

**Sanction: Decision by Ofcom
To be imposed on Satellite Entertainment Limited**

For material broadcast from 24 September 2012 at various times until 8 February 2013.

**Consideration of
sanction against:**

Satellite Entertainment Limited (“SEL” and the “Licensee”) in respect of its services *Northern Birds (Channel 935)*, *Essex Babes (Channel 936)*, *Sportxxx Girls (Channel 940)*, and *Livexxx Babes (Channel 942)*.

For:

Breaches of UK Code of Broadcast Advertising, Rule 30.3¹:

Rule 30.3: Advertisements for products coming within the recognised character of pornography are permitted behind mandatory restricted access on adult entertainment channels only

On:

Northern Birds (Channel 935), *Essex Babes (Channel 936)*, *Sportxxx Girls (Channel 940)*, and *Livexxx Babes (Channel 942)* 24 September 2012 to 8 February 2013, various times throughout the day.

Decision:

To impose a financial penalty (payable to HM Paymaster General) of **£40,000** on Satellite Entertainment Limited.

¹ BCAP Code Section 30: <http://www.cap.org.uk/Advertising-Codes/Broadcast/BCAP-Code/~media/Files/CAP/Codes%20BCAP%20pdf/BCAP%20Section%2030.ashx>

Executive summary

1. The services Northern Birds (Sky channel 935), Essex Babes (Sky channel 936), Sportxxx Girls (Sky channel 940) and Livexxx Babes (Sky channel 942) all transmit interactive daytime chat and 'adult chat' advertising content. These services are freely available without mandatory restricted access and are situated in the "adult" section of the electronic programme guide of the Sky digital satellite platform ("Sky EPG"). Viewers are invited to contact on-screen presenters via premium rate telephony services ("PRS"). In "adult chat" content the female presenters dress and behave in a sexually provocative way. During "daytime chat", all dress and behaviour is non-sexual in tone and apparent intent.
2. The licences for Northern Birds, Sportxxx Girls, Essex Babes and Livexxx Babes (together the "SEL Licensed Services") are all held by Satellite Entertainment Limited ("SEL" or "the Licensee").
3. Since 1 September 2010 all PRS-based 'daytime chat' and 'adult chat' television services have been regulated by Ofcom as long-form advertising i.e. teleshopping. From 1 September 2010 the relevant standards code for such services became The UK Code of Broadcast Advertising (the "BCAP Code") rather than the Ofcom Broadcasting Code.
4. On 28 January 2011 Ofcom published detailed guidance on the Advertising of telecommunications-based sexual entertainment services and PRS daytime chat services (the "Chat Service Guidance"²). The Chat Service Guidance is intended to assist licensees who carry 'daytime chat' and/or 'adult chat' advertising material to understand their obligations under the BCAP Code with specific reference to the application of those rules by Ofcom to chat services. The Chat Service Guidance includes guidance on the application of BCAP Rule 30.3 in this context, stating that "Ofcom licensed services that are broadcast without mandatory restricted access must not promote websites that contain material within the recognised character of pornography".
5. In Ofcom's finding, published on 4 March 2013 in Broadcast Bulletin issue 225³ ("the Finding"), Ofcom found that SEL was in breach of BCAP Code Rule 30.3 for the period 24 September 2012 to 8 February 2013 because throughout this period each of the SEL Licensed Services carried continued and repeated broadcast of promotional references to the "bluebird.tv" website, which at the time of the Finding contained material within the recognised character of pornography.⁴
6. Ofcom noted that the broadcast of an advertisement, on channels without mandatory restricted access, for a website containing pornographic material is a serious breach of the BCAP Code. Ofcom was particularly concerned that the Licensee in these instances broadcast the advertisement for extended periods both during daytime and immediately after the watershed when children were available to view (some unaccompanied). Ofcom therefore put the Licensee on notice that it would consider the breaches for the imposition of a statutory sanction.

Breaches of BCAP Code Rule 30.3

7. Rule 30.3 of the BCAP Code states that "advertisements for products coming within the recognised character of pornography are permitted behind mandatory restricted access on adult entertainment channels only".
8. The Finding noted that an on-screen text graphic providing contact information for the "bluebird.tv" website was broadcast throughout the day across the SEL Licensed Services. A graphic showed the "bluebird.tv" website URL above the chat service's phone number, and to the right was the "bluebird.tv" logo.
9. Ofcom investigated the "bluebird.tv" website and noted and retained records, including screenshots, of links through from the "bluebird.tv" website to "Bluebird Films"⁵ via a direct link

² Published on 28 January 2011: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/bcap-guidance.pdf>

³ See Finding at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb225/>

⁴ A 'content access control system' may consist of any technical tool which effectively bars access to those under 18 such as confirmation of credit card ownership or checks on an independent and reliable database.

⁵ at <http://www.bluebirdfilms.com>

from a “Bluebird HQ”-branded tab on the “bluebird.tv” home page screen.⁶ Ofcom observed that the “Bluebird Films” home page contained explicit pornographic material (equivalent to British Board of Film Classification [“BBFC”] R18-rated content⁷). Registration and age verification by means of credit card ownership was only required if the user wished to become a member of a paid-for content service.

10. In Ofcom’s view, the continued on-screen references to the “bluebird.tv” website URL for at least the period 24 September 2012 to 8 February 2013 both during daytime and the period after the 21.00 watershed clearly amounted to promotions of the bluebird.tv website, its related video content material, and associated products. The on-screen references to the bluebird.tv website were therefore advertising these products.
11. Ofcom concluded that the website references were in breach of BCAP Code Rule 30.3 because they were advertisements for products coming within the recognised character of pornography. These are only permitted behind mandatory restricted access on adult entertainment channels only. Ofcom sent a Preliminary View to the Licensee on this basis.
12. Therefore, Ofcom recorded the following breaches of Rule 30.3 of the BCAP Code:

Northern Birds (Channel 935), Essex Babes (Channel 936), Sportxxx Girls (Channel 940), and Livexxx Babes (Channel 942), 24 September 2012 to 8 February 2013, various times throughout the day.

Summary of Ofcom’s Sanctions Decision

13. Ofcom considered that this breach was sufficiently serious so as to warrant the imposition of a sanction on the Licensee in this case.
14. In accordance with Ofcom’s procedures for the consideration of statutory sanctions in breaches of broadcast licences (“the Sanctions Procedures”)⁸, and having considered all the evidence and all of the representations made to it by the Licensee, Ofcom has decided for the reasons set out in paragraphs 46 to 89 below that it would be appropriate to impose a financial penalty.
15. **Having regard to the serious nature of the BCAP Code breach, the Licensee’s representations and the Ofcom Penalty Guidelines (“the Penalty Guidelines”)⁹, Ofcom decided that it is appropriate and proportionate in the circumstances to impose a financial penalty of £40,000 on the Licensee in respect of the breaches of Rule 30.3.**

⁶ Observed on 13th November 2012.

⁷ The ‘R18’ category is a special and legally restricted classification primarily for explicit works of consenting sex or strong fetish material involving adults. Films may only be shown to adults in specially licensed cinemas, and video works may be supplied to adults only in licensed sex shops. ‘R18’ videos may not be supplied by mail order.

⁸ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/june2011/breaches-content-standards.pdf>

⁹ <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

Legal Framework

Communications Act 2003

16. In discharging its functions, Ofcom's principal duties set out in section 3(1) of the Communications Act 2003 ("the Act") are to further the interests of citizens in relation to communications matters and the interests of consumers 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)).
17. Ofcom has a specific duty under section 319 of 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 set out in section 319(2). One of those objectives is that "the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented." (Section 319(2)(h)).
18. 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, to have regard to 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)); and
 - the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection (section 3(4)(h)).

The Human Rights Act 1998

19. 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 on Human Rights ("the Convention").
20. 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" (Article 10(1) of the Convention). 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).
21. 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.

The UK Code of Broadcast Advertising

22. Standards set by Ofcom in accordance with section 319(2)(h) of the Act relating to advertising are set out in the BCAP Code. The BCAP Code is drawn up and published by the Broadcast Committee of Advertising Practice Ltd ("BCAP") pursuant to contracting out arrangements entered into between Ofcom and BCAP.¹⁰
23. However, Ofcom remains responsible for the regulation of long-form participation television advertising. This class of advertising includes telecommunications-based chat services – such as 'adult chat'.

¹⁰ Further details of the contracting out arrangements are contained in the Memorandum of Understanding between Ofcom and the ASA and BCAP and Basbof (published May 2004) which can be found at: http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/mou.pdf

24. Ofcom has published a guidance note to assist licensees who carry 'adult chat' material to understand their obligations under the BCAP Code with specific reference to the application of those rules by Ofcom to chat services. The Chat Service Guidance includes guidance on the application of Rule 30.3 to promotions for websites.
25. The relevant BCAP Code rule in this case is Rule 30.3.

Remedial action and penalties

26. Under section 325 of the Act, a licence for a programme service issued by Ofcom under the Broadcasting Act 1990 or 1996 must include conditions for securing that the standards set under section 319 are observed by the licensee. In the case of a television licensable content service ("TLCS") licence, Condition 6 of the licence requires the licensee to ensure that the provisions of any Code made under section 319 are complied with, including the BCAP Code. The Licensee holds a TLCS licence for each of the SEL Licensed Services.
27. Where Ofcom has identified that a condition of a TLCS licence has been contravened, its powers to take action are set out in sections 236 to 238 of the Act insofar as relevant to the case.
28. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or a statement of Ofcom's findings (or both), or not to repeat a programme which was in contravention of a licence condition.
29. Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence. The maximum penalty which may be imposed in respect of each contravention of a licence condition is whichever is the greater of £250,000 and 5 per cent of the qualifying revenue for the licensee's last complete accounting period falling within the period for which its licence has been in force.
30. Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence where a licensee is in contravention of a condition of a TLCS licence or direction thereunder.

Breaches of the BCAP Code

Background – the findings

31. In Ofcom's Finding, published on 4 March 2013 in Broadcast Bulletin issue 225¹¹ ("the Finding"), Ofcom found that the adult chat advertisements broadcast on the SEL Licensed Services breached Rule 30.3 of the BCAP Code. Ofcom found that the SEL Licensed Services, which were broadcast without mandatory restricted access, all carried continued and repeated broadcast of promotional references to the bluebird.tv website, which at the time of the Finding, contained material within the recognised character of pornography.

Breaches of BCAP Code Rule 30.3

32. The services Northern Birds, Essex Babes, Sportxxx Girls and Livexxx Babes all transmit interactive daytime chat and 'adult chat' advertising content. These services are freely available without mandatory restricted access and are situated in the 'adult' section of the electronic programme guide of the Sky digital satellite platform. Viewers are invited to contact on-screen presenters via premium-rate telephony services.
33. Since 1 September 2010, all PRS-based daytime and adult chat television services have been regulated by Ofcom as long-form advertising, i.e. teleshopping. From 1 September 2010 the relevant standards code for such services has been the BCAP Code. BCAP Rule 30.3 provides that:

Advertisements for products coming within the recognised character of pornography are permitted behind mandatory restricted access on adult entertainment channels only.

¹¹ See Finding at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb225/>

34. On 28 January 2011 Ofcom published the Chat Service Guidance.¹² The Chat Service Guidance is intended to assist licensees who carry 'daytime chat' and/or 'adult chat' advertising material to understand their obligations under the BCAP Code with specific reference to the application of those rules by Ofcom to chat services. The Chat Service Guidance includes guidance on the application of BCAP Rule 30.3 in this context, stating that "Ofcom licensed services that are broadcast without mandatory restricted access must not promote websites that contain material within the recognised character of pornography".
35. Ofcom concluded that the on-screen references to "bluebird.tv" on the SEL Licensed Services breached BCAP Rule 30.3 as they consisted of advertisements for products coming within the recognised character of pornography. Such advertisements are only permitted behind mandatory restricted access on adult entertainment channels.
36. The Finding noted that, throughout the day and across the four SEL Licensed Services, an on-screen text graphic providing contact information for the Bluebird service was positioned at the base of the screen. The left-hand side of this graphic showed the "bluebird.tv" website URL above the chat service telephone number. Also visible on screen, at all times and across all the relevant channels, were the contact telephone numbers for the text services and a photograph of the female model currently presenting the broadcast.
37. As noted in the Finding, Ofcom investigated the "bluebird.tv" website and retained records, including screenshots, of the material available on that website, as described below.
38. On reviewing the "bluebird.tv" website following receipt of the complaint, Ofcom found that access to the "bluebird.tv" site was possible without age verification, and led to a homepage which streamed one of the Bluebird TV linear channels. It prominently displayed five tabs, which each took a user directly to five Bluebird-branded web services. One of these, as indicated by the name on the tab, was "Bluebird HQ". "Bluebird HQ" shares common branding with Bluebird TV and the tab linked through to Bluebird Films, which offered premium film membership services, R18 equivalent pornographic trailers and DVD sales.
39. Ofcom noted that there was no content access control system in place on the relevant websites to ensure users were over 18. The user was given an option to self certify as over 18 by responding "OK" to a pop-up box on first visiting the site bluebird.tv. The "Bluebird HQ" branded tab, positioned on the right-hand side of the home page of bluebird.tv, took the user to the "Bluebird Films" landing page. This page included a further option to self certify as over 18 by means of a document described as an agreement with options for the user to either accept the statements made in the "agreement" (including a statement that the user was over 18) and thereby entering into the "agreement", or not to enter into the "agreement". By clicking "I agree", the user entered the "Bluebird Films" home page.
40. Ofcom noted that the "Bluebird Films" homepage contained video content that featured, among other things, but not exclusively, video images of vaginal penetration and oral sex – some of which was shown in close-up. Two types of explicit pornographic material (equivalent to the British Board of Film Classification ("BBFC") R18-rated content) could be accessed and viewed from the "Bluebird Films" homepage.
41. The first type, on initially accessing the "Bluebird Films" home page, consisted of an embedded video player positioned in the centre of the screen, which automatically played a video clip. The player showed a 50-second video clip, the first 30 seconds of which featured edited 'glamour' shots of scantily clad or naked women, kissing, touching and posing in an erotic way. The final 20 seconds of the clip featured explicit sexual material of an R18 equivalent nature including shots of oral sex, vaginal penetration, and the use of sex toys for sexual stimulation or penetration – some of which were in close-up.
42. The second type of pornographic material was accessible at the bottom of the page (beneath the player containing the video material described immediately above) and consisted of 17 photographic hyperlinks under the heading "Bluebird Films Hot Movies". These links promoted pornographic films that could be viewed in full by purchasing premium Bluebird membership or by purchasing the associated DVD product (from the "Buy DVD's [sic]" tab positioned at the top of the page). Clicking on these photographic hyperlinks led the user through to "teaser" videos, each

¹² Subsequently published in revised versions on 27 July 2011 and 4 February 2013, revisions not relevant to this sanction.

between about one and two minutes in length, promoting the full film to which the photographic hyperlink corresponded. These teaser videos featured explicit sexual material including vaginal penetration, oral sex, and masturbation – some of which was again in close-up.

43. Following receipt of the Licensee's comments on Ofcom's preliminary breach finding on 21 December 2012, Ofcom noted that each of the SEL Licensed Services continued to promote the "bluebird.tv" website in the manner described above. Ofcom further investigated the bluebird.tv website on 19 December 2012 and in January 2013. Ofcom noted several changes to the website, which were explained in the Finding. However, Ofcom found that despite these changes, the pornographic material referred to above could still be viewed without access restrictions from the "Bluebird HQ" tab on the bluebird.tv website. Each of the SEL Licensed Services continued to promote the bluebird.tv website during this period.
44. In Ofcom's view, the continued on-screen references to the bluebird.tv website URL for at least the period 24 September 2012 to 8 February 2013 both during daytime and the period after the 21.00 watershed clearly amounted to promotions of the bluebird.tv website, its related video content material, and associated products as detailed below – including, but not exclusively, membership of the Bluebird premium service and the sale of related DVDs. The on-screen references to the bluebird.tv website were therefore advertising these products. In Ofcom's view, SEL promoted the bluebird.tv website within its licensed television services as a means for viewers to purchase membership of the Bluebird premium service, available from the Bluebird Films website (accessible through the "Bluebird HQ" tab), which offers access to both its exclusive adult film content and live webcams, and to purchase adult DVDs. The on-air promotional references to the website containing pornographic material were clearly broadcast advertising content.
45. Moreover, Ofcom noted that, although the four SEL Licensed Services in this case are within the 'adult' section of the Sky EPG, they are broadcast unencrypted and without mandatory restricted access. Ofcom therefore considered that these advertisements for products within the recognised character of pornography were shown on the SEL Licensed Services without mandatory restricted access in breach of Rule 30.3 of the BCAP Code as noted in the Finding.

Ofcom's decision to impose a statutory sanction

46. As set out in paragraph 1.10 of the Sanctions Procedures the imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly, or recklessly breached a relevant requirement.
47. In this case, Ofcom issued a preliminary view ("Preliminary View") that Satellite Entertainment Limited had breached Rule 30.3 of the BCAP Code, and that the breaches were sufficiently serious to warrant the imposition of a statutory sanction. Ofcom sent a copy of the Preliminary View to Satellite Entertainment Limited on 2 May 2013, at the same time giving Satellite Entertainment Limited the opportunity to provide written and oral representations ("the Representations") on the Preliminary View. Satellite Entertainment Limited provided its written representations ("Written Representations") to Ofcom on 11 June 2013, and provided its oral representations ("Oral Representations") to Ofcom on 15 July 2013. The Representations are summarised in paragraph 49 below.
48. In reaching its final Decision on whether to impose a statutory sanction and, if so, what type and level of sanction, Ofcom was not bound by the Preliminary View. Ofcom took account of all the evidence and representations on behalf of Satellite Entertainment Limited, including the Representations on the Preliminary View, and has had regard to the Sanctions Procedures and to Ofcom's Penalty Guidelines in reaching its Decision in this sanctions case (see further below).

Licensee's representations

49. The Licensee accepted that the material broadcast breached Rule 30.3, but in its Written and Oral Representations made the following comments in mitigation:
 - the breach was not deliberate.

The Licensee stated that it was originally unaware that the “Bluebird HQ” tab of the “bluebird.tv” website linked through to R18 equivalent pornographic material, believing instead that it linked to a “corporate” part of the website. The Licensee did not know how the material became linked to that particular tab;

- the Licensee had not been reckless.

The Licensee submitted that it had, and continues to have, strong compliance procedures, targeted primarily towards its broadcast services, under the supervision of a director. It indicated that these procedures included internal production manuals for producers and models, as well as daily production meetings. Its web operations had been less frequently subject to compliance review, as the majority of the site’s content did not change often. The Licensee’s Financial Controller explained that he was not at the time of the breach in charge of supervising or editorially managing the website, though the broadcast compliance of the website URL’s would have fallen under his remit;

The Licensee has now “tightened” its compliance and disciplined the staff responsible for the shortcomings of the initial remedial action; the Licensee’s Managing Director explained that he has now taken personal responsibility for monitoring the web site and in any event, the web site’s URL is no longer being broadcast.

- the Licensee had responded to regulatory intervention.

The Licensee accepted that it had not recognised that the breach had occurred – and had responded accordingly in December 2012 in response to Ofcom’s preliminary breach finding. Once the Licensee realised the breach was in fact occurring, it did make changes to the website, and eventually the on screen URL at issue, although it could not provide the dates on which changes were implemented. The Licensee asserted that, between Ofcom’s initial preliminary breach finding and the Sanction Preliminary View, it took steps, which did not entirely restrict access to the R18 equivalent pornographic material, but in the Licensee’s view minimised the risk of potential harm by making the material more difficult for the user to find. Following the Licensee’s realisation that the material was still accessible, it took subsequent action, with the website being “completely redesigned” so as to prevent access to the material;

- the risk of harm to children was minimal.

The character of the bluebird.tv website itself, whose URL was promoted in the Licensed Services, is at the “the very lowest end” – i.e. glamour - of the pornography spectrum. It was, and continues to be, “informational”, providing information about the models and the television channels.

The Licensee submitted that there is no evidence that any children viewed the Licensed Services, nor that any children accessed the website as a result. The Licensee submitted that the nature of the complaint and who the complainant might be should have a bearing on Ofcom’s assessment of harm. It said that if the complaint was made by a competitor it is relevant to the argument of mitigation. If the complaint was made by a member of the public under the age of 18, then that is slightly different in dealing with the concept of mitigation than if it was a competitor which first raised the fact the link existed.

In the Licensee’s view, the complexity of the means of access to the R18-equivalent pornographic material on the Bluebird Films site, accessed through the “bluebird.tv” homepage made a complaint from the public unlikely, and the Licensee asserted that this was reflective of the risk of harm to children. The Licensee submitted that there are safeguards provided within the Sky network that enable parents to exclude access to those particular channels which, had those been in place, would have naturally reduced the number of individuals that could have accessed the adult entertainment site at first instance. The Licensee also submitted that for any under-18s who were hell-bent on finding hard core adult – beyond R18 – it would take one simple entry in a Google search engine and they would be invited to view very significantly stronger material than anything else that’s certified by the BBFC.

- there was no commercial gain.

Satellite Entertainment Ltd did not receive any revenue from sales, nor did it receive any commercial gain from the “Bluebird HQ” tab linking through to the Bluebird Films website, and that there had been no “hidden agenda” to do so.

Serious nature of breaches

50. Ofcom considered that the breaches of Rule 30.3 were sufficiently serious to warrant the imposition of a statutory sanction for the reasons set out below.
51. Firstly, the promotion of a web site containing explicit R18 pornographic material, particularly during the day, is a serious breach. The promotion was prominent and constant during the period of the breach, consisting of a graphic for the “bluebird.tv” website integrated into the on-screen graphic promoting the chat service’s phone number. Its integration into the main services promoted by the SEL Licensed Services resulted in it being highly likely to be seen, and followed up as a route to the services offered by “bluebird.tv”.
52. Secondly, as noted above, the references promoting the relevant website were broadcast for extended periods in daytime when children were available to view. As the relevant website promoted provided a user path¹³ to R18-equivalent material without any form of content access control system, allowing anyone who followed the user path access to that R18 equivalent material and given the importance placed upon protecting children from unsuitable material, Ofcom is particularly concerned that the website was promoted in particular at times when children were available to view.
53. Thirdly, SEL appeared to have wholly insufficient compliance arrangements in place, as demonstrated by the breaches in this case and in SEL’s response to Ofcom’s preliminary breach finding. SEL initially failed to recognise that its promotion of the website amounted to a breach stating that it was “at a loss as to understand the basis of the allegations” by Ofcom that the Licensee had breached BCAP Code Rule 30.3 and that “[t]here are no links to, or promotions of sexually explicit content on this site [“bluebird.tv”]”. The Licensee has since explained that this response was an immediate reaction based on a belief that the site was compliant. However, a check of the relevant tab at the time Ofcom first contacted the Licensee would have shown the breach concerned, and action taken at that point would have averted any continuing risk of harm to children.
54. Given the extensive information provided to the Licensee about what was acceptable in respect of “adult chat” content under the BCAP Code, the Licensee ought to have known that a breach of the BCAP Code was occurring, and failed to take appropriate steps to prevent the contraventions happening. This extensive information included the following:
 - Broadcast Bulletin 165 published on 13 September 2010. This contained a Note to broadcasters regarding the new regulatory regime under which long-form advertising predicated on premium rate telephone services (including “chat” and “adult sex chat” services) would be regulated by Ofcom from 1 September 2010 under the BCAP Code;¹⁴
 - a meeting for all adult chat broadcasters on 14 December 2010 at Ofcom (attended by the Licensee) when Ofcom outlined its forthcoming guidance on the BCAP Code and answered questions from licensees;
 - a Note to all broadcasters in the “daytime” and “adult chat” sector in Broadcast Bulletin 172 published on 20 December 2010 that stated that Ofcom will not tolerate repeated breaches of the BCAP Code by services operating in the sector of daytime and adult chat and will not hesitate to take appropriate enforcement action where necessary¹⁵; and

¹³ Outlined in paragraphs 9

¹⁴ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb165/issue165.pdf>

¹⁵ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb172/issue172.pdf>

- Ofcom's Chat Service Guidance, published on 28 January 2011, gave detailed advice on what type of material is unacceptable during "adult chat" broadcasts.

55. The Licensee has since explained why it believed at the time of the breach that the material accessed via the "Bluebird HQ" tab, located on the "bluebird.tv" website, was "as the language indicates a page designed to deliver information about the world behind the scenes in a broadcast facility". However, as detailed above, the website clearly contained material within the recognised character of pornography. To the extent that SEL was unaware of this, this would represent a serious compliance failure. We would expect licensees to exercise a degree of due diligence before promoting such websites on licensed broadcast services. This is all the more so in the adult industry, given the potential nature of the material that may be included in these websites, which is accessible to children insofar as the website does not have an access control system.
56. This failure to ensure sufficient and robust compliance arrangements were in place directly resulted in the continued broadcast of the references in question, in breach of Rule 30.3, despite being on notice that this material was clearly unsuitable for children to view, during periods when significant numbers of children may have been available to view such as Christmas Bank Holidays and weekends.
57. Fourthly, the breaches are serious in light of the compliance record of SEL, which is set out in detail at paragraph 74 below.
58. In view of the factors set out above, Ofcom considered that the breaches are sufficiently serious as to warrant the imposition of a statutory sanction.

Imposition of sanctions

59. As set out above, Ofcom's powers to impose a sanction are set out in sections 236 to 238 of the Act insofar as relevant to the present case.

Consideration of sanctions other than a financial penalty

60. Ofcom has the power to direct the holder of a TLCS licence¹⁶ to broadcast a correction or a statement of Ofcom's findings (or both) in the licensed service, in such form and at such time or times as determined by Ofcom, or not to repeat a programme (or advertisement) which was in contravention of a licence condition.
61. In this particular case, it is Ofcom's view that a direction not to repeat the advertising content would not be an appropriate sanction as the references to the "bluebird.tv" URL have now been removed from the SEL Licensed Services.
62. Similarly, Ofcom does not believe that a direction to broadcast a statement of Ofcom's findings is appropriate as it would further publicise the website in question.
63. Ofcom considers that, for the reasons set out in this document, the breaches were sufficiently serious to warrant the imposition of a financial penalty. In Ofcom's view, this would act as an effective deterrent to discourage the Licensee, and other licensees, from breaching the BCAP code in a similar manner in the future.
64. In light of the above, and taking into account the broadcaster's right to freedom of expression and the information currently available, Ofcom does not consider that it would be necessary or proportionate to recommend revocation of the Licence as an appropriate statutory sanction in respect of the current breaches under consideration.

Imposition of a financial penalty

65. Under 237 of the Act, the maximum level of financial penalty that can be imposed on the holder of a TLCS licence in respect of each breach is £250,000 or 5% of the licensee's 'qualifying revenue', whichever is the greater.

¹⁶ This also applies to DTPS licences.

66. Qualifying revenue is calculated by adding together revenue gained from advertising, sponsorship and subscription. It does not include revenue gained from interactive services, such as premium rate phone calls.
67. SEL has no declared 'qualifying revenue'. Ofcom therefore considered a financial penalty of up to £250,000 in respect of each breach of the SEL Licences of each of the SEL Licensed Services as set out under section 237 of the Act.
68. Ofcom's Penalty Guidelines state that "Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement." Ofcom has taken full account of the need to ensure that any penalty acts as a deterrent and has also taken account of the specific factors set out at paragraph 4 of the Penalty Guidelines.

Factors taken into account in determining the amount of a penalty

69. In considering the appropriate amount of a financial penalty for each of the breaches, Ofcom took account of relevant factors in accordance with Ofcom's Penalty Guidelines, as set out below. In particular, Ofcom has considered the extent to which any penalty acts as a deterrent to future contraventions of the BCAP Code by SEL.
70. *The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants*

Ofcom noted the Licensee's Oral and Written Representations in relation to the identity of the complainant and to the likelihood of harm to children. In Ofcom's view, the identity of the complainant is irrelevant to the assessment of potential harm. The promotions of the "bluebird.tv" URL, whose "Bluebird HQ" tab linked through to R18-equivalent pornographic material, were broadcast on the SEL Licensed Services without mandatory restricted access throughout the day, including before the 21.00 watershed, at times when significant numbers of children would have been available to view. In Ofcom's view, the promotion of a website providing links to unrestricted access to R18-equivalent material, when children were likely to be available to view, had the potential to cause distress or harm to child viewers, and therefore merits a higher penalty than if the breaches had only occurred after 22.00.

71. *The duration of the contravention*

Ofcom noted that the recorded breaches were in relation to promotions broadcast on four channels from at least 24 September 2012 on an ongoing basis until at least 8 February 2013. Ofcom noted that, by 15 March 2013 the content of the "bluebird.tv" website had changed such that the on-screen promotion of the website on the SEL Licensed Services was no longer in breach of Rule 30.3.¹⁷

72. *Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention*

The ability for users to purchase premium "Bluebird" membership, or to purchase related DVDs, through clicking on tabs on the "bluebird.tv" homepage, provided a commercial opportunity to achieve sales of these products. However, Ofcom does not have evidence to show that the Licensee made any financial gain from these breaches of the BCAP Code, and the Licensee denied in its Representations that this was the case.

73. *Any steps taken for remedying the consequences of the contravention*

Steps taken by the Licensee in response to the breaches of the BCAP Code have been noted above, particularly the failure to properly investigate the breach when first notified by Ofcom, resulting in the denial of a breach made in response to Ofcom's preliminary breach finding in December 2012.

¹⁷ Confirmed on investigation by Ofcom on 15 March 2013

As also noted above, the Licensee did eventually take steps to remedy the breach, and the pornographic material was made no longer accessible from the "bluebird.tv" website.

We would expect licensees to exercise a degree of due diligence before promoting such websites on licensed broadcast services. This is all the more so in the adult industry, given the potential nature of the material that may be included in these websites, which is accessible to children insofar as it does not have an access control system. In instances such as these, Ofcom would expect licensees to take a precautionary approach to such material, and respond with prompt and appropriate action immediately when notified.

74. *Whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties)*

As noted above Ofcom has previously imposed statutory sanctions on SEL namely:

Sanction against SEL (under the Broadcasting Code)

SportxxxBabes, 26 February 2007, 13 March 2007 and 17 March 2007:

SportxxxBabes broadcast unencrypted 'adult-sex' material, which included sequences apparently showing intercourse, oral-genital contact, masturbation, the use of dildos, a woman gagged with her knickers, and full nudity in breach of Rules 1.24, 2.1 and 2.3.

Penalty: £20,000¹⁸

Sanction against SEL (Under Licence Condition 11):

Essex Babes, Northern Birds and Live XXX Babes, in respect of broadcasts on 9 occasions between 8 September 2010 and 13 October 2010¹⁹:

SEL refused to supply Ofcom with recordings, and for a six week period the Licensee had lost control of its own services.

Penalty: £90,000²⁰

Sanction against SEL (Under of Rule 4.2 and Rule 32.3 of the BCAP Code):

Essex Babes Northern Birds and Sport XXX Girls (TLCS-525, TLCS-761 and TLCS-761 respectively), 20 December 2011

SEL breached Rule 4.2 and Rule 32.3 of the BCAP Code relating to the broadcast of various adult sex chat advertisements between 5 April 2011 and 14 April 2011 and for further breaches of Licence Condition 11

Penalty: £130,000.²¹

75. Recorded Code breaches not leading to sanction:

Two breaches were recorded on 22 October 2007 in Broadcast Bulletin 95²²:

¹⁸ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/sportxxxbabes.pdf> (Published 26 August 2008).

¹⁹ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/satellite-entertainment.pdf> (Published 24 June 2011).

²⁰ At the time of writing, SEL is yet to pay either the £90,000 or the £130,000 financial penalties imposed upon it by Ofcom on 24 June 2011 and 20 December 2011 respectively.

²¹ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/satellite-entertainment-ltd.pdf> (Published on 20 December 2011).

Sanction 92(13) Satellite Entertainment Limited

Breach of Code Rules: 1.3 (protection of under-18s by appropriate scheduling; 1.24 (adult-sex material); 2.1 (generally accepted standards); and Rule 2.3 (offence): LivexxBabes, 17 April 2007, 21:00 to 01:00 and 18 April 2007, 21:00 to 01:00.

A breach was recorded on 21 July 2008 in Broadcast Bulletin 114²³.

Breach of Code Rule 2.2 (misleadingness): SportxxxGirls, 10 February 2008 at 22:00.

A breach was recorded on 29 September 2008 in Broadcast Bulletin 118.²⁴

Breach of Code Rules: 2.1 (generally accepted standards) and 2.3 (Offence): LivexxBabes, 8 June 2008, 21:00 to 03:00.

Two breaches were recorded on 13 October 2008 on Broadcast Bulletin 119²⁵:

Breach of Code Rules 1.24 (adult-sex material); 2.1 (generally accepted standards); and 2.3 (offence): SportxxxBabes, 19 and 20 November 2007 at 22:00²⁶.

Six breaches were recorded on 23 August 2010 in Broadcast Bulletin 164²⁷:

Breach of Code Rules: 2.1 (generally accepted standards) and 2.3 (offence): Live XXX Babes, 31 March 2010, 22:00 to 23:00; 1 April 2010, 22:00 to 22:24; 3 April 2010, 22:00 to 02:00; 19 May 2010, 00:00 to 01:00; and Northern Birds, 11 April 2010 22:30 to 23:00; and

Breach of Code Rules: 1.6 (transition to adult material after the watershed), 2.1 and 2.3: Live XXX Babes, 16 May 2010, 21:00 to 21:30.

76. Recorded BCAP Code breaches not leading to sanction:

Three breaches were recorded on 4 July 2011 in Broadcast Bulletin 185²⁸:

Breach of BCAP Code Rule 4.2 (harm and offence): Northern Birds, 12 March 2011, 21:30 to 22:00; and 13 March 2011, 01:00 to 01:20; and Live XXX Babes, 14 March 2011, at 00:00.

²² <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb95/issue95.pdf> (Published 22 October 2007).

²³ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb114/issue114.pdf> (Published on 21 July 2008).

²⁴ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb118/issue118.pdf> (Published 29 September 2008).

²⁵ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb119/issue119.pdf> (Published 13 October 2008).

²⁶ These breaches ("the November 2007 Breaches") occurred at the same time as other breaches that occurred in February and March 2007, which were the subject of the August 2008 Sanction (see above). Ofcom considered the November 2007 Breaches for statutory sanction. However, in view of all the circumstances of this case - including the broadcaster's quick and frank admission of the breaches, the steps taken to rectify the problem and the subsequent improvements to the channel's content in terms of compliance with the Code - Ofcom finally decided not to refer the November 2007 breaches for sanction.

²⁷ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb164/issue164.pdf> (Published 23 August 2010).

²⁸ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb185/obb185.pdf> (Published 4 July 2011).

77. Recorded breaches of Licence Condition 11 not leading to sanction:

One breach was recorded on 8 November 2011 in Broadcast Bulletin 169²⁹:

Sport XXX Girls, 10 September 2010, 00:00 to 00:30.

78. *Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention*

As detailed above, Ofcom has noted that the Licensee appeared initially unaware that its promotion of its web site amounted to a breach and denied the existence of the first user path described in Ofcom's Finding.

As also noted above, the Licensee did eventually take steps to remedy the breach, and the pornographic material was made no longer accessible from the "bluebird.tv" website.

We would expect licensees to exercise a degree of due diligence before promoting such websites. This is all the more so in the adult industry, given the potential nature of the material that may be included in these websites, which is accessible to children insofar as it does not have an access control system, and the clear requirements of the BCAP Code.

79. *The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur*

On 14 December 2010 Ofcom invited all licensees in the PTV adult sector to a meeting at Riverside House. At that meeting Ofcom reminded licensees of their duties under the BCAP Code, highlighted that Ofcom would take appropriate regulatory action against those licensees that continued to breach the BCAP Code and informed them that Ofcom would shortly be publishing guidance on the BCAP Code to aid broadcasters located in the 'adult' section of the EPG.

Further, the Licensee should have been aware of the BCAP Code through its breach finding against it on 20 December 2011 in respect of Essex Babes, Northern Birds and Sport XXX Girls in which Ofcom warned SEL that it would not expect further breaches of the BCAP Code to occur again.

Moreover, the Chat Service Guidance published on 28 January 2011, gave detailed advice on Rule 30.3 and was clear that Ofcom licensed services that are broadcast without mandatory restricted access must not promote websites that contain material within the recognised character of pornography.

Senior management therefore ought to have been fully aware of the provisions of the BCAP Code and accompanying guidance, and should have ensured that compliance procedures were in place. Ofcom noted that the Licensee initially failed to recognise that the promotion of a website containing pornographic material was a clear breach of the BCAP Code, and its senior management failed to fully investigate the breach after it had first been notified by Ofcom. In Ofcom's view this demonstrated a poor level of compliance.

80. *Whether the contravention in question continued, or timely or/and effective steps were taken to end it, once the regulated body became aware of it.*

The contraventions continued over a four month period between 24 September 2012 and 8 February 2013.

We have noted above at paragraphs 53, 55, 73 and 78 the delay in response to Ofcom's initial notification, but as of 15 March 2013 the pornographic material was no longer accessible from the

²⁹ <http://stakeholders.ofcom.gov.uk/binaries/enforcement/broadcast-bulletins/obb169/issue169.pdf> (Published 8 November 2010).

“bluebird.tv” website, and the URL is no longer promoted within the SEL Licensed Services.

81. The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body

SEL’s reported turnover for 2011 was £1,857,000.³⁰ The proposed penalty represents 2.2% of SEL’s reported turnover. Ofcom considers this to be a proportionate financial penalty as it achieves the appropriate level of deterrence taking into account - in particular, the serious nature of the breaches concerned and the previous sanctions against SEL.

Precedent

82. In accordance with the Penalty Guidelines, Ofcom has also had regard to relevant precedents set by previous cases.

83. There are no directly relevant precedent cases because this is the first case involving breaches of BCAP Code Rule 30.3 referred for consideration of sanction. Previous sanctions under the BCAP Code have concerned breaches relating to the prohibition of advertisements that cause serious or widespread offence against generally accepted moral, social or cultural standards and/or which do not apply appropriate timing restrictions. Further, Ofcom’s decision is that the financial penalty to be imposed should be determined in large part by the particular details of this case, including the serious nature of the breach and the poor compliance record of SEL.

84. The most relevant precedent cases are therefore those which raise analogous issues under the Broadcasting Code (the promotion of URLs leading to websites containing R18 equivalent material), and cases concerning adult chat channels broadcast without mandatory restricted access concerning breaches of the BCAP Code. Ofcom considers the following to be relevant precedents³¹ in this category:

85. **18 May 2009: RHF Productions Limited (“RHF”) and Portland Enterprises (C.I.) Limited (“Portland Enterprises”)** – a financial sanction of £25,000 was imposed on RHF Productions Limited in respect of its services Red Hot 40+, Red Hot Amateur, Red Hot Girl Girl, Red Hot Just 18, Red Hot DD and Red Hot Fetish for breaches of Rules 1.2, 1.3, 2.1 and 2.3 of the Broadcasting Code between 21 July 2008 and 28 August 2008 from 20:00 onwards, in relation to verbal and on-screen text references to certain URLs for RHF website address a website for Portland Enterprises (a related company). The URLs concerned were promoted with non-explicit stills images, and led to websites which, although they included a warning on their front pages, contained extremely explicit sexual material equivalent to BBFC R18-rated material. This material did not require registration to view and could be seen by under-eighteens. Portland Compliance (which managed the compliance of RHF and Portland Enterprises jointly) informed Ofcom that immediately on receipt of the Finding, its compliance team had requested changes to be made to the websites so that no R18-rated equivalent material was accessible to users. However, these changes were not implemented. On being contacted by Ofcom on 28 August 2008, RHF took immediate steps to ensure the removal of the URLs from the relevant channels.³²

86. **9 November 2011: Just4Us TV Limited and Playboy UK TV Limited/Benelux Ltd (“Playboy TV”)** - a financial sanction of a total of £110,000 was imposed on those two Licensees (£60,000 and £50,000 respectively) in respect of their services Red Light 1, Red Light 2 and Red Light 3

³⁰ This figure is the combined figure for SEL’s licensed services, individual figures are below

TLCS-525	Satellite Entertainment Limited	Essex Babes	519,000
TLCS-761	Satellite Entertainment Limited	Northern Birds	601,000
TLCS-762	Satellite Entertainment Limited	Sport XXXGirls	431,000
TLCS-764	Satellite Entertainment Limited	Live XXXBabes	306,000

³¹ Recent sanctions concerning, for example, “adult” channels normally showing “adult sex material” under encryption, and free to air trailers for such services shown on these channels, are not sufficiently analogous to be helpful precedents.

³² At <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/rhfportland.pdf>. Note: Portland Enterprises were separately sanctioned with a financial penalty of £27,500 in this Decision for an unrelated breach of Rule 1.25 of the Broadcasting Code (for inadvertent broadcast of R 18 equivalent material on air in respect of its Service Television X2).

for ten breaches of the BCAP Code in respect of Rules 4.2: “Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards” and 32.3 “Relevant timing restrictions must be applied to advertisements that, through their content, might harm or distress children of particular ages or that are otherwise unsuitable for them.” The adverts concerned were broadcast at various times including immediately post the watershed and featured images and actions resulting in prolonged and frequent scenes of a strong sexual material although not R18 equivalent. Ofcom was concerned at the degree of offence likely to be caused to viewers who might come across this material unawares and considered this material should not have been broadcast within the context of ‘adult chat’ advertisements that were freely available without mandatory restricted access.³³

87. **20 December 2011: Satellite Entertainment Limited** – as noted above, a financial sanction of £130,000 was imposed on SEL for multiple breaches of BCAP Code Rules 4.2 and 32.3 and a breach of Licence Condition 11. As with the case above, the advertisements concerned were broadcast at various times after the watershed and featured images and actions resulting in prolonged and frequent scenes of a strong sexual material although not R18 equivalent. Ofcom was concerned at the degree of offence likely to be caused to viewers who might come across this material unawares and considered this material should not have been broadcast within the context of ‘adult chat’ advertisements that were freely available without mandatory restricted access.³⁴
88. Ofcom is satisfied that the level of penalty proposed in this case is consistent with the precedent cases, taking due account of the factors outlined in the Penalty Guidelines and the seriousness of the breaches in this case.

Cooperation

89. In accordance with the Penalty Guidelines, Ofcom may increase the penalty where a licensee has failed to cooperate with Ofcom’s investigation. Ofcom considers that the level of penalty should not be increased on this ground.

Conclusion

90. Any financial penalty Ofcom imposes on the Licensee must be appropriate and proportionate to the contravention in respect of which it is imposed. Ofcom’s central objective in setting a penalty is deterrence both for the Licensee and other broadcasters. An appropriate penalty would be one that secures this objective (doing so in a proportionate way).
91. As regards the weighting of the factors considered above, it is Ofcom’s view that the following factors are of particular importance in the circumstances of this case, and in consideration of the level of penalty:
- The breaches were serious;
 - References promoting the relevant website were broadcast for extended periods in daytime when children were available to view;
 - The Licensee appeared to have wholly insufficient compliance arrangements in place in this regard, though the Licensee took steps, albeit on two separate occasions, that ultimately remedied the breach.
92. Having regard to all the factors referred to in this Decision and all the Representations from the Licensee, Ofcom’s decision is that an appropriate and proportionate financial penalty would be **£40,000**.

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³³ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/Just4Us-Sanction.pdf>

³⁴ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/satellite-entertainment-ltd.pdf>