

DETERMINATION THAT THE PROVIDER OF THE ON DEMAND PROGRAMME SERVICE “DREAMS OF SPANKING” WAS IN BREACH OF ATVOD’S RULE 11 AND THEREBY CONTRAVENED SECTION 368E (4) OF THE COMMUNICATIONS ACT 2003 (“THE ACT”)

1. Summary of determination

- i. BREACH OF RULE 11 (Harmful Material: protection of under-18’s) in relation to free-to-view material: ESTABLISHED BY ATVOD INQUIRY
- ii. BREACH OF RULE 11 (Harmful Material: protection of under-18’s) in relation to subscription material: ESTABLISHED BY ATVOD INQUIRY

Each breach constitutes an infringement of the statutory requirement set out in section 368E (4) of the Act which states that “*An on demand programme service must not contain any specially restricted material unless the material is made available in a manner which secures that persons under the age of 18 will not normally see or hear it.*”

“Specially restricted material” means—

- (a) a video work in respect of which the video works authority¹ has issued a R18 classification certificate,
- (b) material whose nature is such that it is reasonable to expect that, if the material were contained in a video work submitted to the video works authority for a classification certificate, the video works authority would issue a R18 classification certificate, or
- (c) other material that might seriously impair the physical, mental or moral development of persons under the age of 18.

In determining whether any material falls within (b), regard must be had to any guidelines issued by the video works authority as to its policy in relation to the issue of classification certificates.

2. Service

DREAMS OF SPANKING (“the Service”)

In this Determination we refer to the service made available through the following outlet:

www.dreamsofspanking.com

3. Service Provider

[REDACTED] operating as Pandora Blake (“the Service Provider”)

¹ The British Board of Film Classification (“BBFC”) is currently designated as the ‘video works authority’.

4. Introduction

- 4.1 The Service is in ATVOD's view an On Demand Programme Service ("ODPS") which claims to offer "high-quality, aesthetically beautiful spanking films, photo galleries and audio stories". It is the subject of concurrent ATVOD Determinations that the Service Provider was in breach of its statutory duty to notify the Service to ATVOD as an ODPS, and was in breach of ATVOD's Rule 14.

5. Initial assessment

- 5.1 In view of the fact that ATVOD considers the Service constitutes an ODPS and is therefore covered by the ATVOD Rules & Guidance², the ATVOD Executive considered that the Service raised issues under Rule 11. The requirements relating to Rule 11 were changed by the introduction on 1 December 2014 of the AVMS Regulations 2014, which amend the Act. The Guidance on this rule describes material likely to fall within its scope, and the types of access control required to protect under-eighteens from exposure to such content, as follows:

"In considering any particular case, ATVOD's approach in the first instance will be to determine whether the content in question falls within the definition of 'specially restricted material'.

Content whose broadcast complies with the Ofcom Broadcasting Code, or that has been classified by the British Board of Film Classification (BBFC) in any category except 'R18', would not normally be considered material that "might seriously impair" and would not normally be subject to the requirements of Rule 11.

R18 and R18-equivalent material and any other material which might seriously impair under 18s is subject to the requirements of Rule 11. All 'material' on the service, including still images and other non-video content is subject to this requirement.

The R18 certificate is a special classification for pornographic works, primarily for explicit works of consenting sex or strong fetish material involving adults. It is issued by the British Board of Film Classification in respect of video works being supplied on a physical video recording such as a DVD. There is no requirement for material being provided on an on demand programme service to be classified by the BBFC, but ATVOD is required to have regard to the BBFC Classification Guidelines when determining whether material on an ODPS is R18-equivalent.

For more information on the R18 certificate, and the type of content likely to be awarded this certificate, see the British Board of Film Classification's website: www.bbfc.co.uk³

Provided the material is not illegal or otherwise prohibited (see "Rule 14"), content which ATVOD considers to fall under this Rule (i.e. 'specially restricted material') may be made available in an on demand programme service provided access is

² http://www.atvod.co.uk/uploads/files/ATVOD_Rules_Guidance_Ed_3.0_May_2015.pdf

³ The BBFC's guidelines are published on its website at <http://www.bbfc.co.uk/what-classification/guidelines>. It is the responsibility of Service Providers to ensure that they are aware of any changes to the BBFC's guidelines.

controlled in a manner which secures that persons under eighteen 'will not normally see or hear' such material.

ATVOD's interpretation of this requirement is that there should be in place an effective Content Access Control System ("CAC System") which verifies that the user is aged 18 or over at the point of registration or access by the mandatory use of technical tools for age verification and, if age verification does not take place each time the user returns to the service, controls further access to such content when the user returns to the service by the use of mandatory security controls such as passwords or PIN numbers.

Technical tools which may be acceptable for age verification purposes include:

- *Confirmation of credit card ownership or other form of payment where mandatory proof that the holder is 18 or over is required prior to issue.⁴*
- *A reputable personal digital identity management service which uses checks on an independent and reliable database, such as the electoral roll.*
- *Other comparable proof of account ownership which effectively verifies age. For example, possession and ownership of an effectively age-verified mobile phone⁵.*

Where they are required, CAC Systems must be fit for purpose and effectively managed so as to ensure that in ATVOD's opinion persons under the age of eighteen will not normally see or hear specially restricted material. ATVOD will consider the adequacy and effectiveness of CAC Systems on a case by case basis and keep them under review in the context of on-demand programme services.

Responsibility for ensuring that any required CAC System is in place and is operating effectively rests at all times with the person with editorial responsibility for the on demand programme service. ATVOD's 'Guidance on who needs to notify⁶' explains how to determine the person with 'editorial responsibility' for the on demand programme service."

ATVOD draws attention to the footnote in relation to CAC Systems which states that ATVOD will not regard confirmation of ownership of a Debit, Solo or Electron card, or any other card where the card holder is not required to be 18 or over to be verification that a user of a service is aged 18 or over.

- 5.2 After its initial assessment of the Service the ATVOD Executive considered that the Service raised issues under Rule 11 and subsequently conducted a full investigation on 25 March – 23 April 2015. On 8 June 2015, ATVOD issued its preliminary view than on 27 and 30 March 2015 the Service Provider was in breach of Rule 11

⁴ ATVOD will not regard confirmation of ownership of a Debit, Solo or Electron card or any other card where the card holder is not required to be 18 or over to be verification that a user of a service is aged 18 or over.

⁵ 'Mobile phone' here refers to the SIM card rather than the physical handset. For a phone to be effectively age-verified the account holder must have presented proof of identity and age (for example driving licence or valid passport) to the mobile phone operator. An effective CAC system must establish that the owner of the effectively age-verified phone is the person attempting to access content – for example by demonstrating possession of the phone and awareness of the attempted access. As with other age verification methods, mandatory security controls such as passwords or PIN numbers may be used for subsequent access to the service.

⁶ The guidance is published at <http://www.atvod.co.uk/regulated-services>

(Harmful Material: Protection of the Under-18's) in relation to the Service . Video capture evidence of the Service at the time of ATVOD's initial investigation is set out in ANNEX 1 and 2.

- 5.3 In accordance with ATVOD's published procedures, the provider of the service was given 10 working days in which to make written representations to ATVOD.

6. Provider Representations

- 6.1 On 19 June 2015 the service provider submitted representations to ATVOD. Those specifically relevant to Rule 11 can be summarised as:

- The Service Provider disagrees that the material available 'might seriously impair' persons under 18 or that they would 'normally see or hear' such material.
- The Service Provider submits that they were told by CCBill that it was not possible to use a debit card to sign up via CCBill. As such they are in the process of finding out how to disable this.
- The Service Provider will remove the other offending payment mechanisms, direct bank transfer, postal order and Amazon Gift Card.
- The Service Provider contests the fact that Rule 11 draws no distinction between a still and moving image given that Rule 11 derives from the December 2014 SI.
- Rule 11 claims rely on an implementation of the AVMS that goes beyond the provisions of the underlying Directive 2010/13/EU.
- The AVMS Regulations 2014 which introduced S368E(2) and (3) into the Communications Act 2003 were made ultra vires.

7. Further Assessment

- 7.1 ATVOD notes that the service provider's representations disputed the key facts set out in ATVOD's preliminary view that the service had been operating in breach of Rule 11 on 27 and 30 March 2015. Therefore ATVOD conducted a further investigation on 16 July 2015.

8. Further Investigation

- 8.1 Video capture evidence of the service at the time of ATVOD's further investigation is set out in ANNEX 3.

- 8.2 The Service appeared to be the same in all material respects as when accessed on 27 and 30 March 2015, with the exception of the removal of three payment methods, as described below:

8.3 Nature of the Service and content at 27 and 30 March 2015, and 16 July 2015

At all dates the Service offered subscription access to a range of adult fetish videos. The ATVOD Executive found that entering the address above into a web browser took them to an 'entry' page with a text warning for under 18's to leave the page. There was an option to click 'ENTER' to 'acknowledge that you are at least 18 years of age, you understand the above terms and you consent to view sexually explicit fetish content'.

Clicking on 'ENTER' took the ATVOD Executive to the homepage of the Service. This contained links to 3 videos, a photo gallery and a blog post. There were then further options to browse the catalogue of 'scenes' by clicking the 'view all scenes' or 'all scenes' tabs, and to search by 'keywords'. After selecting 'all scenes' the Executive was able to view the entire video catalogue on one page, with each video represented by a single still image, clicking on an image took the Executive directly to that video. There were also photo galleries interspersed amongst the video content, some of which contained images considered to be R18 equivalent. The gallery '*Tangled With You*', for example, contained oral genital contact.

Clicking on the 'keywords' tab allowed the Executive to search for scenes according to category. Having selected the category 'anal eroticism', the Executive was then able to freely access further photo galleries and some preview trailers. Some of these contained material considered to be R18 equivalent. The preview trailer for the video '*Instructed*', for example, contained vaginal and anal penetration. The still images advertising this video also contained anal penetration.

As the free to view content made clear that further content was available to view to members, on 25 March 2015 and 16 July 2015, ATVOD test purchased a membership using a debit card.

Having obtained membership ATVOD could view videos which resembled television programmes on adult linear services. Having had regard to BBFC guidelines, which state that sex works containing clear images of real sex, or other very strong sexual images will be confined to the 'R18' category, ATVOD concluded that the video content was 'R18' equivalent because it contained, in the video '*Instructed*' for example, explicit sight of clearly un-simulated sexual activity including anal penetration, vaginal penetration and strong fetish material. Ofcom's appeal findings in relation to ODPS containing adult content⁷ confirm that 'R18' equivalent programmes may be considered television-like in this context.

Since content available on the Service included content equivalent to that rated 'R18' by the BBFC its provision falls within the scope of Rule 11. Specifically, ATVOD was satisfied that the content included material whose nature is such that it is reasonable to expect that if the material were contained in a video work submitted to the BBFC for a classification certificate, the BBFC would issue an R18 classification certificate. Such material is 'specially restricted material' and an effective CAC system was therefore required.

ATVOD therefore considered how a consumer could access the material and what, if any, CAC Systems were in place.

8.4 Access to content at 27 and 30 March 2015

As described above, the Service offered initial 'conditions' asking users to confirm or accept that they were at least eighteen years of age by virtue of accessing the website.

⁷ <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/DemandAdult.pdf>
<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Climax3Uncut.pdf>

i. Free access to some material – no payment

- a. Any visitor to the sites comprising the Service could access here stills containing hardcore, 'R18' equivalent images, as described above. Section 368E (5) of the Act defines '*specialty restricted material*' as including "*material whose nature is such that it is reasonable to expect that, if the material were contained in a video work submitted to the video works authority for a classification certificate, the video works authority would issue a R18 classification certificate*". Section 368E (5) draws no distinction between a still and a moving image: a still image included within an ODPS is therefore subject to the same restrictions as those applying to moving images.
- b. Furthermore, any visitor could access at least one 'preview' video containing hardcore, 'R18' equivalent material.

ii. Paid access to full video catalogue – subscription

- a. Once an account had been created and a subscription paid, the full catalogue of videos could be viewed.
- b. Subscription could be paid for via one payment processing service, operated by CC Bill. On 25 March 2015 ATVOD used a debit card to purchase a subscription via the 'credit card' option. There were also options to pay by direct bank transfer, post and an 'Amazon Gift Card' made payable to hello@pandorablake.com.

ATVOD then considered whether a person under the age of eighteen could have easily accessed any of the 'R18' equivalent material provided by the Service.

- i. In relation to free access described above, no age verification system was in place and any minor with access to an internet connection could view the material described at i (a) and (b) above without restriction. ATVOD does not consider a voluntary declaration such as that included on the homepage to constitute a CAC System verifying that the user is aged eighteen or over.
- ii. In relation to paid access, the payment system did not constitute a CAC System verifying that the user was aged eighteen or over at the time of registration/subscription, because:
 - a. The payment process used by the Service Provider accepted debit card payments, and no further age verification measures were in place. Since a debit card can be held by a person under the age of eighteen, ATVOD has made clear in guidance that possession of such a card cannot be regarded as confirming age. Any young person with a debit card could access all of the Service's content without being challenged by any age verification process.
 - b. The payment process used by the Service Provider featured an option to pay by direct bank transfer, which did not require a credit card. It appears that any young person with a bank account could access all of the Service's content without being challenged by any age verification.
 - c. The payment process used by the Service Provider also featured an option to pay by post, which did not require a credit card. It appears that

any young person could access all of the Service's content without being challenged by any age verification process.

- d. The payment process used by the Service Provider featured an option to pay by Amazon Gift Card, which did not require a credit card. It appears that any young person with a bank account could access all of the Service's content without being challenged by any age verification.

8.5 Access to content at 16 July 2015

At the date of further investigation, access to content at 16 July 2015 was the same as described above, with the exception of the removal of the facility to pay by direct bank transfer, by post, and by Amazon Gift Card, as indicated in the service provider's representations. However, contrary to the intention outlined in the representations, the ability to pay with a debit card using the 'credit card' option had not been disabled.

8.6 It is therefore ATVOD's view that

- i. On 27 and 30 March and 16 July 2015 a person under the age of eighteen could easily access free-to-view 'R18' equivalent material, including still images and video, unprotected by any form of CAC System or age verification
- ii. On 27 and 30 March and 16 July 2015 the Service Provider did not have in place an effective CAC System which verified that the user was aged eighteen or over at the point of registration or access by the mandatory use of technical tools for age verification. Specifically, the "paywall" which can be constructed to exclude under-eighteens from accessing specially restricted material, could be easily circumvented by minors and could therefore not be regarded as being effective in securing that such persons will not normally see or hear the relevant paid-for material, which included still images and video content.

8.7 ATVOD notes that s368E(4) of the Act, which restricts access to 'specially restricted material, refers specifically to material which would not be passed in a work at R18 by the BBFC rather than simply material which 'might seriously impair' as referred to in the provider's representations.

8.8 In relation to the provider's representations on the status of the AVMS Regulations 2014, it remains ATVOD's view that this is not a matter for ATVOD but for the courts.

9. Determination

9.1 ATVOD's view is that on 27 and 30 March and 16 July 2015 the Service included specially restricted material and that such material was made available in a manner which failed to secure that persons under the age of eighteen would not normally see or hear it.

9.2 ATVOD's Determination is that

ON 27 AND 30 MARCH AND 16 JULY 2015 [REDACTED] OPERATING AS PANDORA BLAKE WAS IN BREACH OF RULE 11 IN RELATION TO FREE-TO-VIEW MATERIAL ON THE SERVICE. This breach constitutes an infringement of the statutory requirement set out in section 368E (4) of the Communications Act 2003 (“the Act”) which states that “*An on demand programme service must not contain any specially restricted material unless the material is made available in a manner which secures that persons under the age of 18 will not normally see or hear it*”.

ON 27 AND 30 MARCH AND 16 JULY 2015 [REDACTED] OPERATING AS PANDORA BLAKE WAS IN BREACH OF RULE 11 IN RELATION TO PAID ACCESS TO MATERIAL ON THE SERVICE. This breach constitutes an infringement of the statutory requirement set out in section 368E (4) of the Communications Act 2003 (“the Act”) which states that “*An on demand programme service must not contain any specially restricted material unless the material is made available in a manner which secures that persons under the age of 18 will not normally see or hear it*”.