

Ofcom Content Sanctions Committee

Consideration of sanction against	Digital Television Production Company Limited in respect of its service XplicitXXX (TLCS 567)
For	Breach of Rule 1.25 (of Ofcom's Broadcasting Code: Section One: Protecting the Under Eighteens): "BBFC R18-rated films or their equivalent must not be broadcast"
On	13 December 2005
Decision to Fine	To impose a financial penalty of £35,000 (payable to HM Paymaster General) on Digital Television Production Company Limited

Summary

For the reasons set out in full in the Decision, under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee ("the Committee"), Ofcom has decided:

- 1) XplicitXXX is a subscription channel provided by Digital Television Production Company Limited ("DTPC" or "the licensee") that broadcasts adult sex material under PIN encryption.
- 2) A member of the general public complained that graphic images of a woman using a dildo for vaginal self-penetration were shown on XplicitXXX in a scheduled 30 minute programme entitled "*Rubber Ron*", broadcast under encryption at 2330 on 13 December 2005.
- 3) Ofcom's Executive viewed the material (a 21 minute sequence within the programme) and found the broadcast in breach of Rule 1.25 of the Ofcom Broadcasting Code ("the Code"). This prohibits the broadcast of British Board of Film Classification ("BBFC") R-18 rated films or their equivalent in accordance with Ofcom's statutory duty to ensure that persons under the age of eighteen are protected and to provide adequate protection for members of the public from the inclusion of offensive and harmful material.
- 4) DTPC was invited to attend an oral hearing. The Committee noted that DTPC admitted breaching the Code and that it had accepted the seriousness of the offence and did not condone the broadcasting of R-18 material.
- 5) Despite the breach being of a different order, this was not the first time that the licensee had appeared before the Committee because of failures concerning its compliance procedures. The fact that such a serious breach of the Code had occurred did not easily reconcile with DTPC's assertions that it had suitable monitoring and compliance procedures in place.
- 6) The Committee took account of the fact that the licensee had responded quickly after being informed of the complaint and the fact that DTPC had put in place

additional measures since the breach had occurred to improve its compliance system.

- 7) Although this specific breach was a one-off, the Committee concluded that it had resulted from inadequate compliance procedures and managerial control. The Committee rejected the licensee's representation that its previous failures, for which it had been fined (see footnote1), were not at all relevant to this case. While this case concerns the transmission of R-18 material, or its equivalent, and the licensee's previous fine concerned the transmission of inappropriate promotional material free to air – there are underlying concerns regarding the licensee's compliance systems in this highly sensitive area of adult broadcasting. Because of Ofcom's statutory duties concerning the protection of children, the broadcasting of adult material carries with it certain onerous responsibilities and even unintentional and inadvertent Code breaches can not be tolerated. Consequently, the licensee's representation that a "yellow card" warning in this case would be appropriate was rejected by the Committee.
- 8) Taking into account all the facts and matters to which the Committee refer (see the full adjudication), the Committee decided that a financial penalty was appropriate and that DTPC should be fined £35,000.

Background

1. XplicitXXX is a subscription channel that broadcasts adult sex material under PIN encryption. The service is operated by Digital Television Production Company Limited (“DTPC” or “the licensee”) and licensed by Ofcom under licence number TLCS 567.
2. On 14 December 2005, Ofcom received a complaint from a member of the general public that material transmitted under encryption on XplicitXXX at 2330 on 13 December 2005 was the equivalent of BBFC R-18 content. The material in question appeared in a programme entitled “*Rubber Ron*” and consisted of a 21 minute sequence showing graphic images of a woman using a dildo for vaginal self-penetration.

Ofcom Investigation

3. On 11 January 2006 DTPC informed Ofcom that the programme had been transmitted in error. It had received a number of editions in this series – some of which were rejected while others were returned for editing. This particular episode of *Rubber Ron* had already been rejected by the channel as unsuitable for broadcast, but as it had a similar title and cast to one that had been approved, the tapes became mixed up and the scheduler inadvertently programmed the wrong episode for transmission. Although DTPC was immediately alerted to the broadcast by its play-out service provider, who spotted the error, the programme nevertheless ran to its full slot time.
4. On 27 January 2006 DTPC told Ofcom that there was a robust compliance system in place at the channel – but that no system was immune from human error. It re-stated that the offending episode had been transmitted “due to an error by the on-duty Operations and Scheduling Manager who inadvertently entered the wrong code”. She had been advised of the seriousness of her error and the channel was considering disciplinary proceedings. A review of screening procedures was also being carried out to ascertain whether further improvements could be made.
5. DTPC explained that its play-out service provider was additionally employed to monitor broadcasts so that any inadvertent breach of the Code could be quickly detected and the broadcast quickly withdrawn which, it said, had happened here. DTPC also said that since viewing figures showed that very few people had seen the transmission it did not believe it would have caused widespread offence. The channel also insisted that it took very seriously its responsibilities to restrict viewing to an adult-only audience. To that end, since the end of 2005 it had introduced a revised PIN entry system for encrypted programmes, requiring viewers to re-enter the PIN at the end of each programme. All subscriptions had to be made by credit card to ensure that subscribers were adults.
6. On 19 April 2006, DTPC provided further explanation about its compliance procedures, explaining that all content was screened on delivery and classified as either fit or unfit for broadcast (and any necessary editing carried out). As part of that screening, each tape was allocated a unique number (a “Media ID”), which was entered into a database. Each tape was also clearly labelled with a printed version of the Media ID. This Media ID was expressed both in letters and numbers, and also in binary code. DTPC had received two tapes with similar names, one was called “Tamara: Perv Party” and the other was “Tamara: Perv Room” (both films had the same cast and were both episodes in a series called “*Rubber Ron*”). The tape that should have been broadcast was allocated Media ID XPL-0241. However, the tape that was actually broadcast had been allocated

a very similar number, Media ID XPL-0265. This tape had been logged as unsuitable for broadcast after having been screened and rejected as not appropriate. These similarities caused confusion and resulted in the wrong Media ID tape being selected for broadcast.

7. DTPC also clarified that the problem had not been noticed until seven or eight minutes into the transmission as these first few minutes of the film were not in themselves unsuitable. DTPC's Head of Content was immediately called on her mobile phone and a voicemail message was left which she picked up some ten minutes later. She immediately returned the call and was advised of the nature of the issue but by this time the programme was effectively completed. DTPC told Ofcom that to ensure that this error could never be made again, the Head of Content asked the Transmission Controller to pull the tape from the library and to make arrangements for the programme to be deleted from the server with immediate effect.
8. With reference to the channel's compliance procedures, DTPC stated that the record of the licensee had been "clean" for the last two years (since April 2004).¹ DTPC emphasised that the previous breaches were of a different nature to the current breach. However, since this date compliance procedures had been reviewed and tightened with considerable effect. An expensive DV cam machine had been bought to check all material for compliance, it was checked again before broadcast and the Media ID log system described above had also been implemented.
9. DTPC confirmed that the final viewing figures showed that the programme was viewed only by 62 people and whilst the channel did not condone the broadcast of R-18 material it asked for this to be taken into account by Ofcom as a mitigating factor when considering the level of sanction that was appropriate.
10. On 11 July 2006 DTPC made further representations to Ofcom about their compliance history, emphasising that no complaints had been received since Ofcom's previous fine and that this was a one-off breach which had been admitted by DTPC. As to whether the programme had been transmitted prior to 13 December 2005 (as claimed by the complainant), DTPC was unable to state categorically whether the exact same content had been previously transmitted in error but believed that it was unlikely. DTPC believed that if it had been previously transmitted the material would have been picked up by the channel's play-out service provider as had occurred in relation to the broadcast on 13 December 2005.

Referral to Ofcom's Content Sanctions Committee

11. Taking the above points into consideration Ofcom's Executive considered that a serious breach of Rule 1.25 of the Broadcasting Code had occurred. In accordance with its published procedures (Outline procedures for the

¹ In February 2004 DTPC was given a written warning from Ofcom for showing sexually explicit material transmitted repeatedly during free to air promotions and was advised that any further recurrence might result in the consideration of a statutory sanction (see http://www.ofcom.org.uk/tv/obb/prog_cb/pcb_03/intervention). However, in April 2004 DTPC again broadcast sexually explicit promotional material. On this occasion DTPC was invited to attend a hearing before Ofcom's Content Sanctions Committee. Taking into account that the February finding related to comparable infringements and the fact that DTPC had on that occasion been given a written warning that any further recurrence might result in a statutory sanction, the Committee fined DTPC £50,000. At the time it was noted that the Committee gave serious consideration to a fine in six figures which it considered might become the norm for such serious Code breaches. However, taking account of DTPC's representations about its financial position and the compliance steps it had taken, it decided against imposing such a fine on this occasion (see http://www.ofcom.org.uk/tv/obb/ocsc_adjud/adj_20040727.pdf).

consideration of statutory sanctions) the Executive recommended that the case be referred to Ofcom's Content Sanctions Committee ("the Committee").

The Hearing

12. Ofcom held an oral hearing on 16 November 2006 to give the licensee a full opportunity to make representations before deciding whether the breach by DTPC warranted the imposition of a statutory sanction, and if so at what level. Ofcom was addressed by Jonathan Crystal on behalf of DTPC as well as other representatives of the licensee.

Code Breach

13. The licensee accepted that it had broadcast prohibited material in breach of the Code. In mitigation, it wished to emphasise that DTPC had never sought to dispute that an error had been made and that it had cooperated immediately and fully with Ofcom by spirit and by letter at every stage throughout its investigation.
14. By reference to Ofcom's Penalty Guidelines² (which sets out a number of factors which should be taken into account when determining a level of penalty), Jonathan Crystal invited the Committee to consider that no sanction would be appropriate. However, if the Committee felt that a fine was appropriate it should be, at the "very lower end of the scale on this occasion". The licensee considered that this was the first time DTPC had made such an error and there was only one complaint. The licensee had a concerted and comprehensive compliance record. While the licensee accepted that its representatives had appeared before this Committee previously (April 2004) it argued that this was for an entirely separate breach. Unlike on that occasion, this was an isolated occurrence and concerned a single broadcast which had been entirely inadvertent and the result of human error. Further, the licensee stated that the error had been spotted. It believed that this case was not the result of repeated errors and therefore did not suggest that there was a consistent pattern of compliance failure. The fact that DTPC did not stand to receive any financial gain as a result of the broadcast further underlined that the material had been broadcast in error.
15. In terms of its compliance procedures, DTPC had changed its internal procedures by appointing a new scheduling manager and implementing a robust system for viewing and labelling material to ensure compliance. As an additional check DTPC had contracted its play-out service provider to carry out a process of final pre-broadcast monitoring. However, no system is immune from human error and on this occasion, the internal system had failed. Although the prohibited material had been detected by the play-out service provider prior to transmission the film was left to run to the end of its slot because DTPC's Head of Content had not been immediately available to respond.
16. The licensee also explained that it had taken immediate remedial steps following the breach by adopting additional measures to further tighten the licensee's compliance procedures (including using red labels to mark unsuitable tapes and green labels for tapes suitable for broadcast) and thereby avoid the possibility of confusion over tapes and Media ID numbers occurring again. This showed a further willingness to cooperate promptly and that DTPC were serious about their compliance obligations.

² Available at <http://www.ofcom.org.uk/about/accoun/pg/>

17. In terms of the degree of harm caused by the material, the attention of the Committee was drawn to the time of broadcast, which was well after the watershed, and the fact that it was seen by only 62 viewers, meaning that whilst there was a potential for harm this was *de facto* small. Given that only one complaint was received by Ofcom, the material did not appear to have caused widespread offence. Whilst it was not denied that this was a serious breach, it was suggested that the impact of the breach should be considered in the context of the viewership the material received (i.e. in considering the extent of the possible harm).
18. The Committee questioned why DTPC in July 2006 was unable to determine whether the material had been transmitted previously on its channel – as claimed by the complainant. Recognising that it was possible that the material could have been shown before but not picked up by either DTPC or its play-out service provider, the licensee assured the Committee that it should nevertheless be comfortably satisfied that this had not been the case. As to whether DTPC keeps a transmission log, it was confirmed that the licensee did but it remained unclear as to why this had not been checked or provided to Ofcom in this case.
19. As to why the tape itself hadn't been physically removed after it had been viewed and marked as "not suitable" and why it was given a code in the same series as other material which had been passed as suitable for broadcast, it was explained that there were two checks in the process, with material being looked at first by an external editor and then internally by a second editor. It had nonetheless been possible for a mix-up to occur. DTPC accepted that its procedures were clearly not as robust as it had thought.

Sanctions Decision

20. The licensee was aware (from both the previous correspondence and the meeting) that the Committee was considering imposing a financial penalty.
21. The licensee asked the Committee to note that DTPC is a small player in the market with a correspondingly low turnover and to look favourably on it when considering whether a penalty was appropriate, and if so at what level. The licensee also wished to advise Ofcom that arrangements to transfer the licence had been put on hold pending the outcome of Ofcom's determination, which had already had some financial repercussions. Lastly, the licensee asked the Committee again to note the one-off nature of the breach, its willingness to assist and cooperate with Ofcom and the measures which had been implemented to tighten DTPC's compliance procedures.
22. The Committee carefully considered all the oral and written submissions provided by DTPC regarding the circumstances of the breach, including in particular the mitigating factors that had been highlighted at the hearing, together with the licensee's representations about the circumstances of the breach, its compliance procedures and its compliance record to date.
23. The Committee noted that DTPC admitted breaching the Code and that it had accepted the seriousness of the offence and did not condone the broadcasting of R-18 material or its equivalent. The Committee also noted that this appeared to have been a specific breach concerning the transmission of R-18 material or its equivalent, following an otherwise clean compliance record over the previous twenty months. The Committee also took into account the licensee's representations that this breach was also of a different nature from the previous breaches which related to material shown before the watershed in a free to air slot and for which the licensee had been fined £50,000 (though the Committee

had considered a fine in six figures which it considered might become the norm for breaches of that sort in the future).

24. However, despite the breach being of a different order, this was not the first time that the licensee had appeared before the Committee because of a failure in its compliance procedures. The Committee was particularly concerned that the licensee had described its procedures as being “robust”. Not only had the material remained undetected within the system until the point of transmission but it was also broadcast in its entirety, being left to run to its full slot time (which included the 21 minutes of prohibited content). Further, it was apparent at the hearing that a compliance failure had occurred not only when the wrong code had been entered for transmission, but also when the material was initially identified as not being suitable for broadcast and not removed from the system. The licensee admitted that their compliance system was not as robust as it might have thought. In the Committee’s view, the fact that such a serious breach of the Code had occurred did not easily reconcile with DTPC’s original assertions that it had suitable monitoring and compliance procedures in place.
25. In addition, the Committee noted that the licensee was unable to say categorically whether or not the material had been previously broadcast. DTPC was apparently unable to provide any transmission logs or explain satisfactorily why these had appeared not to have been checked. While this demonstrated a further concern regarding the broadcaster’s compliance system, it was not possible to establish whether or not the material had been previously transmitted and so Ofcom’s considerations were based solely on the broadcast of the material on 13 December 2005.
26. In terms of DTPC’s cooperation with Ofcom, the Committee took account of the fact that the licensee had accepted the breach of the Code, responded quickly after being informed of the complaint and had put in place additional measures to improve its monitoring system since the material was broadcast. However, in the course of questioning the licensee why it took until April 2006 for DTPC to establish the precise circumstances which led to the mistake, it had become evident that the matter had not been fully and properly considered at a sufficiently early stage. If it had been, Ofcom could have established sooner how precisely the tapes became mixed up and that this resulted from DTPC’s compliance procedures not, in fact, being as robust as the licensee had suggested in its earlier correspondence.
27. Although the specific breach was a one-off, the Committee concluded that it had resulted from inadequate compliance procedures and managerial control. The Committee rejected the licensee’s representation that its previous failures, for which it had been fined, were not at all relevant to this case. While this case concerns the transmission of R-18 material or its equivalent and the licensee’s previous fine concerned the transmission of inappropriate promotional material free to air – there are underlying concerns regarding the licensee’s compliance systems in this highly sensitive area of adult broadcasting. Because of Ofcom statutory duties concerning the protection of children, the broadcasting of adult material carries with it certain onerous responsibilities and even unintentional and inadvertent Code breaches can not be tolerated. Consequently, the licensee’s representation that a “yellow card” warning in this case might be appropriate was rejected by the Committee,
28. Taking all the factors into account the Committee was not persuaded by DTPC representations that a financial penalty was inappropriate. The Committee considered that a fine was proportionate and necessary in all the circumstances. For the reasons outlined above and having regard to the criteria set out in

Ofcom's Penalty Guidelines, the Committee concluded that the licensee should be fined £35,000 in respect of the breach (all fines are payable to HM Paymaster General and once received by Ofcom, are forwarded to The Treasury).

Content Sanctions Committee

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8 December 2006