

Ofcom Content Sanctions Committee

It is Ofcom policy to state the full language used on air by broadcasters who are the subject of a sanction adjudicated upon by the Content Sanctions Committee where it is relevant to the case. Some of the language used in this decision may therefore cause offence.

Consideration of sanction against: Portland Enterprises (C.I.) Limited (“the Licensee” or “Portland”), in respect of its service Television X – The Fantasy Channel (“TVX” or “the Channel”).

For: Breaches of Ofcom’s Broadcasting Code (“the Code”) in respect of:

Rule 1.24: “Premium subscription services and pay per view/night services may broadcast ‘adult-sex’ material between 2200 and 0530 provided that in addition to other protections:

- there is a mandatory PIN protected encryption system, or other equivalent protection, that seeks satisfactorily to restrict access solely to those authorised to view; and
- there are measures in place that ensure that the subscriber is an adult”;

Rule 1.25: “BBFC R18-rated films or their equivalent must not be broadcast”;

Rule 2.1: “Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material”; and

Rule 2.3: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...Appropriate information should also be broadcast where it would assist in avoiding or minimising offence”.

On: 8 June 2007.

Decision: To impose a financial penalty on Portland of **£25,000** (payable to HM Paymaster General).

Summary

- 1.1 For the reasons set out in section 8, under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee ("the Committee"), the Committee decided to impose a statutory sanction on Portland. This is in light of the seriousness of the Licensee's failure to ensure compliance with the Code in its service *Television X*.
- 1.2 TVX is an adult-sex channel operated by Portland. It broadcasts programmes between 22.00 and 05.30 listed within the 'adult' section of the Sky Electronic Programme Guide ("EPG"). Although all of its main programmes are broadcast under PIN encryption, the channel transmits a number of ten minute 'free-to-air' (i.e. unencrypted) promotional trailers. Some of the main programmes and trailers are broadcast 'live', featuring scantily dressed or naked female presenters (known as 'babes'). The trailers are used to encourage viewers to subscribe to the encrypted, pay-TV output.
- 1.3 Ofcom received complaints about the over explicit sexual nature of output broadcast on TVX during both encrypted and free-to-air elements on 8 June 2007 from 22:00. This was during a live 'babe' programme. The complaints, from competitor broadcasters, suggested some of the encrypted output was equivalent to material that would be classified as 'R18' by the British Board of Film Classification ("the BBFC").
- 1.4 The material transmitted under PIN encryption on 8 June 2007 between 22.10 and 22.40 featured two naked female presenters engaging in very explicit sexual acts. This included: frequent and prolonged masturbation, shown in close-up; explicit scenes of oral sex; and explicitly depicted scenes of vaginal penetration by fingers and dildos.
- 1.5 The ten minute free-to-air trailer transmitted immediately prior to the encrypted output on the same night (8 June 2007) featured the same presenters. During this section one of the 'babes' removed her knickers and was then depicted in relative close up touching and being touched between her legs. Labial detail was apparent. Throughout, the 'babes' invited viewers to subscribe to the encrypted service using explicit language, such as: "...I can't wait to bring my head in between those luscious thighs and get sucking on that juicy pussy!" and "...If you wanna see me fucking this pussy I've got all kinds of toys.... that you can see me fucking Tiffany with...."
- 1.6 The Licensee immediately accepted that part of the live programme transmitted on 8 June 2007 from 22:10 breached Rule 1.25 of the Code i.e. it was the equivalent of 'R18'-rated material. The transmission of content equivalent to BBFC-rated 'R18'-rated material is not permitted under Rule 1.25 of the Code. It is the strongest sexual material legally available in the UK and can only be purchased from licensed adult sex shops, by people over the age of 18. Portland also accepted that the images broadcast during the free-to-air promotional trailer were in breach of the Code. However, they did not accept that the language during the free-to-air promotional trailer breached the Code.
- 1.7 Ofcom concluded that the material broadcast on 8 June 2007 between 22.10 and 22.40 was equivalent to 'R18' content because of the sexual explicitness detailed above (paragraph 1.4 above). It therefore recorded that the broadcast was in breach of Rule 1.25 of the Code. Ofcom also decided that

the material broadcast on 8 June 2007 between 22.00 and 22.10 was so explicit, especially the visual images, that it was 'adult-sex' material. Accordingly Rule 1.24 applied, which meant it should have been broadcast under encryption. Since however this material was not protected by encryption and other measures required by Rule 1.24, it contravened this Rule. In view of this material being shown free-to-air, the Executive also decided that it breached Rules 2.1 and 2.3. These require broadcasters to protect viewers from material that is harmful or offensive and which cannot be justified by the context. In Ofcom's view, the breaches were sufficiently serious that the case should be referred to the Committee for consideration of a statutory sanction.

- 1.8 The Committee decided that the case was sufficiently serious to be considered for a statutory sanction. Portland made both written and oral representations, all of which the Committee took into account
- 1.9 After considering all the evidence and all the representations made to it, the Committee decided that the breaches of the Code by TVX were sufficiently serious to attract a financial penalty.
- 1.10 The broadcast free-to-air of content depicting presenters engaged in explicit sexual activity, such as masturbation, and which contains insufficient editorial justification for the inclusion of such images, is totally unacceptable. It has the potential to cause offence to the audience and harm to under-eighteens, and children in particular. Similarly, the showing of 'R-18'-rated material at any time on an encrypted channel is also unacceptable and a serious breach of the Code. Broadcasters in the 'adult' television sector in particular must understand the importance of robust compliance
- 1.11 Having regard to the seriousness of the breaches, Ofcom's penalty Guidelines and having given careful consideration to the Licensee's written and oral representations, the Committee decided it was appropriate and proportionate in the circumstances to impose a financial penalty on the Licensee of **£25,000** (payable to HM Paymaster General). Except for the various mitigating factors outlined at paras. 8.15 and 8.16 below (and in particular the swift action to discipline the production staff responsible and improve compliance), the Committee would have imposed a higher financial penalty.

Background

- 2.1 As summarised above, *Television X – The Fantasy Channel* ("TVX" or the "Channel") is one of a number of adult-sex channels operated by Portland. TVX broadcasts programmes between 22.00 and 05.30 within the 'adult' section of the Sky Electronic Programme Guide ("EPG"); and is also available on cable TV through Virgin Media and, from 23.00, on a pay-per-night basis on the Freeview DTT platform.
- 2.2 Although all of its main programmes are broadcast under PIN encryption, the channel transmits a number of ten minute 'free-to-air' (i.e. unencrypted) promotional trailers, including at 22.00. These are used to promote the encrypted services, and so encourage viewers to subscribe to the pay-TV output.

- 2.3 Most of the TVX output consists of pre-recorded 'adult' movies, but the service has also included some live programmes featuring scantily clad female presenters (known as 'babes'). The first ten minutes of these programmes are shown free-to-air to encourage subscriptions, with the remaining, more sexually explicit airtime being shown under PIN protected encryption. During these programmes viewers are encouraged to interact with the presenters by means of Premium Rate Services ("PRS").
- 2.4 There are a number of other free-to-air channels broadcasting in the adult section of the EPG. In June and September 2006, Ofcom wrote to a number of broadcasters who transmitted 'babe-style' programmes without encryption, including the Licensee, because it was concerned about the degree of explicit sexual content on these channels. Ofcom drew these broadcasters' attention to their obligations under the Code and that if one of these broadcasters was found in breach of the Code following the June and September letters, Ofcom would consider the imposition of a statutory sanction against the broadcaster.

Legal Framework

- 3.1 Ofcom has a duty under section 319 of the Communications Act 2003 ("the Act") to set standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives. The standards objectives are set out in section 319(2) of the Act. They include provisions that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material (section 319(2)(f)).
- 3.2 In discharging its functions, Ofcom's principal duties are to further the interests of citizens in relation to communications matters and the interests of consumers (section 3(1)) and to secure a number of other matters. These include the application in the case of all television and radio services of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services (section 3(2)(e)).
- 3.3 In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, a number of other considerations including:
- The need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g)).
- 3.4 Under section 325 of the Act, every programme service licensed by a Broadcasting Act licence includes conditions for securing that the standards set by Ofcom under section 319 are observed. If Ofcom is satisfied that the holder of a licence to provide a television licensable content service has contravened a condition of the licence, it may impose the following sanctions:

- issue a direction not to repeat a programme;
- issue a direction to broadcast a correction or a statement of Ofcom's finding;
- impose a financial penalty; and/or
- revoke the licence.

The Human Rights Act 1998

- 3.5 Under section 6 of the Human Rights Act 1998, there is a duty on Ofcom (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention of Human Rights ("the Convention").
- 3.6 Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster's right to "impart information and ideas" and also the audience's "right to receive information and ideas without interference by public authority". Such rights may only be restricted if the restrictions are "*prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary*" (Article 10(2) of the Convention).
- 3.7 Ofcom must exercise its duty in light of these rights and not interfere with the exercise of these rights in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

Ofcom Broadcasting Code

- 3.8 Standards set by Ofcom in accordance with section 319 of the Act are set out in Ofcom's Broadcasting Code ("the Code") which came into force on 25 July 2005.
- 3.9 Accompanying Guidance Notes to each section of the Code are published and from time to time updated, on the Ofcom website. The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Code.

Relevant provisions of the Ofcom Broadcasting Code

- 3.10 Rule 1.24: "Premium subscription services and pay per view/night services may broadcast 'adult-sex' material between 2200 and 0530 provided that in addition to other protections mentioned above [Rules 1.22 and 1.23]:
- there is a mandatory PIN protected encryption system, or other equivalent protection, that seeks satisfactorily to restrict access solely to those authorised to view; and
 - there are measures in place that ensure that the subscriber is an adult.
- 3.11 Rule 1.25: "BBFC R18-rated films or their equivalent must not be broadcast".
- 3.12 Rule 2.1: "Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for

members of the public from the inclusion in such services of harmful and/or offensive material”.

- 3.13 Rule 2.3: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context”.

Remedial action and penalties

- 3.14 Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or statement of findings (or both) or not to repeat a programme on contravention of a licence condition.
- 3.15 Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence of a maximum of whichever is the greater of £250,000 and 5% of its qualifying revenue.
- 3.16 Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence.

Ofcom’s investigation and Portland’s responses

- 4.1 Ofcom received complaints from Portland’s competitors about the over explicit sexual nature of the encrypted part of the content shown on TVX on 8 June 2007. The complaints suggested some of the output was equivalent to what would be classified as ‘R18’ by the British Board of Film Classification (the “BBFC”). One of the complaints also referred to the content of a ten minute ‘free-to-air’ preview transmitted by TVX between 22.00 and 22:10 on the same night (8 June 2007).
- 4.2 The material transmitted under PIN encryption on 8 June 2007 between 22.10 and 22.40 featured two naked female presenters engaging in very explicit sexual acts, including vaginal penetration by fingers and dildos. The ten minute free-to-air trailer transmitted immediately prior to the encrypted output on the same night (8 June 2007) featured the same presenters. During this section one of the ‘babes’ removed her knickers and was then depicted in relative close up touching and being touched between her legs. Labial detail was apparent. Throughout, the ‘babes’ invited viewers to subscribe to the encrypted service using explicit language.
- 4.3 Having viewed the content, Ofcom was concerned about the explicit sexual nature of the programming. Ofcom therefore wrote to the Licensee asking for comments in relation to the following Rules of the Code: 1.24 (‘adult-sex’ material); 1.25 (BBFC ‘R18’-rated material must not be shown at any time); 2.1 (generally accepted standards), and 2.3 (material that may cause offence must be justified by context). In this correspondence, Ofcom drew Portland’s attention to Ofcom’s previous letters of June and September 2006, which had been sent to the Licensee.
- 4.4 In its responses, the broadcaster unreservedly accepted that the strength of material broadcast under encryption on 8 June 2007 from 22:10 went beyond that permitted under Rule 1.25 of the Code. The broadcaster also accepted that the strength of material broadcast free-to-air on 8 June 2007 between 22.00 and 22:10 went beyond that permitted under Rule 1.24 of the Code.] However, the broadcaster initially did not accept that the ‘free-to-air’ trailer broadcast on 8 June 2007 from 22:00 breached Rules 2.1 and 2.3 of the

Code. The broadcaster argued that the language in the trailer was not 'adult-sex' material and did not go beyond generally accepted standards for an 'adult' channel, even during 'free-to-air' transmission. They said it was consistent with audience expectations within the context of the 'adult' section of the EPG, especially when broadcast late at night.

Ofcom's decision that Portland was in breach of the Code

- 5.1 Having carefully considered the representations made by Portland, the Ofcom Executive ("the Executive") concluded on 14 September 2007 that the programming broadcast on 8 June 2007 was in breach of the following Rules of the Code. As regards the encrypted material, the Licensee contravened Rule 1.25 (no 'R18' material to be broadcast). As regards the 'free-to-air' trailer, Portland breached:
- Rule 1.24 ('adult-sex' material only permitted under encryption);
 - Rule 2.1 (generally accepted standards); and
 - Rule 2.3 (material which may cause offence must be justified by the context).
- 5.2 Concerning the encrypted material, the decision that there was a breach of Rule 1.25 was based on the Executive's view that the content transmitted under encryption on 8 June 2007 between 22:10 and 22:40 included output equivalent to BBFC 'R-18' standard. This was because it featured two naked presenters/actresses engaging in very explicit sexual acts including frequent and prolonged masturbation, shown in close-up; explicit scenes of oral sex; and explicitly depicted scenes of vaginal penetration by fingers and dildos. There is an absolute prohibition on the transmission of such material under Rule 1.25 of the Code.
- 5.3 Concerning the 'free-to-air' material broadcast between 22:00 and 22:10, the decision that there was a breach of Rule 1.24 was based on the Executive's view that the content of the programme was sexually explicit and that its primary purpose was to arouse the audience sexually. The 'free-to-air' trailer featured the same presenters/actresses. At the beginning of the trailer they were dressed in underwear, but one of the 'babes' subsequently removed her knickers. She was then depicted in relative close up touching and being touched intimately between her legs and on her genitals. Labial detail was clearly apparent. Throughout this ten minute section, there were invitations for viewers to subscribe to the encrypted service. These invitations used explicit language, especially as the end of the unencrypted segment approached, such as: *"...If you want to see me and Tiffany fucking each other here on TVX you gotta subscribe right now... I can't wait to bury my head in between those luscious thighs and get sucking on that juicy pussy!"* and *"... nice juicy pussy... If you want to see me fucking this pussy I've got all kinds of toys... that you can see me fucking Tiffany with... twenty seconds left if you want to see this pussy getting fucked and sucked good and proper by me."*
- 5.4 The Executive concluded that this content was 'adult-sex' material and unsuitable for broadcast unencrypted on a free-to-air channel.
- 5.5 The decision that the 'free-to-air' broadcast breached Rules 2.1 and 2.3 was based on the Executive's opinion that the material as a whole, including the language used, was contrary to generally accepted standards and had the

potential to cause harm and/or offence, and that this offence was not sufficiently justified by the context in which the content was broadcast.

Referral to the Content Sanctions Committee

- 6.1 Taking all the circumstances into account, and after consideration of the Licensee's representations, the Executive concluded that the breaches of Rules 1.24, 1.25, 2.1 and 2.3 were sufficiently serious to refer the case to the Committee for a statutory sanction to be considered.
- 6.2 The Committee having reviewed the Executive's decision to refer the breaches accepted that the case was sufficiently serious that it should be considered for sanction. Accordingly, Portland was invited to attend an oral hearing before the Committee.
- 6.3 Portland provided written representations in the form of letters to Ofcom dated 30 May 2008 and attended an oral hearing on 27 June 2008.

Portland's written representations on the imposition of a sanction

- 6.4 In correspondence dated 28 September 2007, 21 December 2007 and 30 May 2008, the Licensee said it accepted Ofcom's findings that both the encrypted and 'free-to-air' broadcasts on 8 June 2007 were in breach of the Code. However, in the same correspondence the Licensee urged the Committee not to impose a statutory sanction. It asked the Committee to take various factors into account including:
 - the company had launched an immediate inquiry as soon as the complaints came to light;
 - the dismissal of the production team responsible. The company had also subsequently terminated the employment of the Licensee's Director of Programming, who was in charge at the time of the broadcast. These measures demonstrated the seriousness in which the matter was viewed;
 - revised compliance guidelines had been issued to all staff, together with new training programmes;
 - programme output returned immediately to a compliant standard. The original broadcast was the result of "an inexperienced production team in a very much isolated incident";
 - the company did not make any appreciable financial gain from the breaches of the Code and, therefore, a financial penalty would not be needed to act as a deterrent as the company had no incentive to breach the Code;
 - the channel is in the 'adult' section of the EPG and the offending material transmitted well after the watershed. The stronger material was encrypted and only accessed by adults;
 - the complaints were from rival companies, not the general public;
 - the company has an excellent track record in compliance. The breaches only came about because of "an errant individual production crew";
 - the Licensee's Legal Director's office has been relocated to the site of the TVX's production, so aiding contact between production staff and the Legal Director for compliance advice; and

- the warning letters sent by Ofcom in June and September 2006 should not be considered as a factor tending to increase any level of penalty. Portland had well-established compliance procedures in place with a long track record of effectiveness. The procedures failed on this “one-off occasion” for reasons other than those identified in the letters.

Sanctions Hearing

- 7.1 The Committee held an oral hearing to consider this case on 27 June 2008. At this meeting Portland was given the opportunity to make oral representations to the Committee before it decided whether the breaches warranted the imposition of a statutory sanction, and if so, at what level. The Committee was addressed on behalf of the Licensee by Marcus Lee, Legal Director, and Paul Dunthorne, Managing Director.
- 7.2 Portland stressed that the breaches of the Code were an isolated incident caused by a maverick production team, and that immediate steps had been taken to ensure there would be no repetition of these breaches of the Code. The programme had been transmitted on a Friday night, 8 June 2007, and the production team responsible were summoned to a meeting the following Monday. This meeting established that the team had taken a collective decision to “see what it could get away with”. This was in defiance of written company guidelines and the director and producer were told that day that they would not work for Portland again. This action was taken before any contact from Ofcom about the programme.
- 7.3 Portland told the Committee that new training sessions had been introduced to strengthen internal compliance with the Code. Initially, these happened every six months, but they now occur monthly. In addition, the Legal Director had moved his office to the production centre to ensure he was immediately on hand to advise on compliance issues.
- 7.4 The Licensee stressed that the company had made no financial gain from the licence breaches. On the contrary, an adverse finding from Ofcom was damaging to the parent company’s reputation and hindered commercial negotiations with a potential partners. The PRS text and phone services had been introduced solely to enable interaction between viewers and presenters and not to generate revenue. According to Portland, the use of PRS services on 8 June 2007 by viewers had raised £49 – far less than the cost of operating the system.
- 7.5 Portland had immediately accepted Ofcom’s findings that the Code had been breached, and had taken immediate steps in response. For this reason, and in view of the isolated nature of the breaches, Portland asked the Committee to refrain from imposing a financial penalty in this case.
- 7.6 The Committee questioned Portland about the overall structure of compliance within the company. The Licensee explained that a single parent company, Portland Enterprises, operated and complied licences run through three separate divisions – RHF Productions; Portland Enterprises (C.I.) Limited, which controlled TVX; and Portland Interactive, a gaming operation. Responsibility for all compliance lay with the Legal Director, and there were clear guidelines in relation to ‘adult’ programming. These guidelines were regularly reviewed in the light of Ofcom’s published findings and other guidance.

- 7.7 The Committee questioned Portland about why such an inexperienced production team had been allowed to run the programme unsupervised. Portland explained that there had been a compliance officer present in the studio on the first nights that the production team had worked together, but they had subsequently been judged competent enough to work unsupervised. Both the director and producer had previously worked on shopping channels, were very experienced as regards 'live' television and were well aware of the rules concerning 'adult' programming. They had however knowingly chosen to breach those rules.

Decision by the Committee

- 8.1 The Committee may impose a sanction which may be a financial penalty and/or revocation of the licence. In this case, having viewed the material and having considered all the other evidence and representations before it, the Committee decided that, on the balance of all the facts, it was appropriate to impose by way of statutory sanction a financial penalty of £25,000.
- 8.2 In deciding on the level of financial penalty the Committee had regard to Ofcom's Penalty Guidelines.¹

The seriousness of the breaches

- 8.3 Having viewed this material, and taken account all the other evidence and the representations of the Licensee, the Committee considered that the breaches of Code Rules 1.24, 1.25, 2.1 and 2.3 were particularly serious. This was for the following reasons.
- 8.4 First, because of the graphic and visual explicitness of the sexual activity broadcast *encrypted* on 8 June 2007. This content shown between 22.10 and 22.40 was equivalent to 'R18' material, as has been admitted by the Licensee. Details are set out above (paragraph 5.2 above). In particular two naked female presenters engaged in very explicitly depicted sexual acts, including frequent and prolonged masturbation (shown in close-up), oral sex, and vaginal penetration by fingers and dildos. Rule 1.25 prohibiting the broadcast of R18 material is an absolute. Further, the material shown in this case was not borderline but very clearly breached Rule 1.25 of the Code.
- 8.5 The **un**encrypted visual material broadcast between 22.00 and 22.10 on 8 June 2007 was also sexually explicit. Details are set out above (paragraph 5.3 above). In particular one of the same presenters removed her knickers and was then clearly depicted in relative close up touching and being touched between her legs. Labial detail was clearly apparent. A reasonable person would regard this material as inappropriate to be broadcast unencrypted. In the Committee's opinion this content was obviously unacceptable for broadcast free-to-air and, as 'adult-sex' material, Rule 1.24 applied.

¹ Ofcom's Penalty Guidelines are available at <http://www.ofcom.org.uk/about/accoun/pg/>. Section 392 of the Communications Act 2003 requires Ofcom to prepare and publish a statement containing guidelines it proposes to follow in determining the amount of any penalties imposed by Ofcom, which Ofcom must have regard to in setting any penalty.

- 8.6 Second, these breaches are particularly serious because of the significant harm and offence they cause to viewers in general. In this respect, concerning free-to-air promotions on ‘adult’ encrypted channels, the Committee took account of viewer research into sexual imagery on television conducted by Ofcom in 2005². The Committee regarded the breaches of the Code concerning the **un**encrypted content as more serious because they involved the broadcast of explicit sexual material which could be easily accessed by viewers under the age of 18, with the potential to cause them harm and offence. The Committee considered that whereas the material broadcast encrypted may have exceeded audience expectations to some extent, the explicit material shown between 22:00 and 22:10 clearly went well beyond audience expectations for what should be broadcast free-to-air on television, even in the ‘adult’ sector of the EPG.
- 8.7 The seriousness of the breaches is compounded by the fact that the Licensee was specifically notified of Ofcom’s concerns regarding the sexual content of free-to-air ‘babe-type’ programmes in June and September 2006. See paragraph 2.4 above.
- 8.8 In following Ofcom’s Penalty Guidelines,³ in determining the starting point for any financial penalty, the Committee had regard to: the seriousness of the contraventions as discussed above; any relevant precedents set by previous cases; and, the need to ensure that any penalty would act as a sufficient incentive to comply.

Precedent

- 8.9 In relation to the R-18 material, the Committee noted the similarities between the *factual* background in the *Playboy TV UK* sanctions case (2004),⁴ where the Licensee was fined £25,000, and that of the current case as regards the encrypted material. *Playboy TV UK* also involved an adult channel broadcasting an encrypted R18-rated film. *Playboy TV UK* admitted the breaches, which it said were the result of human error, and introduced new compliance procedures. The Committee also noted that in the *Playboy TV UK* sanctions case two other breaches of the Code also took place at around the same.
- 8.10 Concerning the free-to-air material, the Committee found some assistance in the *Babeworld* (2007) case⁵, where the Licensee was fined £25,000. *Babeworld* concerned an adult chat PRS channel (compared to a free-to-air promotional trailer for an encrypted adult channel) which soon after the 21.00 watershed broadcast ‘adult-sex’ material in the form of explicit sexual activity, such as female masturbation, and included explicit sexual language. In the Committee’s opinion, the visual material and language were not as graphic in *Babeworld* as in the present case. The breaches in the *Babeworld* case –

² “Language and Sexual Imagery in broadcasting: A Contextual Investigation”, Ofcom, September 2005, page 61. This qualitative research was based on a sexually explicit promotional trailer shown free-to-air on an encrypted channel at 20.30. It confirmed that most participants were surprised and shocked to find this material could be accessed unencrypted and that children might come across this sort of content.

³ <http://www.ofcom.org.uk/about/accoun/pg/penguid.pdf>

⁴ 1 May 2004: http://www1.bsc.org.uk/tv/obb/ocsc_adjud/adj-playboytv.pdf

⁵ 30 November, 2007: http://www.ofcom.org.uk/tv/obb/ocsc_adjud/babeworld.pdf

unlike in the present one – were however repeated, and occurred closer to the watershed.

Incentive

- 8.11 In deciding on the appropriate size of a financial penalty in this case, the Committee considered it needed to be sufficiently large so as to act as an incentive to ensure that Portland – and other Licensees – did not breach the Code in future, especially as regards showing over explicit sexual material.

Financial gain

- 8.12 The Committee noted that there was no evidence that the Licensee gained financially from these breaches of the Code.

Factors tending to increase the level of penalty

- 8.13 The Committee then considered whether there were any factors which aggravated or tended to increase the level of any financial penalty it might impose.
- 8.14 The Committee took account of the fact that the breaches occurred following Ofcom letters of June and September 2006, copies of which were sent to the Licensee, warning it against broadcasting explicit sexual content.

Mitigating Factors

- 8.15 The Committee then considered whether there were any factors which in its view might limit or decrease the level of financial penalty.
- 8.16 The Committee noted all the submissions as to mitigation made by the Licensee. In particular the Committee took account of the following:
- Portland admitted the breach of Rules 1.24 and 1.25 immediately and accepted the breaches of Rules 2.1 and 2.3 as soon as they were recorded by Ofcom, and had cooperated fully with Ofcom's investigation;
 - the Licensee took swift and effective action to discipline the production staff responsible;
 - prior to 8 June 2007, no breaches of the Code had been recorded against the Licensee; and
 - the Licensee had taken a number of measures to improve compliance after 8 June 2007, such as moving the Legal Director's office to the production centre and improving compliance training.

Conclusion

- 8.17 The broadcast free-to-air of content depicting presenters engaged in explicit sexual activity, such as masturbation, and which contains insufficient editorial justification for the inclusion of such images, is totally unacceptable. It has the potential to cause offence to the audience and harm to under-eighteens, and children in particular. Similarly, the showing of 'R-18'-rated material at any time on an encrypted channel is also unacceptable and a serious breach

of the Code. Broadcasters in the 'adult' television sector in particular must understand the importance of robust compliance.

- 8.18 Having considered the relevant facts as outlined above, and especially the seriousness of the breaches and all the representations made by Portland, the Committee decided to impose a financial penalty on the Licensee of **£25,000** (payable to HM Paymaster General), which it considered to be a proportionate and appropriate penalty in all the circumstances.

Content Sanctions Committee

Philip Graf
Kath Worrall
Anthony Lilley

23 July 2008