

Ofcom Content Sanctions Committee

It is Ofcom policy to describe the material and language broadcast by licensees who are the subject of a sanction decided upon by the Content Sanctions Committee where it is relevant to the case. Some of the broadcast material described in this decision may therefore cause offence.

This Decision concerns programmes broadcast between April and July 2009, which are covered by the version of Ofcom's Broadcasting Code which came into effect on 25 July 2005¹. All references to the Broadcasting Code and its Rules in this Decision are therefore to that version of the Code.²

Consideration of sanction against:

Springdoo Media Limited in respect of its service Friendly TV; and User Generated Broadcasting Limited in respect of its service Bedroom TV.

For:

Breaches of Ofcom's 2005 Broadcasting Code ("the Code") in respect of:

Rule 1.6: "The transition to more adult material must not be unduly abrupt at the watershed or after the time when children are particularly likely to be listening. For television, the strongest material should appear later in the schedule";

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

Rule 2.3: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...Such material may include, but is not limited to, ...sex...".

On:

19 April 2009: breach of rules 1.6, 2.1 and 2.3
21 April 2009: breach of rules 2.1 and 2.3
5 July 2009: breach of rules 1.6, 2.1 and 2.3

For

Breaches of Springdoo Media Limited's Television Licensable Content Service Licence, dated 30 April 2003 in respect of:

Condition 11: "(1) The Licensee shall adopt procedures acceptable to Ofcom for the retention and production of

¹ With the exception of Rule 10.17 which came into effect on 1 July 2005. The 2005 Code can be found at http://www.ofcom.org.uk/tv/ifi/codes/bcode_2005/

² A new version of Ofcom's Broadcasting Code took effect on 16 December 2009 and covers all programmes broadcast on or after 16 December 2009, but has not been considered for the purposes of this Decision.

recordings in sound and vision of any programme which is the subject matter of a Standards Complaint ...

(2) In particular, the Licensee shall: (a) make and retain or arrange for the retention of a recording in sound and vision of every programme included in the Licensed Service for a period of 60 days from the date of its inclusion therein; and

(b) at the request of Ofcom forthwith produce to Ofcom any such recording for examination or reproduction”

On:

3 April 2009: breach of licence condition 11

20 June 2009: breach of licence condition 11

For

Breaches of User Generated Broadcasting Limited’s Television Licensable Content Service Licence, dated 1 November 2005 in respect of:

Condition 11: “(1) The Licensee shall adopt procedures acceptable to Ofcom for the retention and production of recordings in sound and vision of any programme which is the subject matter of a Standards Complaint ...

(2) In particular, the Licensee shall: (a) make and retain or arrange for the retention of a recording in sound and vision of every programme included in the Licensed Service for a period of 60 days from the date of its inclusion therein; and

(b) at the request of Ofcom forthwith produce to Ofcom any such recording for examination or reproduction”

On:

4 April 2009: breach of licence condition 11

22 April 2009: breach of licence condition 11

Decision:

To impose a financial penalty (payable to HM Paymaster General) of **£6,000** in respect of the code breaches by Springdoo Media Limited, **£6,000** in respect of the licence condition 11 breaches by Springdoo Media Limited, and **£12,000** in respect of the licence condition 11 breaches by User Generated Broadcasting Limited.

1. Summary

- 1.1 For the reasons set out in section 7, under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee ("the Committee"), the Committee has decided to impose statutory sanctions on Springdoo Media Limited ("Springdoo") and User Generated Broadcasting Limited ("User Generated") (together, the "Licensees").³ This is in light of the serious and repeated failure of Springdoo to ensure compliance with the Code in their services as discussed at paragraphs 1.3-1.5 below and the serious and repeated failure of Springdoo and User Generated to ensure compliance with their Television Licensable Content Service ("TLCS") Condition 11 requirements. Springdoo and User Generated are sister companies under common ownership and control. All editorial compliance decisions regarding the companies are taken by a centralised compliance team headed by the same individual, Mr David Wainwright.
- 1.2 Friendly TV and Bedroom TV provide daytime chat and (post watershed) adult sex chat telephone services with little or no editorial context. Their programmes encourage viewers to call a premium rate service ("PRS") telephone number and talk to an onscreen presenter. Viewers can see female presenters engaged in conversation but cannot hear what is being said as music is played over the images. At certain intervals the presenters switch on a microphone and speak directly to viewers to encourage them to call the PRS number.

Springdoo (broadcast of sexual and sexually explicit material without access restrictions)

- 1.3 On 19 April 2009, in a programme broadcast at 21:00, Springdoo broadcast images of a woman performing various acts including displaying her genital area, performing masturbatory actions and miming fellatio. On 21 April 2009, a programme broadcast by Springdoo at 23:59 included graphic images of a woman revealing her genital and anal areas to the camera. On 5 July 2009 a programme broadcast by Springdoo at 21:00 showed a woman clearly simulating genital masturbation and repeatedly touching and massaging her breasts.
- 1.4 On 4 June 2009, Springdoo admitted breaches of Ofcom's Broadcasting Code ("the Code") in respect of the programmes broadcast on Friendly TV on 19 April and 21 April 2009, and agreed that the content broadcast on these dates was unsuitable for free-to-air broadcast. Accordingly, on 28 July 2009 Springdoo was found in breach of the Code in respect of these broadcasts. On 14 August 2009, Springdoo apologised for the material broadcast on 5 July 2009 and on 25 August 2009 was also found in breach of the Code for showing this content.
- 1.5 The following programmes transmitted by Springdoo without access restrictions on Friendly TV have therefore been found by Ofcom to have breached the Code as follows:
- Friendly TV, 19 April 2009, 21:00: breach of rules 1.6, 2.1 and 2.3;
 - Friendly TV, 21 April 2009, 23:59: breach of rules 2.1 and 2.3; and
 - Friendly TV, 5 July 2009, 21:00: breach of rules 1.6, 2.1 and 2.3

Together, these breaches shall be referred to in this decision as "the Springdoo Code Breaches".

³ The company Hi2 Limited currently owns both Springdoo and User Generated. Mr David Wainwright is the sole director of Springdoo and User Generated and is, in turn, the majority shareholder and sole director of Hi2 Limited. He is responsible for compliance at both Friendly TV and Bedroom TV.

Springdoo (failure to provide recordings)

- 1.6 Licence condition 11 of Springdoo's licence (and of all TLCS licences) concerns the retention and production of recordings. This condition requires Springdoo to provide copies of a recording "forthwith" to Ofcom on request.
- 1.7 Springdoo confirmed that it was unable to provide recordings of two separate programmes requested by Ofcom, both of which were the subject of complaints. These programmes were:
- Friendly TV, 3 April 2009, Midday
 - Friendly TV, 20 June 2009, 02:00
- 1.8 Ofcom considers that the failure by a TLCS licence holder to provide recordings "forthwith" when requested to do so by Ofcom is a serious breach of condition 11 of its licence. Ofcom therefore recorded two breaches of this licence condition against Springdoo on 28 July 2009. Together, these breaches shall be referred to in this adjudication as "the Springdoo Licence Condition 11 Breaches".

User Generated (failure to provide recordings)

- 1.9 User Generated also confirmed that it was unable to provide recordings of two separate programmes requested by Ofcom pursuant to licence condition 11 of its licence, both of which were the subject of complaints. These programmes were:
- Bedroom TV, 4 April 2009, 00:55-01:30
 - Bedroom TV, 22 April 2009, 22:20
- 1.10 As noted above, Ofcom considers that the failure by a TLCS licence holder to provide recordings "forthwith" when requested to do so by Ofcom is a serious breach of condition 11 of its licence. Ofcom therefore recorded two breaches of this licence condition against User Generated on 28 July 2009. Together, these breaches shall be referred to in this decision as "the User Generated Licence Condition 11 Breaches".

Summary of Committee's Decisions

- 1.11 The Committee decided that these cases were sufficiently serious and repeated to be considered for a statutory sanction. The Committee held a hearing on 14 December 2009 to consider its decision. A representative of the Licensees attended the hearing to make oral representations on behalf of both companies.
- 1.12 After considering all the evidence and all the representations made to it, the Committee decided that the Springdoo Code Breaches, Springdoo Licence Condition 11 Breaches and User Generated Licence Condition 11 Breaches were so serious and repeated that a financial penalty should be imposed. The Committee then also considered the level of the fine to be imposed, in accordance with Ofcom's Penalty Guidelines⁴.

⁴ Ofcom's Penalty Guidelines are available at <http://www.ofcom.org.uk/about/accoun/pg/>. Section 392 of the Communications Act 2003 requires Ofcom to prepare and publish a statement containing guidelines it proposes to follow in determining the amount of any penalties imposed by Ofcom, which Ofcom must have regard to in setting any penalty.

Springdoo Code Breaches

- 1.13 Springdoo made representations that a third party production company was responsible for the output which breached the Code. It stated that Friendly TV was located in the adult section of the electronic programme guide (“EPG”) so its viewers are “extremely unlikely to be offended by images of a sexual orient [sic] because of the nature of their viewing habits and programme interests”, and expressed the view that the actual adult content in question was not strong. Springdoo also stated that other, similar channels broadcast far worse content, and Springdoo was being singled out for sanction. It added that some of its adult chat competitors deliberately ignored the restrictions on sexual material imposed by the Code in order to gain a commercial advantage. However, unlike these competitors, the Springdoo Code Breaches were not intentional.
- 1.14 Springdoo stated that it took immediate action after it became aware of the Springdoo Code Breaches, including taking disciplinary action. It also admitted the breaches to Ofcom and apologised for them at the time. Since then, Springdoo stated, it had voluntarily stopped producing live content itself and was in the process of ceasing its broadcasting operations for this channel entirely.
- 1.15 The Committee considered that the Springdoo Code Breaches were serious because they involved explicit and graphic sex material broadcast without access restrictions. The Committee considered that the seriousness of the breaches was compounded and made sufficiently serious so as to warrant a sanction by their repeated nature and the fact that two of the breaches occurred so soon after the 21:00 watershed.
- 1.16 Further, the Committee considered that the Springdoo Code Breaches were also serious because they occurred following previous and numerous warnings both to Springdoo specifically and to the industry in general, and extensive guidance that has been published by Ofcom over the previous three years regarding the sexual content of adult sex chat programming.
- 1.17 In particular, the Committee also noted that all three of the Springdoo Code Breaches occurred after publication of a number of Ofcom Findings, sanction adjudications and notes of guidance about adult chat broadcasting in 2008. See paragraphs 7.7 to 7.12 below.

Springdoo Licence Condition 11 Breaches (failure to provide recordings)

- 1.18 Springdoo made representations that it had taken voluntary steps to improve its processes for recording its broadcast output after becoming aware of failings in its manual recording system, before Ofcom had recorded any breaches of licence condition 11 against it. Once the Springdoo Licence Condition 11 Breaches had occurred it admitted the breaches to Ofcom and apologised for them. Since then, Springdoo stated, it had repeatedly sought to improve its recording system including by outsourcing to a third party service. However, it had encountered a number of problems with each of the new systems, leading to further breaches of the licence condition. It added that it was in the process of ceasing its broadcasting operations for this channel entirely.
- 1.19 The Committee considered that licence condition 11 is a fundamental requirement of holding a TLCS licence. The Committee considered that condition 11 is at the heart of Ofcom’s ability to regulate broadcasters. Without a recording of the output Ofcom has no evidence upon which it can base a decision about compliance with the Code

and therefore no investigation can proceed. The Committee therefore regards contraventions of licence condition 11 very seriously.

- 1.20 The Committee noted that Springdoo failed to provide two recordings of Friendly TV's output on two separate occasions, two months apart (3 April and 20 June 2009), and following a previous finding of a breach of this licence condition by Springdoo in July 2007.
- 1.21 Furthermore, the Committee noted that Ofcom also gave Springdoo a specific reminder of its obligations under condition 11 of its licence on 13 May 2009 following the breach on 3 April (and therefore prior to the 20 June 2009 breach). This correspondence also warned that Springdoo risked being considered for a statutory sanction if it continued to breach the terms of its licence.
- 1.22 The Committee therefore considered that these were serious breaches of Springdoo's TLCS licence.

User Generated Licence Condition 11 Breaches (failure to provide recordings)

- 1.23 User Generated made representations as above at Paragraph 1.18, only adding that it had already ceased its broadcasting operations for this channel.
- 1.24 The Committee considered that the general points made in Paragraph 1.19 above as regards the seriousness of the Springdoo Condition 11 Breaches also applied to the two User Generated Condition 11 Breaches. User Generated was unable to provide recordings of two separate programmes (4 April and 22 April 2009). The Committee considered that these were serious breaches of licence condition 11 because, as a result of the failure of User Generated to provide recordings, Ofcom was unable to investigate complaints about output on these dates.
- 1.25 Ofcom had not previously recorded a breach of this licence condition against this licensee, but the Committee noted that at the time these breaches occurred, the same individual was responsible for compliance at both Springdoo and User Generated, and should therefore have been aware of the breach recorded against Springdoo in July 2007 for breach of licence condition 11.
- 1.26 When it decided the level of financial penalty it would impose in respect of each set of breaches, the Committee took into account the size of the licensees. It sought to levy an appropriate sanction that was proportionate to the licensee's qualifying revenue which, in both cases, was relatively small. While in these cases this resulted in a small penalty in absolute terms, the Committee was clear that the proportional size would be reflected in future cases and would therefore result in larger penalties for broadcasters with larger qualifying revenues.
- 1.27 Having regard to the serious and repeated nature of the breaches, and having regard to the Licensees' representations and Ofcom's Penalty Guidelines, the Committee decided it was appropriate and proportionate in the circumstances to impose:
 - a financial penalty of **£6,000** on Springdoo in respect of the Springdoo Code Breaches (payable to HM Paymaster General);
 - a financial penalty of **£6,000** on Springdoo in respect of the Springdoo Licence Condition 11 Breaches (payable to HM Paymaster General), and

- a financial penalty on User Generated of **£12,000** in respect of the User Generated Condition 11 Breaches (payable to HM Paymaster General).

2. Legal Framework

The Communications Act 2003

- 2.1 Ofcom has a duty under section 319 of the Communications Act 2003 (“the Act”) to set standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives. The standards objectives are set out in section 319(2) of the Act. They include that: persons under eighteen are protected (section 319(2)(a)); and generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material (section 319(2)(f)).
- 2.2 In discharging its functions, Ofcom’s principal duties are to further the interests of citizens in relation to communications matters and the interests of consumers (section 3(1)) and to secure a number of other matters. These include the application in the case of all television and radio services of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services (section 3(2)(e)).
- 2.3 In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, a number of other considerations including:
- the need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g)); 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)).
- 2.4 Under section 325 of the Act, every programme service licensed by a Broadcasting Act licence includes conditions for securing that the standards set by Ofcom under section 319 are observed. If Ofcom is satisfied that the holder of a licence to provide a television licensable content service has contravened a condition of the licence, it may impose the following sanctions:
- issue a direction not to repeat a programme;
 - issue a direction to broadcast a correction or a statement of Ofcom’s findings;
 - impose a financial penalty; and/or
 - revoke a licence (not applicable to the BBC, S4C or Channel 4).

The Human Rights Act 1998

- 2.5 Under section 6 of the Human Rights Act 1998, there is a duty on Ofcom (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention of Human Rights (“the Convention”).
- 2.6 Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster’s right to “impart information and ideas” and also the

audience's "right to receive information and ideas without interference by public authority". Such rights may only be restricted if the restrictions are: "prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary" (Article 10(2) of the Convention).

- 2.7 Ofcom must exercise its duty in light of these rights and not interfere with the exercise of these rights in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

Ofcom Broadcasting Code

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

Relevant provisions of the Ofcom Broadcasting Code

- 2.10 Rule 1.6: "The transition to more adult material must not be unduly abrupt at the watershed or after the time when children are particularly likely to be listening. For television, the strongest material should appear later in the schedule".
- 2.11 Rule 2.1: "Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material".
- 2.12 Rule 2.3: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context".

Relevant licence conditions

- 2.13 Condition 11 is identical in both the Springdoo and User Generated licences. It states:

"(1) The Licensee shall adopt procedures acceptable to Ofcom for the retention and production of recordings in sound and vision of any programme which is the subject matter of a Standards Complaint ...

(2) In particular, the Licensee shall: (a) make and retain or arrange for the retention of a recording in sound and vision of every programme included in the Licensed Service for a period of 60 days from the date of its inclusion therein; and

(b) at the request of Ofcom forthwith produce to Ofcom any such recording for examination or reproduction"

Remedial action and penalties

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

3. Ofcom's investigations of the complaints and Springdoo's and User Generated's responses

- 3.1 Springdoo held TLCS licence number 625 for "Friendly TV", which was listed on the Sky EPG at channel 907, from 30 April 2003 until 7 January 2010. User Generated held TLCS licence number 996 for Bedroom TV from 1 November 2005 until 19 November 2009. As noted above, the companies are sister companies which are under common control, and the same compliance team was responsible for compliance at both Friendly TV and Bedroom TV.

Springdoo Code Breaches

Springdoo, 19 April 2009, 21:00

- 3.2 On 19 April 2009 Ofcom received a complaint which stated: "I am sure between 9pm and 10pm the girl on screen is not allowed to wear see through pants let alone [sic] put her hand inside them and play with herself. My wife kids are staying with us and I didn't think to set age control on my sky box, I was in shock when I came into the room to see this behaviour on the screen."
- 3.3 A recording of the programme provided by Springdoo featured a woman dressed in a bra and G-string thrusting her bottom to camera to show her genital area. She frequently lay with her legs open to camera, touching and caressing herself. She also placed her hand inside her pants and, using two fingers, appeared to rub her vaginal area. In addition she repeatedly 'bunched' her G-string tightly, pulled it into the centre of her vaginal area and performed a masturbatory action using the tightly held fabric. This revealed the outer labial area of the vagina. She also mimed fellatio.
- 3.4 Ofcom asked Springdoo to submit formal comments about this programme with regard to Rules 1.6 (transition to adult material after the watershed), 1.24 (access restrictions on 'adult sex' material), 2.1 (generally accepted standards) and 2.3 (offensive material must be justified by context) of the Code. In response, Springdoo commented that it took immediate action and stopped working with the producer involved when the programme was brought to its attention.
- 3.5 It also stated that:
- whilst Friendly TV is broadcast free-to-air, it is located in the adult EPG which allows for voluntary PIN protection;
 - you must be over 18 to get a Sky subscription;
 - minors are highly unlikely to gain access to the adult section of the EPG after 9pm without parents/guardians being aware of it, as households almost always have a Sky installation in a communal area such as a living room rather than a bedroom;
 - any broadcast of unsuitable material was entirely unintentional;
 - viewers of the adult section of the Sky EPG platform are extremely unlikely to be offended by images of a sexual nature because of the nature of their viewing habits and programme interests; and
 - it took immediate action to ensure that it would not happen again.
- 3.6 Springdoo agreed however, that the presenter was in close-up at times which "caused too much detail to be shown in anal area" and that the producer should have spoken to her about it or taken her off air. It also accepted that the content was unsuitable for free-to-air broadcast.

- 3.7 Springdoo confirmed that it had experienced difficulty as regards certain staff not following internal rules as to what should be broadcast on Friendly TV and that it had switched production companies to another provider of daytime chat and adult sex chat material, for its output, and provided clear guidelines as to what is acceptable.

Springdoo, 21 April 2009, 23:59

- 3.8 On 28 April 2009 Ofcom received a complaint which stated: "Model bent over in close up, wearing string thong, pulling it to one side to deliberately show whole anal area in detail..."

- 3.9 A recording of the programme provided by Springdoo showed a woman dressed in skimpy underwear lying on her back with her legs wide open to camera, and at other times clearly revealing her anal area. At various intervals the presenter bunched her knickers to reveal greater vulval detail and placed her fingers in her anal and genital areas.

- 3.10 Ofcom asked Springdoo to submit formal comments about this programme with regard to Rules 2.1 and 2.3 of the Code. Springdoo commented that it took immediate action and stopped working with the producer involved when the programme was brought to its attention.

- 3.11 It also stated that:

- it had previously spoken with its producers and presenters about what broadcast material was and was not acceptable pre- and post-watershed;
- it had had issues with certain staff not following its internal rules and after disciplinary action it had dismissed a producer and presenter because of this material;
- whilst its output could have caused offence when compared to other free-to-air channels, it considered that special consideration should be given to Friendly TV's position in the adult section of the Sky EPG; and
- it took immediate steps to ensure that it would not happen again.

- 3.12 Springdoo confirmed Friendly TV had switched production companies to another provider of daytime chat and adult sex chat material, for its output and provided clear guidelines as to what is acceptable.

- 3.13 Finally, Springdoo accepted that the content was unsuitable for free-to-air broadcast.

Springdoo, 5 July 2009, 21:00

- 3.14 The Executive monitored Friendly TV on 5 July 2009 at around 21:00. In response to a request from Ofcom, a recording of that output was supplied by Springdoo. The content showed a woman dressed in a bra and G-string. She was filmed from the front at a close-up angle with her legs aloft and apart when she rubbed her vaginal area. She also turned round to be on all fours and was shown from behind, with her bottom thrust towards the camera in close-up, when she touched and rubbed her anal area. This rubbing and touching was clearly intended to suggest genital masturbation. She also repeatedly touched and massaged her breasts.

- 3.15 Ofcom asked the Licensee to submit formal comments with regard to Rules 1.6, 1.24, 2.1 and 2.3 on 16 July 2009 in relation to this programme.

- 3.16 In its response, Springdoo apologised that the content contained material of a sexual nature. It said that the production company had recently changed and that it would “ensure this does not happen again”. The programme had been produced by a third party, and it was broadcast with a less experienced producer in charge. Springdoo said that it had made it clear to the production company that pre 22:00 broadcasts should not contain any images of a sexual nature and that it had also installed a system that would allow it to monitor the content electronically to ensure it could monitor and review content in a “much more structured manner”.
- 3.17 As the holder of the licence, however, Springdoo was still responsible for ensuring that material broadcast on that channel was compliant with the Code.

Springdoo Licence Condition 11 Breaches:

Springdoo, 3 April 2009, Midday – failure to provide recording

- 3.18 Ofcom received a complaint on 6 April 2009 regarding material broadcast on Friendly TV on 3 April 2009. The complaint stated that: “A dark haired presenter wearing little clothing (a small tight PVC “fetish” style mini skirt) offering close up views of her backside and crotch, while dancing provocatively, moving deliberately to show more of her cleavage, and licking her lips and mouth as if to mime oral sex”. Ofcom requested a recording of the material from Springdoo on 9 April 2009. However, upon receipt of the recording Ofcom noted that it did not contain material that matched the description provided by the complainant.
- 3.19 On 11 May 2009, Springdoo confirmed that a failed hard drive on its compliance video recording unit had meant that it was having problems accessing material. It was making manual DVD recordings of its output and continuing its efforts to recover other data using hard disc retrieval and recovery methods. Ofcom wrote to Springdoo on 13 May 2009 asking it to confirm whether or not it was able to supply a recording of the 3 April programme, whether it has a compliance recording system, and that proper checks are made on material supplied to Ofcom to ensure that what is supplied is what is requested. This correspondence also noted that a failure to supply material when requested is a breach of condition 11 of Springdoo's licence.
- 3.20 On 14 May 2009 Ofcom requested Springdoo's comments in relation to licence condition 11. On 4 June 2009 Springdoo confirmed that the 3 April 2009 recording was not available and that the recording previously provided for this date was not the correct programme, for which it apologised. It also noted that its previous hard drive based compliance recording was insufficient in quality and reliability. It stated it had therefore reverted to a manual recording and DVD archive procedure for future use.

Springdoo, 20 June 2009, 02:00 – failure to provide recording

- 3.21 Ofcom received a complaint on 29 June 2009 regarding material broadcast on Friendly TV on 20 June 2009 from 02:00. The complaint stated: “Topless nurse scenario. Mimed Masturbation.” Ofcom requested a recording of the material on 30 June 2009. On 8 July 2009 Springdoo informed Ofcom that the recording could not be supplied “due to the off-air Sky box having been retuned”.
- 3.22 On 9 July 2009 Ofcom requested Springdoo's comments in relation to licence condition 11. Ofcom noted that: “This is the fourth time in the last four month period that...you have informed us that you are unable to supply the material due to problems with your compliance recording equipment...Ofcom considers such

apparent repeated regulatory breaches of your Licence as extremely serious. This is all the more serious given previous correspondence from [Ofcom] dated 13 May 2009, which stressed the need to ensure you had a satisfactory recording compliance system in place”.

- 3.23 In its response on 16 July 2009, Springdoo stated that it had recently switched its satellite capacity and that the change of satellite configuration details was not communicated correctly in-house, which meant that the recording failed. It explained that it had several problems in-house re recordings and had since outsourced the service to an external company. It noted that it understood the gravity of the situation and took immediate action to remedy it.

User Generated (failure to provide recordings)

4 April 2009 01:30 and 22 April 2009 22:20 – failure to provide recordings

- 3.24 Ofcom received two complaints on 24 April 2009 regarding material broadcast on Bedroom TV. The first complaint related to a programme broadcast between 00:55 and 01:30 on 4 April 2009. The complaint stated: “Model in see-through pants, bunching them up with genital detail to be seen. Showing recorded footage as live”. The second complaint expressed concerns about material broadcast on 22 April at 22:20, and stated “Model named “Juliette” pulled her thong up exposing her genitals then masturbated”.
- 3.25 Ofcom requested recordings of both of these programmes on 1 May 2009. In its response on 11 May 2009, User Generated explained that it was having problems accessing material of the 4 and 22 April 2009 due to a failed hard drive on its compliance video recording unit and that it was attempting to recover this material through various hard disc retrieval and recovery methods.
- 3.26 By the same email referred to at Paragraph 3.19 above, Ofcom wrote to User Generated on 13 May 2009 asking about its compliance recording system, and reminding it of its obligations under Condition 11 of its licence.
- 3.27 On 14 May 2009 Ofcom asked User Generated for formal comments on the possible breaches of licence condition 11 as regards output broadcast on Bedroom TV on 4 April 2009 and 22 April 2009. On 4 June 2009 User Generated confirmed that a recording for 4 April was not available.

4. Ofcom’s decisions that Springdoo and User Generated were in breach of the Code

Springdoo Code Breaches

- 4.1 Having taken Springdoo's representations into account, on 28 July 2009 and 25 August 2009, Ofcom found that the programmes broadcast on Friendly TV on 19 April 2009 and 5 July 2009 were in breach of the following Code Rules:
- Rule 1.6 (transition to adult material);
 - Rule 2.1 (generally accepted standards); and
 - Rule 2.3 (material which may cause offence must be justified by the context).

- 4.2 As regards the 19 April 2009 broadcast, the Executive concluded that this material was broadcast in breach of Rule 1.6 of the Code because it contained strong and explicit sexual images which were not suitable for broadcast in the period immediately following the 21:00 watershed on a service which was freely available to view without access restrictions. The broadcast of such images, so close to the watershed, caused serious concern for Ofcom. Ofcom did not consider that the explicit sexual material that was broadcast could be justified by the context. In addition, as regards Rules 2.1 and 2.3 for both the 19 and 21 April 2009 broadcasts, Ofcom had concerns about the sexual explicitness of this material irrespective of the time of its broadcast. This was because it considered that it would have exceeded the expectations of viewers watching a channel without access restrictions, especially those who may have come across this content unawares. Ofcom concluded that the location of a free-to-air channel in the adult section of the EPG does not in itself provide contextual justification for the inclusion of such strong sexual material on a service which is freely available without access restrictions. It therefore contravened generally accepted standards.
- 4.3 As regards the 5 July 2009 programme, the Executive concluded that this material breached Rule 1.6 of the Code because it contained strong and graphic sexual images which were not suitable for broadcast in the period immediately following the 21:00 watershed, on a service which was freely available to view without access restrictions. The broadcast of such images, so close to the watershed, generated serious concern for Ofcom. In addition, Ofcom stated that this material breached Rules 2.1 and 2.3 because the strong and graphic sexual images were offensive and not justified by the context. The Executive concluded that this content was not justified by the context in terms of the nature of the content, audience expectations, or the location of the service in the adult section of Sky's EPG and so breached generally accepted standards.

Springdoo Licence Condition 11 Breaches

- 4.4 Having taken Springdoo's representations into account, on 28 July 2007, Ofcom recorded two breaches of condition 11 of Springdoo's licence as a result of Springdoo's failure to provide recordings of the two programmes above.

User Generated Licence Condition 11 Breaches

- 4.5 Having taken the User Generated's representations into account, on 28 July 2007, Ofcom recorded two breaches of condition 11 of User Generated's licence as a result of User Generated's failure to provide recordings of the two programmes above.
- 4.6 In response to Ofcom's decisions of 28 July 2009, the Licensee informed Ofcom that Bedroom TV had ceased broadcasting, and that Springdoo intended to cease broadcasting Friendly TV.

5. Referral to the Content Sanctions Committee

- 5.1 The Executive considered that, taking all circumstances into account, and in particular the seriousness of the breaches and potential harm to children, and the repeated nature of the breaches, the Code and Licence Condition 11 Breaches were sufficiently serious to warrant the consideration of a statutory sanction.
- 5.2 Springdoo and User Generated were invited to make written representations on this proposal. As noted above, all editorial compliance decisions regarding the

companies are taken by a centralised compliance team headed by the same individual, Mr David Wainwright, who responded on behalf of both companies. In summary the main points put forward to argue that neither Licensees' case warranted a statutory sanction were that:

- The Licensees had a good track record of operating TV channels without problems.
- Both channels operated by selling airtime to third party production companies that operated various services. The Licensees insisted that recordings were made and that the channels operated within the Code. When it became apparent that the third parties were incapable of this, the Licensees took "immediate action".
- In respect of the Springdoo and User Generated Licence Condition 11 Breaches, the third party company responsible for their recordings had had "an unfortunate number of problems with the channel recording equipment".
- the Licensees are not in a financial position to pay any fines imposed.
- User Generated had ceased broadcasting and Friendly TV was in the process of closing down. The Licensees stated they would no longer operate this business model, and wished to surrender both licences. The Licensees considered that the closure of the channels was a more appropriate sanction than a fine.

5.3 Having taken account of all of the Licensees' representations Ofcom concluded that the Springdoo Code Breaches, Springdoo Licence Condition 11 Breaches, and User Generated Licence Condition 11 Breaches were sufficiently serious and repeated to refer the case to the Committee for the consideration of a statutory sanction.

5.4 The Committee, having reviewed the decision of the Ofcom Executive to refer the current breaches to it, and having viewed all the relevant material, accepted that the Springdoo Code Breaches, Springdoo Licence Condition 11 Breaches, and User Generated Licence Condition 11 Breaches were sufficiently serious and repeated that they should be considered for statutory sanction. Accordingly, Springdoo and User Generated were invited to attend a hearing before the Committee.

6. Sanctions Hearing

6.1 The Committee held a hearing to consider this case on 14 December 2009. Mr David Wainwright, Managing Director and Head of Compliance, Springdoo and User Generated ("the Representative") attended the hearing, to represent both Springdoo and User Generated. At the hearing, the Representative made oral representations to the Committee, and then the Committee put questions to the Representative.

6.2 In relation to the Springdoo Code Breaches, the Representative said that Springdoo had admitted the breaches straight away. While Springdoo accepted the programmes breached the Code, it did not feel that these programmes went far beyond it, and that they were something of a "grey area". The programmes which had been found in breach contained material equivalent to 15-rated content, which is not as strong or explicit as content available on other, similar adult-chat channels broadcast in the UK. For example, in the programmes under consideration, the presenters were not naked. The Representative asserted that there are other

channels which put out far stronger material. The Representative said that Springdoo had never deliberately sought to breach the Code for financial gain. He said that it was unfair that Springdoo has been singled out for technically breaching the Code, when it kept to the spirit of the Code

- 6.3 In relation to both the Springdoo and User Generated Licence Condition 11 Breaches, the Representative explained that previously the channel operators had had a manual process in place for recording live output, using a VHS system. Following some occasional lapses in this system, it was decided to move to a third party-operated, automated digital system, in the hope that this would improve the system and eliminate the chance of any further omissions. However, the system suffered a hardware failure which meant that the third party operator was unable to retrieve the 3 and 4 April 2009 programmes which Ofcom requested. When the third party operator attempted to retrieve a further programme on behalf of Springdoo, as had been broadcast in Summer 2009, it became apparent that the channel's satellite broadcast frequency had been changed, without this change having been made to the recording equipment. As a result, the Licensee had been unable to retrieve the recording and provide it to Ofcom as requested.
- 6.4 The Representative said that following the Ofcom's investigation into the Code and Licence Condition 11 breaches, Springdoo had admitted the breaches, apologised and shut down the Friendly TV channel – voluntarily – and had informed Ofcom of its intention to surrender its licence in January 2010. The channel was still broadcasting but was no longer airing any live material, only “filler” content in order to fulfil its commercial contracts; Friendly TV had not broadcast any live adult content in the previous two months. User Generated had also admitted the breaches, apologised and ceased broadcasting. The Committee noted that User Generated surrendered its TLCS licence to Ofcom effective from 19 November 2009.
- 6.5 The Representative explained that in general the compliance record of both channels over the previous five years had been very good, up until the breaches which were the subject of this sanctions hearing. The Representative said that there had been no problems with the adult chat content it was responsible for and, under its old manual recording system it had been able to provide recordings to Ofcom of all programmes that had been requested.
- 6.6 The Representative explained that Springdoo was fully aware that it retained responsibility for compliance although it relied on a third party producer for content. The Representative stated that Springdoo had at times, and independently of Ofcom, taken action against the third party production companies when it deemed that content broadcast had gone too far.
- 6.7 When asked by the Committee to clarify what processes were in place to ensure compliance was adequately monitored, the Representative replied that he and his team are and had been responsible for Springdoo and User Generated's compliance procedures. He and the team monitored Ofcom findings and guidance about adult chat broadcasting. He also stated that live content was not monitored for compliance purposes as it was broadcast and was only reviewed post-broadcast.

7. The Committee's Decision

- 7.1 The Committee may impose a sanction which can include a financial penalty and/or revocation of the licence. In this case, having viewed the material and having considered all the other evidence and representations before it, the Committee

decided that, on balance and taking account of all the facts, it was appropriate to impose by way of statutory sanction:

- on Springdoo, a financial penalty of **£6,000** in respect of the Springdoo Code Breaches and **£6,000** in respect of the Licence Condition 11 Breach; and
- on User Generated, a financial penalty of **£12,000** in respect of the User Generated Licence Condition 11 Breaches.

7.2 In deciding on an appropriate and proportionate level of financial penalty the Committee had regard to Ofcom's Penalty Guidelines. The Committee considered each set of breaches separately as follows:

- Springdoo Code Breaches (see paragraphs 7.3 to 7.43);
- Springdoo Licence Condition 11 Breaches (see paragraphs 7.44 to 7.76), and
- User Generated Licence Condition 11 Breaches (see paragraphs 7.44 to 7.76)

Springdoo Code Breaches

The seriousness of the breaches

7.3 Having viewed the material, and taken account of all the evidence and Springdoo's representations the Committee considered that the breaches of Code Rules 1.6, 2.1 and 2.3 by Springdoo were serious. This was for the following reasons.

7.4 Firstly, two of these breaches involved explicit and graphic sex material broadcast without access restrictions after the 21:00 watershed. In accordance with Ofcom's statutory duty to protect the under-eighteens, Rule 1.6 of the Code requires that the transition to more adult material must not be unduly abrupt and that the strongest material is shown later in the schedule. The Committee considered that two of the breaches (in relation to programmes shown on 19 April and 5 July 2009) were serious because of the nature of the material shown so close to 21:00. In these two programmes the female presenter was shown for example placing her hands inside her underwear to suggest masturbation, and vaginal and anal detail was featured. The Committee considered that the simulated masturbation and other sexual acts, and genital or anal detail shown in these programmes was explicit and graphic sexual material (i.e. adult material). The broadcast of such strong material on a channel broadcast without access restrictions so soon after 21:00 was completely incompatible with Rule 1.6 of the Code and had the potential to cause harm to under-eighteens, in particular children under fifteen. The Committee considered that the breaches in relation to the 19 April and 5 July broadcasts were compounded by the fact that they were broadcast so soon after the watershed. A number of children watch television in this period, and the Committee noted that the complaint about the programme broadcast on 19 April 2009 was from a concerned parent.

7.5 Ofcom and the Committee have repeatedly made clear in various sanctions decisions that children (and adults) are not necessarily adequately protected from strong sexual material through a channel simply being placed in the adult section of the Electronic Programme Guide, especially when strong sexual material is broadcast so soon after the watershed. This conclusion is supported by Ofcom's research into sexual imagery on television, where viewers expressed concern that children might come across sexual material unawares. However, the Committee also recognised that material broadcast after 21:00 may become progressively more

challenging later in the schedule and that parents should exercise responsibility over what their children watch.

- 7.6 The Committee considered that all three Springdoo Code Breaches were also serious because they concerned explicit and graphic sexual material (simulated masturbation and other sexual acts, and genital or anal detail) being shown in contravention of generally accepted standards on a channel without access restrictions, and without any contextual justification. These breaches of Rule 2.1 and 2.3 were serious because showing such material had the potential to cause considerable harm and offence to all viewers in general, not just the under-eighteens. The Committee considered that the 21 April 2009 breach, when the broadcast began at midnight, was less serious than the two incidents which occurred shortly after 21:00. It was deemed to have been closer in line with audience expectations for material broadcast at this time and on an adult chat television channel. However, the Committee still believed that this breach of the Code was sufficiently serious so as to warrant a sanction. The broadcast of anal detail at midnight on 21 April 2009 was acknowledged as so unacceptable by the Licensee that it took disciplinary action against both the presenter and producer. The Committee considered that the broadcast of such images was unacceptable.
- 7.7 The Committee also considered that the Springdoo Code Breaches were serious because they occurred following previous and numerous warnings both to Springdoo specifically and to the industry in general, and extensive guidance that has been published by Ofcom over the previous three years regarding the sexual content of adult sex chat programming.
- 7.8 The Committee noted that one of these warnings was specifically directed at Springdoo (when it was known as Telecoms TV Limited) in 2008. Ofcom recorded breaches of Rules 1.2, 2.1 and 2.3 against Telecoms TV Limited, for broadcasting material between 21:00 and 22:30 showing female presenters appearing to masturbate and simulate various sex acts. Ofcom concluded this was “inappropriate for broadcast on an unencrypted service available from 21:00.”⁵ The breach of Rule 1.2 was for showing over-explicit sexual material soon after the watershed when children were likely to be available to view. Ofcom also considered that the material breached generally accepted standards and there was insufficient context to justify the potential offence to viewers in general. It was therefore also in breach of Rules 2.1 and 2.3.
- 7.9 The Committee noted in this Finding that: “these breaches were sufficiently serious that careful consideration was given to whether to recommend this matter to Ofcom’s Content Sanctions Committee for a statutory sanction. After careful consideration it was decided on this occasion not to refer this case for sanction in view of all the circumstances – primarily the relative strength of the material. However, Ofcom had informed the broadcaster that any breach of a similar nature in future is likely to result in serious regulatory action.”
- 7.10 The Committee also noted that all three of the Springdoo Code Breaches occurred after publication of the following in 2008, for example:
- a) On 25 February 2008, Ofcom published a Note to Broadcasters outlining concerns about compliance by channels that transmit in the ‘adult’ section of the EPG (Broadcast Bulletin 103).

⁵ See Bulletin 116 published on 1 September 2008

- b) On 10 July 2008 Ofcom published a decision of the Committee to fine Square 1 Management (Smile TV) £17,500 for programming shown without access restrictions that was of an explicit sexual nature in breach of Rules 1.24, 2.1 and 2.3 of the Code. This decision stated that: “‘Babe’ channels and ‘adult’ channels generally should be in no doubt of Ofcom’s concerns about the broadcast of sexual material which is too explicit...if highly explicit sexual material is broadcast without editorial justification on a free-to-air channel on a single occasion it can be – as in this case – a very serious breach of the Code”. (Broadcast Bulletin 114).
- c) On 11 August 2008 Ofcom published a Finding in respect of House of Fun, a free-to-air unencrypted ‘adult’ chat services channel. The broadcaster was found in breach of Rules 1.24, 2.1 and 2.3 for broadcasting sexually explicit material that was unsuitable for free-to-air television. (Broadcast Bulletin 115).
- d) On 11 August 2008 Ofcom published a Finding in respect of Sex Station/‘Lucky Star’, a free-to-air unencrypted adult sex chat services channel. The broadcaster was found in breach of Rules 1.2, 1.24, 2.1 and 2.3 for explicit sexual images including apparent female masturbation. (Broadcast Bulletin 115).
- e) On 26 August 2008, Ofcom published a decision of the Committee to fine Satellite Entertainment Limited £20,000 for showing images of an explicit sexual nature in breach of Rules 1.24, 2.1 and 2.3, on its adult sex chat channel SportxxxBabes. The Committee stated that: “The unencrypted broadcast of content showing presenters engaging in explicit sexual activity without strong and sufficient editorial justification for the inclusion of such images, is totally unacceptable. It has the potential to cause offence to viewers and harm to minors.” (Broadcast Bulletin 116).
- f) On 29 September 2008 Ofcom published a Finding in respect of LivexxxBabes, a free-to-air unencrypted adult sex chat services channel. The broadcaster was found in breach of Rules 2.1 and 2.3 because there were close-up shots of the anal and genital areas of female presenters. The Finding stated that: “In order to remain compliant with the Code, broadcasters operating in the free-to-air ‘adult’ chat sector should take great care when using extreme close-ups of the crotch and backside. These images can result in physically invasive shots which are not suitable for free-to-air transmission.” (Broadcast Bulletin 118).
- g) On 27 October 2008 Ofcom published a Finding in respect of Bang Babes, a free-to-air unencrypted ‘adult’ chat services channel. The broadcaster was found in breach of Rules 2.1 and 2.3 for prolonged close-ups and full screen images of a presenter’s breasts and nipples, and rubbing her genital area, before 22:00. (Broadcast Bulletin 120).

7.11 Therefore the Committee considered that Ofcom had clearly provided extensive guidance to broadcasters – and Friendly TV in particular – that invasive close-ups of anal and genital areas, and simulated masturbation, were in breach of generally accepted standards; and that being broadcast in the adult section of the EPG alone did not provide contextual justification for showing such content without access restrictions. As a result of the guidance above and other guidance published over the previous three years the Committee was of the view that Ofcom had made it clear over time what content was, and is, unacceptable for broadcast without access restrictions on adult sex chat services and what the boundaries are. It was the clear responsibility of Springdoo to ensure that it made itself aware of all these published findings and sanctions decisions to ensure that its services complied with the Code,

especially in view of the Finding published on 1 September 2008 which gave it an explicit warning. The Committee noted that the Representative confirmed that he was aware that he was responsible for compliance at the two channels, and that he has seen all of the Ofcom's guidance and bulletins as to what is and isn't permitted.

7.12 Further, the Committee considered that it had repeatedly underlined in various sanctions decisions over the previous two years that it would regard very seriously breaches of the Code by adult sex chat services referred to it in the future. These services – and Springdoo in particular in view of the September 2008 Finding – had therefore been on notice for a considerable period that the showing of explicit sexual material on services without access restrictions is unacceptable.

7.13 The Committee noted the various representations on behalf of Springdoo arguing that the Code Breaches were either not serious enough to be considered for statutory sanction or only merited a minimal sanction. The Committee took these representations into account, but still concluded that the Springdoo Code Breaches were sufficiently serious and repeated so as to warrant a financial penalty. For example:

- the Representative mentioned that the Code breaches were equivalent to “15-rated” material and that the presenters were topless but not naked. The Representative also expressed the view that what content was and what was not permitted by the Code was a “grey area”. As outlined above at Paragraphs 7.3 to 7.17, the Committee considered that all three Code breaches were clear and sufficiently serious so as to warrant a sanction, and in particular, for the breaches on 19 April and 5 July 2009, the time the material was broadcast increased their seriousness.
- The Representative maintained that this material was not as explicit as that broadcast on other adult chat services, some of which he described as equivalent to “18 or R18”⁶ rated. The Committee was clear that the alleged behaviour of other TLCS licensees was irrelevant to its considerations of these particular breaches.

Precedent

7.14 The Committee considered that there were three relevant precedents. These cases all involved adult sex chat channels broadcasting graphic sexual material in breach of Rules 1.24, 2.1 and 2.3 of the Code. In all these cases the previous Committees had considered that the breaches were so serious they warranted the imposition of a financial penalty. These are: the Committee's Decisions against: (a) Connection Makers Limited in respect of its service Babeworld TV, (fine of £25,000, published on 30 November 2007), (b) Square 1 Management Limited in respect of its service Smile TV, (fine of £17,500, published on 10 July 2008); and (c) Satellite Entertainment Limited in respect of its service SportxxxBabes (fine of £20,000, published on 26 August 2008).

7.15 The Committee noted that each of these cases was decided on its particular facts, which differed in certain respects from those of the current case. For example, the Babeworld case concerned three separate breaches of the Code as regards the

⁶ The British Board of Film Classification (“the BBFC”) is responsible for classifying film content into different rating categories. The “R18” rating is a special classification which applies to adult sex material; that is material that contains images and/or language of a strong sexual nature which is for the primary purpose of sexual arousal or stimulation. R18 rated material is subject to greater restrictions than all other rated content.

promotion of adult sex chat telephone (0909) lines before the watershed, and one incident as regards broadcasting relatively explicit sexual imagery (simulated masturbation) immediately after the watershed accompanied by lewd sexual language. The Smile TV case concerned one breach of the Code relating to very graphic and explicit sexual imagery (a female presenter appearing to insert a finger into her anus and masturbate for several minutes). The SportxxxBabes case also concerned three breaches of the Code which the Committee considered concerned relatively strong material (apparent insertion of dildos, oral sex on a male presenter, and naked presenters).

- 7.16 The Committee noted that in each of the precedent cases mentioned above the material in question was considered to be 'adult-sex' material, putting it in breach of Rule 1.24 of the Code, which was not considered in relation to the Springdoo Code Breaches.
- 7.17 However, in the Committee's opinion, the precedents were sufficiently similar to the present case that they should suggest to the Committee that any financial penalty imposed on Springdoo for the Code Breaches should not be minimal. In certain respects the breaches before the Committee were as, if not more, serious than those in the precedents.
- 7.18 First, two of the three Springdoo Code Breaches (19 April and 5 July 2009 broadcasts) concerned graphic sexual images broadcast very soon after the 21:00 watershed. As the Committee pointed out in the Babeworld case, it takes such contraventions very seriously. The two other precedent cases involved material broadcast well after the watershed.
- 7.19 Second, the Committee noted that the Springdoo Code Breaches occurred after a specific warning on 1 September 2008 by Ofcom to Friendly TV about further regulatory action being considered if there were further contraventions of the Code by the holder of Friendly TV's licence. These earlier breaches also involved the broadcast of over explicit material soon after the watershed.
- 7.20 The present breaches also occurred after a series of extensive guidance, findings and sanctions decisions relating to adult sex chat channels was published by Ofcom (see for example Paragraph 7.10 above).

Incentive to comply

- 7.21 In deciding on the appropriate size of a financial penalty in relation to the Springdoo Code Breaches, the Committee considered that the penalty should be sufficiently significant to act as a deterrent against similar Code breaches by licensees who choose to operate in the 'adult' market. It is important that licensees should understand that such breaches of the Code are of a serious nature and could lead to the imposition of a statutory sanction.

Other specific factors

- 7.22 In considering the appropriate size of a financial penalty for Springdoo, the Committee also took account of the following other criteria, as set out in Ofcom's Penalty Guidelines:

Any gain (financial or otherwise) made by the regulated body in connection with the breach

- 7.23 There was no evidence that Springdoo made any financial gain from its repeated breaches of the Code.

The degree of harm caused

- 7.24 The Springdoo Code Breaches concerned breaches of section one of the Code which is aimed at protecting children, and section two of the Code, which is aimed at protecting members of the public from harmful and/or offensive material. The Committee considered that the two contraventions of Rule 1.6 had the potential to cause considerable harm or offence, especially to children, because highly inappropriate material was broadcast without access restrictions soon after the watershed, when children are likely to be available to view.
- 7.25 The Committee also considered that all three Springdoo Code Breaches breached section two of the Code which is aimed at protecting members of the public from harmful and/or offensive material. These contraventions also had the potential to cause offence to viewers.

Size and turnover of the regulated body

- 7.26 Springdoo had a relatively small qualifying revenue for the calendar year 2008.

The extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the regulatory body

- 7.27 While the Committee understands that a third party production company was engaged by Springdoo to produce output for the Friendly TV channel, the Committee does not consider that the Springdoo Code Breaches were outwith Springdoo's control as compliance licensee.

The duration of the contravention

- 7.28 The breaches continued over an 11 week period, which was approximately seven months after the previous breach was recorded against Springdoo in relation to similar material.

Whether a penalty in respect of the same conduct has already been imposed by Ofcom or another body

- 7.29 The Committee notes that no penalty in respect of the same conduct has already been imposed by Ofcom or another body.

Audience expectations and scheduling

- 7.30 The Committee considers that audiences do not expect strong sexual material to be broadcast very soon after the watershed on channels without access restrictions. In relation to two out of the three breaches, strong sexual material was broadcast soon after the watershed, which breached those expectations.

Factors tending to increase the level of penalty

- 7.31 The Committee then considered whether there were any factors which aggravated or tended to increase the level of any financial penalty it might impose, in accordance with Ofcom's Penalty Guidelines.

Repeated contraventions by the same regulated body

- 7.32 Springdoo has been found in breach of the Code for a number of programmes:

- 19 April 2009 - Rules 1.6, 2.1 and 2.3,
- 21 April 2009 - Rules 2.1 and 2.3; and
- 5 July 2009 - Rules 1.6, 2.1 and 2.3.

- 7.33 As set out in the Sanctions Procedures, a repeated breach includes repetition of the same or similar conduct as that which earlier contravened a licence condition. In this case, the Committee considered that Springdoo's conduct in each of these cases concerned identical or similar conduct. The Springdoo Code Breaches can therefore be considered to be repeated, and this was taken into account by the Committee.

Continuation of the contravention after either becoming aware of the contravention or being notified of a contravention by Ofcom

- 7.34 The Committee noted that the Springdoo Code Breaches occurred after a specific warning to Friendly TV from Ofcom on 1 September 2008 about showing strong sexual content in the period 21:00 to 22:30. This warning also raised the possibility of further regulatory action if there were similar breaches of the Code in future.

- 7.35 The Springdoo Code Breaches also included breaches of Rule 1.6, 2.1 and 2.3 which occurred almost three months apart, despite the fact that Ofcom had contacted Springdoo about the 19 and 21 April Springdoo Code breaches in May 2009, well in advance of the 5 July Springdoo Code breach. Together with the Springdoo and User Generated Condition 11 Breaches, this indicates a pattern of systemic compliance weaknesses.

The extent to which senior management knew, or ought to have known that a contravention was occurring or would occur

- 7.36 The Representative was responsible for the day to day management of and compliance at Springdoo during the relevant period. In his capacity as Ofcom's primary contact for Springdoo, he was fully aware of the need to comply with the Code. He ought to have been fully aware that the material broadcast on 19 and 21 April, and 5 July 2009 breached the Code, and that breaches would occur again in future without sufficient remedial action.

The absence, ineffectiveness or repeated failure of internal mechanisms or procedures intended to prevent contravention by the regulated body concerned, or other bodies in the same group

- 7.37 The Committee considers the fact that strong sexual material was broadcast in April 2009 and yet this compliance failure was not corrected by Springdoo by July 2009 without intervention by Ofcom, points to the absence or ineffectiveness of its compliance procedures at that time; and, as noted above, the management of Springdoo should have been aware of such compliance failures.

- 7.38 The Committee considered that it was evident from the Licensees' representations that there was insufficient compliance training in place to prevent Code breaches from occurring. This was despite Springdoo having been found in breach of the Code on multiple occasions as listed above at Paragraph 7.32, as well as one instance in 2008. This was compounded by the fact that the Representative was not aware of this prior breach.
- 7.39 In addition, the Committee noted that there was no process in place to monitor content as it was broadcast. The material was predominantly broadcast live so this meant that there was no system in place to prevent the broadcast of live material which breached the Code. There was a process in place to review the previous day's output but this was not sufficient to stop any potential breaches as they occurred.

Factors tending to decrease the level of penalty

- 7.40 The Committee then considered whether there were any factors which in its view might limit or decrease the level of financial penalty.
- 7.41 The Committee noted all the submissions as to mitigation made by the Licensee. In particular, the Committee took account of the following:
- Shortly after the 19 and 21 April breaches Springdoo made it clear to the relevant staff that this was unacceptable.
 - Following contact with Ofcom about the 5 July 2009 broadcast, Springdoo offered an apology for the content and the fact that it had breached the Code. The Committee considered this was a small mitigating factor.
 - The Committee noted that Springdoo has surrendered its licence and wished for this action to be taken into account as a factor which might reduce any penalty. Whilst accepting that surrendering the licence meant that the channel would no longer be broadcast, the Committee did not consider that this significantly reduced the level of any appropriate penalty.

Conclusion on financial penalty to be imposed in respect of the Springdoo Code Breaches

- 7.42 When it came to decide the penalty it would impose, the Committee considered the size of the licensees. It sought to levy an appropriate sanction proportionate to the licensee's qualifying revenue which, in both cases, was relatively small. While in these cases this resulted in a small penalty in absolute terms, the Committee was clear that the proportional size would be reflected in future cases and would therefore result in larger penalties for broadcasters with larger qualifying revenues.
- 7.43 Having considered the relevant facts as outlined above and all the representations made by Springdoo, the Committee decided to impose the following financial penalty in respect of the Springdoo Code Breaches, which it considered to be proportionate and appropriate in all the circumstances:
- a financial penalty of **£6,000** (payable to HM Paymaster General)

Springdoo and User Generated Licence Condition 11 Breaches

The seriousness of the breaches

- 7.44 Having taken account of all the evidence and Springdoo's representations, the Committee considered that the breaches of Licence Condition 11 by Springdoo and User Generated were serious and repeated. This was for the following reasons.
- 7.45 Firstly, the Committee noted that all holders of TLCS licences are required by condition 11 of their licence to make and retain, or arrange for, the retention of a recording in sound and vision of every programme included in the licensed service for a period of 60 days and to provide a copy "forthwith" on request by Ofcom. The Committee considered that this is a fundamental requirement of holding a TLCS licence and is at the heart of Ofcom's ability to regulate broadcasters. Without a recording of the output Ofcom has no evidence upon which it can base a decision about compliance with the Code and therefore no investigation can proceed. The Committee therefore regards contraventions of licence condition 11 very seriously. Breaches are always published in the Broadcast Bulletin and held on record.
- 7.46 Springdoo failed to provide two recordings of Friendly TV's output on two separate occasions, two months apart (19 April and 20 June 2009).
- 7.47 User Generated confirmed it was unable to provide recordings of two separate programmes (4 April and 22 April).
- 7.48 The Committee considered that these were serious breaches of Condition 11 because, as a result of the Licensees' failure to provide recordings, Ofcom was unable to investigate complaints about output on these dates. The seriousness was increased by the fact that Ofcom had previously found Springdoo in breach of the same licence condition in July 2007. At that time Ofcom noted that "Failure to supply the recording... is a serious and significant breach of Friendly TV's licence."
- 7.49 Ofcom had not previously recorded a breach of this licence condition against User Generated, but the Committee noted that at the time these breaches occurred, the same individual was responsible for compliance at both Springdoo and User Generated, and should have been aware of the breach recorded against Springdoo in July 2007 for breach of licence condition 11.
- 7.50 The Committee noted that Ofcom also gave Springdoo a specific reminder of its obligations under condition 11 of its licence in a 13 May 2009 email following the breach on 19 April, and prior to the 20 June 2009 breach. This correspondence warned that Springdoo risked being considered for a statutory sanction if it continued to breach the terms of its licence.
- 7.51 The Committee noted that it appeared from his representations that the Representative was aware of failures in both the manual recording system and the new digital system, although he claimed (incorrectly) that this had never affected Springdoo's ability to produce recordings for Ofcom in the past. Ofcom was unable to establish for how long Springdoo had been aware of these problems.

Precedent

- 7.52 The Committee noted that there had been no previous sanctions for a breach of licence condition 11, but there have been a number of Findings, and as noted above Friendly TV has previously been found in breach of the same licence condition in

July 2007. At that time Ofcom noted that “Failure to supply the recording...is a serious and significant breach of Friendly TV’s licence”.

Incentive to comply

- 7.53 In deciding on the appropriate size of a financial penalty in relation to each of the Springdoo and User Generated Licence Condition 11 Breaches, the Committee considered that the penalty should be sufficiently significant to act as a deterrent against similar Code breaches by all licensees. As noted above, the Committee was clear that it is essential that Ofcom has access to material about which complaints are made, in order to investigate potential breaches of the Code or other broadcasting requirements. Condition 11 and compliance with this condition by all TLCS licence holders is therefore central to Ofcom’s ability to regulate broadcasters. The Committee therefore wished to make it clear to all broadcasters that their failure to observe Condition 11 could lead to the imposition of a statutory sanction. The Committee therefore considered a significant financial penalty to be merited.

Other specific factors

- 7.54 In considering the appropriate size of a financial penalty for each of Springdoo and User Generated, the Committee also took account of other criteria in accordance with Ofcom’s Penalty Guidelines.

Any gain (financial or otherwise) made by the regulated body in breach

- 7.55 There was no evidence that Springdoo or User Generated made any financial gain from the repeated contravention of their licence conditions.

The degree of harm caused

- 7.56 As noted above, the failure by Springdoo and User Generated to provide recordings to Ofcom on two separate occasions each, meant that Ofcom was not able to investigate complaints about potential Code breaches and so fulfil its statutory duty to enforce standards. This meant that Ofcom was unable to investigate four complaints.

The size and turnover of the regulated body

- 7.57 In relation to Springdoo, please see Paragraph 7.26 above.
- 7.58 User Generated had a relatively small qualifying revenue for the calendar year 2008 (although its qualifying revenue is approximately twice that of Springdoo).

The extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the regulated body

- 7.59 The Committee noted that a third party company may have been responsible for making recordings on Springdoo and User Generated’s behalf over some periods. However, the Committee considered that ultimate responsibility for compliance remained with Springdoo and User Generated at all times.

The duration of the contravention

- 7.60 The Springdoo Licence Condition 11 breaches occurred repeatedly over a period of 12 weeks.

- 7.61 The User Generated Licence Condition 11 Breaches occurred twice over a period of 12 weeks.

Factors tending to increase the level of penalty

- 7.62 The Committee then considered whether there were any factors which aggravated or tended to increase the level of any financial penalty it might impose, in accordance with Ofcom's Penalty Guidelines.

Repeated contraventions by the same regulated body

- 7.63 As set out above, a repeated breach includes repetition of the same or similar conduct as that which earlier contravened a licence condition.
- 7.64 Springdoo failed to provide recordings of Friendly TV's output on two separate occasions, two months apart (19 April and 20 June 2009). In this case, the Committee considered that Springdoo's conduct in each of these cases concerned identical conduct. The Springdoo Licence Condition 11 Breaches could therefore be considered to be repeated. User Generated failed to provide recordings of two separate programmes (4 April and 22 April). In this case, the Committee considered that User Generated's conduct in each of these cases concerned identical conduct. The User Generated Condition 11 Breaches could therefore be considered to be repeated.
- 7.65 In addition, the Committee noted that since the sanctions process in relation to these breaches had started, the Executive had recorded another breach of Condition 11 against Springdoo, on 24 November 2009. This was for failing to provide a recording of a programme broadcast on 14 October 2009 which Ofcom wished to investigate. This breach therefore forms part of Springdoo's compliance record, along with the previous Finding against Springdoo of July 2007.

Continuation of the contravention after either becoming aware of the contravention or being notified of a contravention by Ofcom

- 7.66 The Committee noted that the Springdoo Licence Condition 11 Breaches occurred after a specific warning to Friendly TV from Ofcom on 30 July 2007.
- 7.67 Ofcom had not previously recorded a breach of licence condition 11 against User Generated, but noted that at the time these breaches occurred, the same individual was responsible for compliance at both Springdoo and User Generated, and ought to have been aware of the breach recorded against Springdoo in July 2007 for breach of licence condition 11.

The extent to which senior management knew, or ought to have known that a contravention was occurring or would occur

- 7.68 The Committee noted that the same individual was responsible for the day to day management of, and compliance at both Springdoo and User Generated at the relevant times. At the hearing the Representative said that he was aware the recording systems were not working properly, and how long for, but Ofcom remains unclear as to how long this was. Although he stated that providing a recording to Ofcom on request had never been a problem for Springdoo in the past, the Committee noted that this statement was incorrect as he had previously failed to

provide a recording in July 2007. In any case, the Committee considered that this was not an acceptable response.

- 7.69 In addition the compliance team at Springdoo should have been aware of the previous Finding of a breach of Condition 11 against Springdoo on 30 July 2007. Given the voluminous correspondence with Ofcom from 1 May 2009 to November 2009, and numerous warnings about these repeated breaches, the compliance team at Springdoo should have been fully aware that there was a risk that such breaches would occur again in future without sufficient remedial action.
- 7.70 As noted above, Ofcom had also specifically reminded Mr Wainwright of the obligations in Condition 11 of Springdoo and User Generated's licences on 13 May 2009, following the 3 April Springdoo, and 4 and 22 April User Generated Licence Condition 11 Breaches. In that email Ofcom noted that a failure to supply material when requested would be a breach of the licences.
- 7.71 Mr Wainwright was therefore on notice that the recording systems at Springdoo and User Generated were unreliable and that Springdoo and User Generated may be found in breach of Condition 11 of their licences if they were unable to provide recordings to Ofcom on request, prior to Springdoo's failure to provide a recording for the broadcast on 20 June 2009.

The absence, ineffectiveness or repeated failure of internal mechanisms or procedures intended to prevent contravention by the regulated body concerned, or other bodies in the same group

- The fact that this compliance failure was able to take place, given the previous warning to Springdoo, and that it was not corrected by Springdoo by June 2009, following Ofcom's email of 13 May, points to the fundamental ongoing failure of the compliance systems at Springdoo.

Factors tending to decrease the level of financial penalty

- 7.72 The Committee then considered whether there were any factors which in its view might limit or decrease the level of financial penalty.
- 7.73 The Committee noted all the submissions as to mitigation made by the Licensee. In particular, the Committee took account of the following:
- that a third party company may have been responsible for making recordings on the Licensees' behalf over some periods, including those in which the Licensees were found in breach of Licence Condition 11. However, the Committee considered that ultimate responsibility for compliance remained with Springdoo and User Generated at all times.
 - The Committee noted that the Licensees have surrendered their licences, and ceased broadcasting. Whilst acknowledging this, the Committee did not consider that this significantly reduced the level of any appropriate penalty.

Conclusion on the level of the penalty in relation to the Springdoo and User Generated Licence Condition 11 Breaches

- 7.74 As noted above, all holders of TLCS licences are required by condition 11 of their licence to make and retain, or arrange for, the retention of a recording in sound and

vision of every programme included in the licensed service for a period of 60 days and a provide a copy “forthwith” on request by Ofcom. Ofcom regards this requirement as essential to its ability to regulate broadcasters. By taking action against broadcasters who fail to take such steps, Ofcom fulfils its statutory duties to protect persons under the age of eighteen, and to provide adequate protection to members of the public from offensive and harmful material in television services.

- 7.75 When it came to decide the penalty it would impose, the Committee considered the size of the Licensees. In each case, it sought to levy an appropriate sanction proportionate to the Licensees’ qualifying revenue, which in each case was relatively small (although User Generated’s qualifying revenue is approximately twice that of Springdoo). While in these cases this resulted in a small penalty in absolute terms, the Committee was clear that the proportional size would be reflected in future cases and would therefore result in larger penalties for broadcasters with larger qualifying revenues.
- 7.76 Having considered the relevant facts as outlined above and all the representations made by the Licensees, the Committee decided to impose the following financial penalties on Springdoo and User Generated in respect of the Springdoo and User Generated Licence Condition 11 Breaches, which it considered to be proportionate and appropriate in all the circumstances:
- on Springdoo, a financial penalty of **£6,000** (payable to HM Paymaster General)
 - on User Generated, a financial penalty of **£12,000** (payable to HM Paymaster General).

Conclusion in relation to all breaches

- 7.77 Having regard to the serious and repeated nature of the breaches, and having regard to the Licensees’ representations and Ofcom’s Penalty Guidelines, the Committee decided it was appropriate and proportionate in the circumstances to impose:
- a financial penalty of £6,000 on Springdoo in respect of the Springdoo Code Breaches (payable to HM Paymaster General);
 - a financial penalty of £6,000 on Springdoo on in respect of the Springdoo Licence Condition 11 Breaches,(payable to HM Paymaster General), and
 - a financial penalty on User Generated of £12,000 (payable to HM Paymaster General).

Content Sanctions Committee

Philip Graf
Richard Ayre
Kath Worrall

26 February 2010