

Ofcom Content Sanctions Committee

Consideration of sanction against Gamecast UK Limited in respect of its service You TV2 (TLCS 918) and also in respect of the material broadcast as “You TV3”

For

Breaches of the Ofcom Broadcasting Code:

- Rule 2.11 – Competitions must be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made know
- Rule 1.3 – Children must...be protected by appropriate scheduling from material that is unsuitable for them
- Rule 1.25 – BBFC R18-rated films or their equivalent must not be broadcast

and

Breach of Television Licensable Content Service licence, Condition 11: a delay in the provision of suitable recordings and a failure to supply recordings in a readable format

and

Unauthorised transmissions – the licensee transmitted unauthorised material on “You TV3” claiming the transmission was under its You TV2 licence. The licensee did not have a licence for “You TV3” and therefore was only permitted to broadcast a time shift of the licensed service You TV2.

Decision

To impose a financial penalty on Gamecast UK Limited of £100,000 (payable to HM Paymaster General).

Summary

On the basis detailed in the Decision, under powers delegated from the Ofcom Board to Ofcom’s Content Sanctions Committee (“the Committee”), Ofcom has decided:

- 1) You TV2 (TLCS 918) is a free-to-air service provided by the licensee Gamecast UK Limited (“Gamecast” or “the licensee”). Its parent company is Cellcast UK Ltd (“Cellcast”). Gamecast is also the applicant for a proposed, but not licensed, service “You TV3”.
- 2) At the time of investigation, You TV2 was licensed to provide an entertainment service and operated in the entertainment section of the Electronic Programme Guide¹.
- 3) Ofcom received complaints that the licensee transmitted, on 1 September 2005, in the afternoon, 6 minutes of sexually explicit material equivalent to BBFC-rated R18 (“R18 equivalent material”) free-to-air.
- 4) Gamecast transmitted material on an unlicensed service, claiming the transmission was

¹ You TV2 currently transmits material promoting adult chat lines and is placed in the adult section of the Electronic Programme Guide.

under its You TV2 licence.

- 5) Ofcom received a complaint that the licensee was broadcasting a pre-recorded quiz, on 28 July 2005, but had not informed viewers that the telephone number was not live.
- 6) The licensee failed to supply Ofcom, on a number of occasions, with adequate recordings of its output as requested.
- 7) Ofcom was concerned by the licensee's compliance record, which it considered to be unacceptable. Its continued inability to provide Ofcom with adequate recordings of its output was totally unsatisfactory and in breach of its licence conditions. The transmission in the afternoon, free-to-air, of sexually explicit material showed an apparent neglect for its compliance responsibilities. Moreover, the Committee considered that Gamecast was less than transparent in its dealings with Ofcom. Contrary to previous indications by the licensee, the decision to broadcast R18 equivalent material to territories outside the UK from the same play-out centre was Gamecast's (or one of its affiliates). This lack of frankness by the licensee about who was responsible (until pressed at the oral hearing) aggravated the Committee's concerns about the licensee's record.
- 8) Whilst the Committee acknowledged that the licensee has suffered financial loss from its inability to launch its new service (as a result of this sanctions investigation), it considered the licensee to be responsible for transmitting material on an unlicensed service. The Committee was not convinced by the licensee's explanation as to why it considered it could legitimately broadcast the material.
- 9) Overall it was the Committee's view that Gamecast had failed to take full responsibility for its compliance failures and had showed an apparently wilful lack of understanding for the requirements of the Broadcasting Code and its obligations under its licence conditions. In addition, the licensee had been less than transparent in its dealings with Ofcom, which in the Committee's view, aggravated the seriousness of its position.
- 10) Taking into account all the facts and matters to which the Committee refers (see full adjudication), the Committee decided that it should reflect the serious nature of the compliance failures and fine Gamecast £100,000 (payable to HM Paymaster General).

Background

1. You TV2 (TLCS 918) is a free-to-air service provided by the licensee Gamecast UK Limited ("Gamecast" or "the licensee"). Its parent company is Cellcast UK Ltd ("Cellcast"). Gamecast is also the applicant for a proposed, but not licensed, service "You TV3".
2. Gamecast was licensed to provide a general entertainment service on 25 May 2005. On 4 October 2005, You TV2 Extra was launched (a time-shifted service of You TV2) following agreement by Ofcom. At the time of this investigation You TV2 was a family entertainment service operating in the entertainment section of the Electronic Programme Guide.
3. On 14 July 2005, Ofcom received an application from Gamecast for You TV3. To date the licence has not been granted due to the consideration of sanctions against the licensee.

You TV2 broadcast – 28 July 2005

4. A complaint was made by a member of the general public concerning a quiz called "Guess the Celebrity Live", part of a programme called "Play2Win". The complainant alleged that on 28 July 2005, You TV2 (formerly You TV+1) broadcast a quiz, using an identical telephone number for phoning in answers to that being used for a quiz on another, related channel (You TV). The complaint stated that whilst You TV was broadcasting its live quiz, You TV2 was also broadcasting a pre-recorded quiz. However, You TV2 had failed to make clear to

viewers, for example by a warning, that they should not call the telephone number on screen as it was not live. The complaint suggested that viewers would have wasted money by calling the telephone number advertised on the pre-recorded service (You TV2) thinking that they were entering a live competition which they had a chance of winning, when in fact they were answering a pre-recorded competition and had no chance of winning the live one.

5. On 4 August 2005, Ofcom requested relevant recording of the output and comments relating to the Ofcom Broadcasting Code ("the Code").
6. Gamecast said that it had apologised to the complainant and had made efforts to refund any money he had lost as a result of this error. However, subsequent inquiries revealed that no charges had been made to callers. The licensee explained that a technical error had led to the telephone number for the quiz line actually being dormant. The licensee stated that it had not intended to mislead viewers and that the problem had been rectified and a procedure instigated to check the validity of all advertised phone numbers so this would not happen again.
7. The recordings supplied by Gamecast were incomplete and were not in a format readable by Ofcom. Gamecast was unable to supply Ofcom with complete copies of the material because it said that a further request from Ofcom to supply adequate recordings came after the 60 day period for which the licensee was legally obliged to retain recordings. However, it was Ofcom's view that the licensee had been on notice that this matter was being investigated and so should have been in a position to provide the recordings. Failure to supply full recordings and in a manner that is acceptable to Ofcom is a breach of TLCS Licence Condition 11.
8. You TV2 had previously informed Ofcom that the issues regarding on-screen logos for its pre-recorded quizzes on You TV2 had been rectified on 27 July 2005. It was on this basis that a previous complaint about the licensee had been resolved. However, Ofcom considered that the issue of on-screen logos had not been resolved at this point, given that the current complaint related to content transmitted on 28 July 2005. A channel that transmits interactive quizzes should recognise the importance of conducting competitions fairly by not misleading the audience.
9. The Code requires licensees to ensure that they have appropriate procedures and safeguards in place to ensure that competitions are conducted fairly. The failure to identify content as pre-recorded was unfair to viewers who may have been led to believe they could enter the competition broadcast on You TV2. This was in breach of Rule 2.11 of the Code. Ofcom recognised that the line was not active but considered it was relevant that the licensee had confirmed it was not aware that the quiz line was inactive at the time of broadcast.
10. Taking the above points into consideration, Ofcom concluded that the following breaches had occurred on 28 July 2005:
 - A breach of Rule 2.11 – "Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known"
 - A breach of Television Licensable Content Service licence Condition 11 – a failure to provide recordings in a timely manner or in a readable format.

You TV2 and "YouTV3" broadcast – 1 September 2005

11. Three viewers complained that "hard core pornography" had been transmitted free-to-air on You TV3 on 1 September 2005 in the afternoon (between approximately 13.25 and 13.45). One of the complainants said that they were viewing the channel with children when the material was shown.

12. On 2 September 2005, the licensing department in Ofcom wrote informing the licensee that it had become aware that a service had been broadcasting adult material under the name of "You TV3". The letter stated that the provision of a licensable service without the appropriate licence is an offence under Section 13 of the Broadcasting Act 1990 (as amended) and may be prosecuted by the Director of Public Prosecutions. Ofcom requested that the licensee send the material transmitted on You TV3 to Ofcom as well as relevant recordings of You TV2 to ascertain whether the material had also been broadcast on this service.
13. The material transmitted on You TV3 featured a professionally produced, sexually explicit film of 6 minutes of two men and a woman taking part in group sex. This included masturbation, fellatio, cunnilingus, vaginal and anal sex.
14. However, the recordings of You TV2 broadcast on 1 September 2005 were supplied in a format which could not be viewed by Ofcom. On 3 October 2005 a further request was made for the You TV2 material to be supplied in another format. Ofcom was provided with software by the licensee that enabled a viewing of the recordings.
15. On reviewing the material, Ofcom discovered that there was a gap of approximately two hours in the You TV2 recording where there was apparently no signal received by the equipment used to record the output. A further request was made of the licensee seeking an explanation and the missing material. There was a considerable delay on the part of the licensee to provide both an explanation and the missing material – this was not received until 3 November 2005.
16. The licensee stated that the adult content that was transmitted was another broadcaster's material played out on its channel because of a technical error by a third party. It described the incident as "appalling" but "...pure and simple force majeure – not a deliberate decision to broadcast". Gamecast argued that the fact that an accident occurred does not, by itself, prove negligence was the cause. It had been the broadcaster's own compliance staff who had spotted the adult content and had taken it off air. The broadcaster said that it had now "severed [its] play-out facilities from third party channels." In relation to the delay in providing recordings, it accepted that there was some confusion but said it had started an immediate review of procedures and response times with its recordings provider. The licensee stated that the company which provided the broadcaster's recording service was upgrading its equipment and had guaranteed a faster delivery of recordings in future.
17. Ofcom considered that the material broadcast by Gamecast on You TV3 was of an extremely explicit sexual nature involving 6 minutes of two men and a woman taking part in group sex, including masturbation, fellatio, cunnilingus, vaginal and anal sex. This material was equivalent in nature to content that would be classified by the British Board of Film Classification as an R18 ("R18 equivalent material"). Such material is prohibited from being broadcast both under encryption as well as on free-to-air services.
18. Ofcom did not accept that the transmission of offending material was due to circumstances outside the licensee's control and therefore a result of "force majeure". The Television Licensable Content Service ("TLCS") licence states that force majeure is only accepted where the relevant act is due to "accident or breakdown of any equipment...(caused otherwise than by a wrongful act, neglect or default of the Licensee his servants or agents)". Whether force majeure applies depends on the nature and general terms of the particular contract (in this case the TLCS) and what the relevant clause says. Force majeure does not apply where the failure is directly or indirectly caused by or arises from any circumstances within the control of the licensee.
19. In this case, the licensee had accepted that were it not for the fact that Gamecast (or one of its affiliate companies) had provided the R18 material to the play-out centre and had failed to ensure the complete separation of that material from the material intended for broadcast by

Gamecast, the offending material could not have been transmitted. Ofcom therefore concluded the force majeure clause was not invoked.

20. For the above reasons, Ofcom considered that Gamecast was in serious breach of the following Rules of the Code on 1 September 2005:
- 1.3 – Children must also be protected by appropriate scheduling from material that is unsuitable for them:
 - 1.25 – BBFC R18-rated films or their equivalent must not be broadcast; and
 - a breach of Condition 11 of Gamecast’s licence in that it failed to provide suitable recordings of You TV2 when requested.

Unauthorised Transmissions

21. At the time of the investigation, Gamecast had applied for, but had not received a licence to broadcast a service known as You TV3. Although no licence had been issued, Gamecast had transmitted a service under the name of You TV3. Gamecast stated that it had understood You TV3 to be “essentially a time-shifted version” of You TV and You TV2² in that it thought that the rules relating to the broadcasting of time-shifted services allowed the broadcasting of an amalgam of existing licensed services. It had not appreciated that the You TV3 service needed a separate licence as it said that it had misunderstood what the term “time-shifted” meant. Gamecast stated that it believed at the time that the issue of the licence for You TV3 was no more than a formality as it was simply waiting for signature. It had therefore gone ahead with transmitting the service known as You TV3 notwithstanding that transmitting a service without a licence is a criminal offence under the Broadcasting Act 1990 (as amended).

Referral to Ofcom’s Content Sanctions Committee

22. Ofcom’s Executive viewed the Code breaches and the transmission of an unauthorised service as very serious. In accordance with its published procedures (Outline procedures for the consideration of statutory sanctions) the Executive recommended that the case be referred to Ofcom’s Content Sanctions Committee (“the Committee”). There were also serious concerns about the licensee’s inability to provide Ofcom with adequate recordings of its output as required by its Licence conditions.

The Hearing

23. Ofcom held an oral hearing on 18 December 2006 to give the licensee a full opportunity to make representations before deciding whether the breaches by Gamecast warranted the imposition of statutory sanctions, and if so at what level. Ofcom was addressed by the Managing Director and Compliance Manager of Gamecast UK Limited, Patrick Holliday and his solicitor Caroline Kean of Wiggins.

You TV2 broadcast – 28 July 2005

“Play2Win Competition”

24. On behalf of her client, Caroline Kean stated that Gamecast did not seek to minimise any of the breaches that had been committed but this was a relatively new service and the breach that occurred on 28 July 2005 was not the most serious offence and the licensee considered it to have been resolved. At no time was there any intention by the licensee to mislead viewers. You TV had had a Compliance Officer at this time but it subsequently transpired he did not have the sufficient skills or experience to deal with such matters. Consequently,

² A time-shifted version (e.g. a “+1” service) of a single, existing channel is covered under an existing licence.

since the compliance officer left in December 2005, Patrick Holliday had taken over responsibility for compliance.

25. With respect to the issues regarding on-screen logos, the Committee asked when this had actually been resolved since the correspondence from Gamecast was unclear and there were apparent discrepancies in the dates. Gamecast had stated that whilst it originally thought that the matter had been resolved on 27 July 2005, it transpired that it was in fact 28 July 2005. However, at the hearing the licensee was still unsure whether the date was 28 July 2007 or “a couple of days later, or a day later, on the 29th...”. The licensee reiterated that there had never been any intention to mislead the public. However, while the Committee accepted the licensee representations that the competition was not broadcast to mislead viewers, the Committee was particularly concerned that, despite the sanctions process and investigations, the licensee still did not appear to have a full grasp of when the resolution had taken place.

You TV2 and “YouTV3” broadcast – 1 September 2005

Broadcast of R18 material

26. Gamecast accepted that the broadcast of R18 equivalent material was a “grave” incident and “the most serious breach that could have occurred”. The licensee stated that “This is not a channel that broadcast adult material...We are a general lifestyle game channel”³. Gamecast assured the Committee that it did not seek to transmit explicit material and that this “was not material they had in the office themselves”.
27. The licensee had claimed before the hearing that the accidental transmission of the R18 equivalent material was because of an error made by “a third party” and therefore out of its control. It claimed this was a straightforward case of force majeure for which it should not be held responsible. Further, in correspondence with Ofcom, the licensee had stated that “It appears that the play-out system provided to us ...was also used to broadcast material to the US...including pornographic material” (emphasis added). However, at the hearing, it transpired that it was, in fact, the licensee itself, Gamecast (or one of its affiliated companies), which provided the explicit R18 equivalent material to the US through this play-out centre. This R18 equivalent material was also stored on a server on Gamecast premises. This was despite the fact that at the hearing the licensee, through its legal representative, said that “It [the transmission of the R18 equivalent material] is something that genuinely was nothing to do with my clients”.
28. The licensee maintained that the material had been broadcast due to a “complete computer error” affecting the schedule, but that the content was immediately removed following broadcast. It requested the Committee give consideration to the “force majeure” clause in the TLCS licence which states:

“The licensee shall not be in any way responsible for any failure to comply with any Conditions of this Licence directly or indirectly caused by or arising from any circumstances beyond the control of the Licensee including (without limitation) accident or breakdown of any equipment or apparatus (caused otherwise than by the wrongful act neglect or default of the Licensee his servants or agents)...”

29. The licensee re-iterated its argument that the incident was “pure and simple force majeure” as it was not caused by someone playing the wrong tape or human error but due to a computer glitch. However, when pressed at the hearing, the licensee confirmed that the company who broadcast the material was an agent of Gamecast’s and that the un-

³ It should be noted that You TV2 currently transmits material promoting adult chat lines and is placed in the adult section of the Electronic Programme Guide.

broadcastable material had been provided to that agent by Gamecast or one of its affiliates without ensuring that it was kept separate from material that could be broadcast. It acknowledged that if the licensee had not used the play-out centre in these circumstances, then the broadcasting of the material “would not have happened”.

Recordings

30. Patrick Holliday, Gamecast’s Managing Director, accepted overall responsibility for Gamecast’s compliance but advised that the recordings had been outsourced to another company to ensure that they were done properly. He said that that company was reputable and had a suitable track record. However, he acknowledged that at times Ofcom had had to repeatedly request recordings and that there had been times when these recordings were blank or unreadable. The licensee advised that it has since reached an agreement with the recording company to change the format so that it was readable.

Unauthorised transmission of an unlicensed service

31. Prior to transmitting material on the unlicensed service You TV3, Patrick Holliday stated that he had had a telephone conversation with Ofcom who he said had advised him that the licence for You TV3 “had been sent off for signature”. However, he acknowledged that he had not received actual written confirmation that this was the case and under a deadline to launch the service, had gone ahead and launched the new service, unaware of the significance of the signing before doing so, for which he apologised. On behalf of Gamecast, Caroline Kean stated that her client accepted that they had been “naïve” and “jumped the gun”, and that the licensee took this matter very seriously.
32. Patrick Holliday stated that he did not believe it was necessary to apply for a new licence as he was only planning to broadcast a “time-shift” of the You TV2 service, though eventually the intention was to broadcast different content on the new service. He stated that, at the time, he had understood that a time-shifted service could include material that had already been transmitted on other services at other times and simply re-broadcast on another (time-shifted) service. However, he admitted that he had not checked what was meant by a time-shifted service.

Sanctions Decision

33. During the hearing, Caroline Kean advised the Committee that her client believed a statutory sanction was not appropriate in any of the cases before the Committee:
 - With regard to the broadcast on 28 July 2005, the licensee believed that this had now been resolved and was not a serious enough breach to consider a statutory sanction;
 - With regard to the broadcast on 1 September 2005, the licensee accepted that the incident was serious but had been caused by the actions of a third party, which they believed was covered under the “force majeure” clause of the TLCS licence;
 - With regard to the unauthorised transmissions, the licensee accepted that they had “jumped the gun” but that they had already suffered a significant financial loss which should mitigate any further penalty;
 - The licensee had already suffered significant financial costs, since its application for the licence You TV3 had been on hold for 15 months.
34. The Committee rejected the licensee’s representation that a financial penalty was not appropriate in this case. It considered that the breaches of the Code and its licence conditions alongside the transmission of material on an unlicensed service were very serious. Further it considered that the licensee had been less than transparent with Ofcom which aggravated the position. Despite its assertions to the contrary, Gamecast had shown a reluctance to accept responsibility for much of what had happened, much of which had been blamed on third parties or ex-employees. In particular, the Committee was most

concerned by the licensee's apparent lack of frankness with respect to the background to the transmission of the R18 equivalent material. It considered the fact that very explicit sexual material was being played out under encryption, by the same play-out centre as was used for its entertainment service, and this was the result of an arrangement by Gamecast (or one of its affiliates) was a significant factor which had only been revealed under questioning in the hearing. The Committee was also concerned that the Gamecast's was unable to offer any explanation as to how a programme said to be encrypted for transmission in the US (under NTSC format) could be viewed free-to-air when accidentally broadcast in the UK, where a different format is used. The Committee therefore considered that there had been a multiplicity of failures showing a complete lack of due diligence and an inability to understand and implement compliance procedures.

35. Having considered all the evidence and carefully listened to the licensee's representations, the view of the Committee was as follows:

You TV2 broadcast – 28 July 2005

"Play2Win Competition"

36. The Committee acknowledged that the licensee had admitted the failures regarding the broadcast on 28 July 2005. However the provision of a misleading service to viewers was a serious breach of the Code and the licensee's continual inability to clarify exactly when the issue of the on-screen logo had been resolved compounded the issue.

You TV2 and "YouTV3" broadcast – 1 September 2005

Broadcast of R18 material

37. The Committee considered the transmission of R18 material on a free-to-air channel in the afternoon to be completely unacceptable and most serious.
38. The Committee considered that the licensee had been negligent in simply assuming that they had two servers which were completely separate. As both servers were under the control of Gamecast, Ofcom considered that there should have been procedures in place to ensure that such inappropriate material could not be transmitted.
39. The Committee considered that the mere assertion of a software "glitch" was inadequate to demonstrate that force majeure applied, in circumstances where, if the licensee had undertaken more due diligence and clarification about what systems they actually had in place, then this incident would not have occurred. The Committee considered that if the licensee chose – which it did – to store encrypted R18 material on their servers on their premises then it required a very high level of due diligence. It was a decision of Gamecast (or one of its affiliates) to play out R18 equivalent material – material which is prohibited under current regulations from being broadcast in the UK – from the same play-out centre as Gamecast's entertainment services. In such circumstances, the licensee had clearly failed to take the necessary level of care.
40. The Committee was also extremely concerned that the licensee was unable to explain clearly, and in some cases at all, with whom it had contracts.
41. In this instance therefore, the Committee did not consider that the "force majeure" clause could be invoked. It was clear from the evidence given that the incident had occurred through the apparent neglect by the licensee to ensure that R18 equivalent material was stored separately from other broadcastable material.

Recordings

42. The Committee was concerned at the licensee's lack of acknowledgement and persistent inability to provide adequate recordings to the regulator over a long period of time. Given that the licensee had known that the investigation was proceeding, it had failed to ensure that the recording company had kept the material in question and were negligent in not doing so.
43. The Committee were equally concerned that the chosen company of the licensee who allegedly provided the same service to a number of other broadcasters clearly had little understanding of the regulatory requirements.

Unauthorised transmission

44. The Committee considered that despite there being no written confirmation of what had been said to Patrick Holliday in his telephone conversation with Ofcom regarding his licence for You TV3, as a Compliance Manager and Managing Director, he would have been in no doubt that he should have waited for the licence to be issued before launching the new service.
45. Despite the company having lost a significant amount of money by launching the service before it was licensed, the Committee considered that it was not appropriate to mitigate these losses incurred against the penalty being considered, as it was the licensee's decision to launch the service before a licence was issued.
46. The Committee considered that the licensee had shown a wilful lack of clarity in his explanation regarding time-shifting. The Committee was not persuaded by the licensee's explanation that it had believed a time-shifted service could include an amalgamation of different outputs previously broadcast but on different services – or that this was sufficient to avoid any liability for this offence.
47. The Committee referred to Ofcom's Penalty Guidelines which sets out a number of factors which it should take into account when determining the level of penalty to be imposed including:
 - “Any gain (financial or otherwise) made by the regulated body in breach...”
 - “The degree of harm caused...”
 - “The duration of the contravention”
 - “Repeated contraventions...”
 - “Continuation of the contraventions after either becoming aware of the contravention or being notified...”
 - “The extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur”
 - “The absence, ineffectiveness or repeated failure of internal mechanisms or procedures intended to prevent contravention...”
48. Having taken regard of the representations made and considered the relevant facts as outlined above, the Committee agreed:
 - To impose a financial penalty on Gamecast UK Limited of £100,000 (payable to HM Paymaster General).

Members comprising the Committee for the decision are:

Philip Graf (Chairman)
Richard Ayre
Kath Worrall

17 January 2007