the Committee determines that a sanction by way of a fine is necessary. Any greater sanction by way of revoking the licence is not thought appropriate given the breaches over the 3 day period were over a relatively short period and have not been repeated to date.
- 13** By the Communications Act 2003, section 237(3), a financial penalty for Playboy TV UK in this case may not exceed the greater of £250,000 or 5 per cent of Playboy TV UK's qualifying revenue for the relevant period. Once received by Ofcom, any fine is forwarded to The Treasury.
- 14** On the view the Committee took of the seriousness of the Code breaches that had occurred and of all the other considerations mentioned above, the Committee considered a financial penalty of £25,000 was appropriate. The amount reflects Ofcom's concern that a licensee breached an absolute prohibition in the Code and was aggravated in particular, by the transmission of adult material, free to air and before the watershed.

Conclusion

- 15** For seriously breaching the Code by breaching the absolute prohibition on transmitting R18 version material in its Playboy TV service on 1 May 2004 and taking into account the other two breaches, and in particular, the breach of the free to air (promotional) material, Playboy TV UK is fined £25,000.

Content Sanctions Committee

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10 February 2005