

# Ofcom Content Sanctions Committee

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It is Ofcom policy to state the language used on air by broadcasters who are the subject of a sanction adjudicated on by the Content Sanctions Committee where it is relevant to the case. Some of the language used in this decision may therefore cause offence.

**Consideration of sanction  
against:**

Playboy TV UK/Benelux Limited (“Playboy TV” or “The Licensee” in respect of its service Playboy One (“Playboy One” or “the Channel”), TLCS 767.

**For:**

Breaches of Ofcom’s Broadcasting Code (“the Code”) in respect of:

Rule 1.24: “Premium subscription services and pay per view/night services may broadcast ‘adult-sex’ material between 2200 and 0530 provided that [in addition to other protections]:

- there is a mandatory PIN protected encryption system, or other equivalent protection, that seeks satisfactorily to restrict access solely to those authorised to view; and
- there are measures in place that ensure that the subscriber is an adult;”

Rule 2.1: “Generally accepted standards must be applied to the content 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 [...]. Appropriate information should also be broadcast where it would assist in avoiding or minimising offence.”

**On:**

26 September 2007, 27 September 2007, 29 November 2007, 30 November 2007 and 9 December 2007.

**Decision:**

To impose a financial penalty (payable to HM Paymaster General) of **£22,500**.

## 1. Summary

- 1.1 For the reasons set out in section 8, under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee ("the Committee"), the Committee has decided to impose a statutory sanction on Playboy TV. This is in light of the serious and repeated breaches of the Code because of the Licensee's failure to ensure compliance in the broadcast of various programmes as discussed at paragraphs 1.3-1.10 below.
- 1.2 Playboy One was the only entirely free-to-air and unencrypted adult (as opposed to 'adult sex chat') channel situated in the 'adult' section of the Sky EPG (Channel 911)<sup>1</sup>. The Channel provided adult entertainment in the form of long and short form dramas with sexual themes and content, and sex-related reality TV programmes and documentaries.
- 1.3 Ofcom received five complaints between September 2007 and January 2008 that material broadcast free-to-air and un-encrypted on Playboy One featured explicit sexual content that was inappropriate on a free-to-air service. Ofcom investigated material transmitted on Playboy One in seven programmes (collectively known as the "broadcasts"):
- *Jenna's American Sex Star* (26 September 2007, 23:35);
  - *Adult Stars Close-up* (27 September 2007, 00:35);
  - *Blue Collar Babes* (27 September 2007, 01:05);
  - *Sexy Girls Next Door* (27 September 2007, 02:00);
  - *Sexy Urban Legends* (29 November 2007, 23:00);
  - *Sex House* (30 November 2007, 00:35); and
  - *Sex Guides* (9 December 2007, 03:30).
- 1.4 The broadcasts investigated included sequences depicting masturbation, oral sex (both between women and between men and women), clear labial detail, sexual intercourse, and full nudity. Some also included strong language, such as "fuck" and its derivatives and "cunt", in an overtly sexual context.
- 1.5 Ofcom assessed the material broadcast between 23:00 and 03:30 on the dates in question. It concluded that – depending on the individual breach - the explicitness, strength and/or sustained nature of the sexual content and language was unacceptable for broadcast on a free-to-air channel. The primary purpose of this material was sexual stimulation. None had a sufficient and clear editorial context to justify its broadcast. It was considered to be 'adult-sex' material under Rule 1.24 and so should have been broadcast under encryption and in line with the other requirements of Rule 1.24. In addition the Licensee had failed to provide adequate protection for viewers from potentially harmful or offensive material which was not justified by the context as required in accordance with Rules 2.1 and 2.3.
- 1.6 Ofcom found the broadcasts in breach of Rule 1.24, 2.1 and 2.3 of the Code.
- 1.7 Due to the seriousness of the breaches when the broadcasts were taken together, and their repeated nature, the case was referred to the Committee

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<sup>1</sup> This service used to broadcast free-to-air until 24 September 2008 under the name Playboy One.

by the Ofcom Executive, in line with Ofcom's published procedures,<sup>2</sup> for the consideration by the Committee of a statutory sanction.

- 1.8 The Committee met on 16 March 2009 to consider whether it should impose a statutory sanction and if so at what level. Representatives of the Licensee attended the hearing to make oral representations.
- 1.9 After considering all the evidence and the Licensee's representations, both oral and written, the Committee decided that the breaches of the Code by Playboy TV on Playboy One were both sufficiently serious when taken together and repeated to attract a financial penalty.
- 1.10 The breaches were serious firstly because of the nature of the content. Depending on the individual programme, there was, in the view of the Committee, a high level of sexual explicitness in some of the material broadcast – both in some of the images of various sexual acts such as intercourse and oral sex, and sexual language. This was unacceptable when shown free-to-air and unencrypted. The channel's position within the 'adult' sector of the EPG could not justify broadcasting material of this nature unencrypted. Second, the Committee was concerned about the harm and offence which such graphic sexual material could cause to viewers, and in particular children, when shown unencrypted. Viewers could have come across this content unawares. Third, the seriousness of the breaches is compounded by the fact that they occurred following Ofcom's advice and guidance to licensees about Rule 1.24, and to Playboy TV in particular, and after Playboy had confirmed that they understood this and would take it into account to ensure that their services complied with the Broadcasting Code.
- 1.11 'Adult' channels generally and 'adult chat' channels should be in no doubt of Ofcom's concerns about the broadcast of sexual material which is too explicit. Should further such cases be considered for sanction in future, the Committee will continue to regard them very seriously. If highly graphic sexual material is broadcast without editorial justification on a free-to-air channel even on a single occasion it can be a very serious breach of the Code.
- 1.12 Having regard to the serious and repeated nature of the breaches, and having regard to the Licensee's representations and Ofcom's Penalty Guidelines, the Committee decided it was appropriate and proportionate in the circumstances to impose a financial penalty on Playboy TV UK/Benelux Limited of **£22,500** (payable to HM Paymaster General).

## 2. Background

- 2.1 Playboy One (TLCS 767) was owned and operated by Playboy TV UK/Benelux Ltd<sup>3</sup>. The channel was originally licensed in 2004 as Playboy Active. However, it was launched on 14 November 2005 as Playboy One. It was the only entirely free-to-air and unencrypted adult (as opposed to 'adult sex chat') channel situated in the 'adult' section of the Sky EPG (Channel 911). The Channel provided adult entertainment in the form of long and short

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<sup>2</sup> <http://www.ofcom.org.uk/radio/ifi/figuidance/sanctions/>

<sup>3</sup> Playboy UK/Benelux Ltd requested a change to its licence on 17 July 2008. From 1 October 2008 a new service was launched on the channel called *Paul Raymond TV* and provided on an encrypted basis only in the adult section of the Sky EPG.

form dramas with sexual themes and content and sex-related reality TV programmes and documentaries.

2.2 When the Licensee first applied for its licence on 21 May 2004 (the licence was issued on 14 June 2004), Playboy TV stated that Playboy Active's content would comprise "*general entertainment*". When asked by Ofcom to clarify the channel's type and range of content, the Licensee responded on 7 June 2004 that the channel would include "lifestyle content, magazine programmes and high quality soft erotic content post watershed (suitable for an unencrypted service)..."

2.3 Subsequently Ofcom published or provided guidance to the Licensee on Rule 1.24 and 'adult-sex' material transmitted free-to-air. For example:

(a) on 26 March 2007 in Broadcast Bulletin 81 a breach of Rules 1.24, 2.1 and 2.3 against Men & Motors was published for including 'adult-sex' material in *The Extreme Truth*<sup>4</sup>; and

(b) in connection with separate licence applications by Playboy TV, on 29 May 2007 Ofcom wrote to the Licensee to give it some guidance regarding adult content. This was in the form of copies of two letters that had been sent by Ofcom in 2006 to Ofcom licensed 'adult chat' channels (regarding sex-related content transmitted outside encryption), together with a previous Ofcom sanctions adjudication against Television Concepts Ltd regarding its service *Look4Love*, published on 24 November 2006<sup>5</sup>. The 29 May 2007 letter informed Playboy TV that whilst the information provided related to 'adult chat' channels, it nonetheless was still relevant as it contained guidance regarding adult content in general. One of the letters contained the following: "**Under the Code it is prohibited to broadcast content where the visuals or the audio or the overall tone is tantamount to adult sex material and we will intervene** if we see such programming" [emphasis in original]. In response on 30 May 2007, the Licensee confirmed that the responsible executives at Playboy TV had read and understood Ofcom's letters and *Look4Love* adjudication and "will take this guidance into account to ensure that our services comply with the Ofcom Broadcasting Code."

### 3. Legal Framework

#### The Communications Act 2003

3.1 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)); 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)).

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<sup>4</sup> [http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb81/](http://www.ofcom.org.uk/tv/obb/prog_cb/obb81/)

<sup>5</sup> [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/look4love.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/look4love.pdf)

- 3.2 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)).
- 3.3 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)).
- 3.4 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**

- 3.5 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").
- 3.6 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).

- 3.7 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**

- 3.8 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.
- 3.9 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.

### **Remedial action and penalties**

- 3.10 Section 236 of the Act provides Ofcom with the power to direct the holder of a Television Licensable Content Service (TLCS) licence to broadcast a correction or statement of findings (or both) or not to repeat a programme on contravention of a licence condition.
- 3.11 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.
- 3.12 Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence.

### **Relevant provisions of the Ofcom Broadcasting Code**

- 3.13 Rule 1.24: "Premium subscription services and pay per view/night services may broadcast 'adult sex' material between 2200 and 0530 provided that... [in addition to other protections]... there is a mandatory PIN protection system, or its equivalent, in place so to restrict access solely to those authorised to view; and that there are measures in place to ensure the subscriber is an adult".
- 3.14 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."
- 3.15 Rule 2.3: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context."

## **4. Ofcom's investigation and Playboy TV's responses**

- 4.1 Following the receipt of five complaints on various dates between September 2007 and January 2008 about the sexual explicitness of material on Playboy One broadcast between September and December 2007, Ofcom commenced an investigation and monitored the channel on 26/27 September 2007 and viewed the programmes "*Jenna's American Sex Star*", "*Adult Stars Close-Up*", "*Blue Collar Babes*" and "*Sexy Girls Next Door*" transmitted on those dates. Having viewed the material, Ofcom's initial opinion was that in

each programme there were frequent and prolonged scenes of an explicit sexual nature and/or scenes of explicit nudity in a sexual context. Ofcom wrote to the Licensee on 17 October 2007, seeking its comments on these programmes under the following Rules of the Code: 1.24 ('adult-sex' material), 2.1 (generally accepted standards) and 2.3 (material that may cause offence must be justified by the context).

- 4.2 In its response, the Licensee stated that the position of the Channel in the 'adult' section of the EPG gave some protection to viewers from coming across its content unawares and that all the programmes Ofcom had asked for comments about were transmitted well after the watershed. In addition, it said that, as with all Sky subscribers, parents can remove channels from the EPG so that they cannot be selected at all which gives them the option of avoiding viewing any material of this kind. In addition, it took the view that the location of the channel in the EPG provided a context where viewers will expect to see exclusively or significantly more 'adult' material than elsewhere on the EPG.
- 4.3 The Licensee admitted that the edition of *Jenna's American Sex Star* transmitted on 26 September 2007 was unsuitable for "broadcast in its current form" and its transmission had resulted from a compliance failure. Playboy TV removed the entire series from its schedule. It confirmed that the member of staff involved had been dismissed and that it had tightened up its compliance procedures. The Licensee did not, however, consider that the other three programmes - *Adult Stars Close Up*, *Blue Collar Babes* and *Sexy Girls Next Door* - were in breach of the Code. It stated that they did not feature explicit nudity, the sexual contact was mild and inoffensive and the editorial context justified the level of nudity.
- 4.4 After receipt of three further complaints about sexually explicit content on Playboy One, Ofcom viewed the following additional programmes: *Sexy Urban Legends* and *Sex House* transmitted on 29/30 November 2007 between 23:00 and 01:00, and *Sex Guides* transmitted on 9 December 2007 at 03:30.
- 4.5 Ofcom's initial view was that these programmes contained explicit nudity including labial detail in a sexual context and depictions of sexual acts (including oral sex, sexual intercourse and masturbation), often for prolonged duration. Again, Ofcom wrote to the Licensee on 11 January 2008, seeking its comments on these programmes under the following Rules of the Code: 1.24, 2.1 and 2.3.
- 4.6 The Licensee defended all these broadcasts on the grounds that: their overall level of explicitness was generally in line with the Code because they avoided prolonged shots of genitalia and simulated sex; and where shots of genitalia and simulated sex were included, they could be justified by the context as defined in Rule 2.3 of the Code. The Licensee stated its commitment to comply fully with all Ofcom rules, reiterating that it was "toning down the content of the channel over time to fall well within Ofcom guidelines".
- 4.7 In addition, with respect to *Sexy Urban Legends* and *Sex House* transmitted on 29/30 November 2007, Playboy TV considered that because of an item included in Ofcom Broadcast Bulletin 99 it believed these programmes were not in breach.

- 4.8 This Bulletin was published on 17 December 2007. The back of the Bulletin, as usual, included a list of complaints under the Code which had not been upheld or were out of Ofcom's remit, but which did not warrant publication of a finding in the Bulletin. One of the entries on this list was to the effect that a complaint relating to a programme/s shown on Playboy One on 29 November 2007 had not been upheld by Ofcom. This entry had in fact been generated by a systems error in Ofcom's complaints handling system<sup>6</sup>. The Licensee told Ofcom that it had taken comfort from this entry in terms of its compliance with the Code<sup>7</sup>.
- 4.9 After being notified by Ofcom of this error, the Licensee contacted Ofcom stating that it had taken the decision to completely replace the Playboy One schedules from 4 February 2008. It said that these replacement schedules would be "significantly softer and include heavily edited versions of any sex content..."

## **5. Ofcom's decision that Playboy TV was in breach of the Code**

5.1 Having carefully considered the representations made by Playboy TV, Ofcom nonetheless found that *Jenna's American Sex Star* broadcast on 26 September 2007, *Adult Stars Close-up*, *Blue Collar Babes* and *Sexy Girls Next Door* all transmitted on 27 September 2007, *Sexy Urban Legends* broadcast on 29 November 2007, *Sex House* transmitted on 30 November 2007 and *Sex Guides* broadcast on 9 December 2007 were in breach of the following Code Rules:

- Rule 1.24 ('adult-sex' material not under encryption);
- Rule 2.1 (Generally accepted standards); and
- Rule 2.3 (material which may cause offence must be justified by the context).

5.2 This decision that there were breaches of Rule 1.24 (formally recorded on 8 April 2008) was based on the Executive's view that each of the programmes featured sexual material which – depending on the individual programme – was a combination of content so explicit, strong and/or sustained and strong sexual language that it was unacceptable when shown free-to-air and unencrypted. Its primary purpose was to arouse the audience sexually. None of this material was in the opinion of the Executive editorially justified. This content included for example depictions of a sustained and sexually explicit all-girl group sex 'gang-bang' featuring naked women performing sex acts, including oral sex, on each other; sexual intercourse (whether simulated or real); oral sex; masturbation, both with and without dildos; and full nudity, in some instances showing labial detail. Further, a number of these sequences were of considerable duration, and with little or no qualifying narrative to justify their inclusion on a free-to-air service. Some for example featured female porn stars stripping to camera and touching themselves explicitly in scenes which included full and frequent nudity including instances of clear

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<sup>6</sup> Ofcom's subsequent investigation as to how this error has occurred established that a duplicate complaint for the original 29/30 November 2007 Playboy One programmes complaint had erroneously been included on the system. When this duplicate was closed down it automatically generated an entry for the Broadcast Bulletin and Ofcom therefore inadvertently published an entry to the effect that this case/complaint was "not in breach".

<sup>7</sup> This entry has since been removed from Bulletin 99



“open-legged” labial detail. The Executive was also concerned by the use of frequent explicit sexual language, for example (from *Jenna’s American Sex Star*), “*I would stick a big fucking dildo in your fucking twat, I’d fucking lick it all up and I’d taste all your fucking pussy juices ‘cos I’d make you come harder than you’ve ever come before.*”

5.3 The decision that there were breaches of Rules 2.1 and 2.3 was based on the Executive’s opinion that this material breached generally accepted standards. Depending on the individual programme, the explicit, strong and/or sustained sexual content including strong sexual language was not sufficiently justified by the context in which it was broadcast.

5.4 Playboy TV did not seek a review of any of these breach decisions.

## **6. Referral to the Content Sanctions Committee**

### **Playboy TV’s written representations on the recommendation to refer the breaches to the Committee**

6.1 The Licensee made a series of written submissions to Ofcom on the proposed decision to refer the breaches of the Code by Playboy TV to the Committee. In summary the main points put forward by the Licensee to argue that the case did not warrant a sanction were that:

- regarding Rule 1.24, the breaches occurred during a period when – it alleged - Ofcom was seeking to impose a “more restrictive” interpretation of the Code provisions regarding ‘adult’ material than had prevailed before “for many years”. During the period when the breaches happened, Playboy TV stated it was consistently applying the “old” set of standards. It was therefore “grossly unfair” for Ofcom to decide these breaches were sufficiently serious and repeated to merit sanction;
- concerning Rules 2.1 and 2.3, in interpreting “generally accepted standards” Ofcom should take account of what the majority of people consider generally acceptable on any platform. Ofcom should not use words such as “explicit” and “graphic” to describe the content found in this case to have breached the Code because nothing about the sex content described in this case could be considered explicit: it was “merely implied”;
- it was not fair and reasonable for Ofcom to take published Ofcom advice and guidance into account as a factor exacerbating the seriousness of the breaches. This was because the Ofcom decisions and guidance were either: (a) “isolated” and “appeared inconsistent” with the “then current standard enforcement by Ofcom,” or were not comparable to the material shown on Playboy One because for example they concerned a channel outside the ‘adult’ section of the Sky EPG (e.g. *The Extreme Truth / Men & Motors* decision<sup>8</sup>) or concerned ‘adult sex chat’ channels which – according to Playboy TV were “in a totally different context” to Playboy One; and (b) could not assist Playboy TV in terms of compliance because the guidance was

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<sup>8</sup> See footnote 4 above

unclear and also the Licensee did not have access to the material found in breach;

- Playboy TV relied, to its detriment, to some extent on the administrative error made by Ofcom in Bulletin 99 (see paragraphs 4.7 to 4.9 above);
- Ofcom's delay in dealing with this case affected the Licensee adversely; and
- the Licensee apologised for the breaches and pointed out that Playboy One ceased transmission on 24 September 2008.

### **Decision to refer to the Committee**

- 6.2 Having taken account of all the representations made by Playboy TV, the Ofcom Executive concluded that the breaches were sufficiently serious when taken together and repeated, to refer the case to the Committee for the consideration of a statutory sanction.
- 6.3 The Committee, having reviewed the decision of the Ofcom Executive to refer the current breaches to it, accepted that the contraventions of the Code were sufficiently serious when taken together and repeated that it should be considered for sanction. Accordingly, Playboy TV was invited to attend an oral hearing before the Committee.

## **7. Sanctions Hearing**

- 7.1 The Committee held a hearing to consider this case on 16 March 2009. Three representatives of the Licensee attended the hearing: Jeremy Yates, Managing Director; Andrew Wren, Company Secretary; and David Cooke, Head of Programming. At this meeting Playboy TV made oral representations to the Committee before the Committee put questions to the Licensee. Taking all of the relevant factors into account, the Committee then decided whether the breaches warranted the imposition of a statutory sanction, and if so, at what level.
- 7.2 The Licensee stated that it was important that the case was being considered afresh by the Committee in particular because it considered that the application by Ofcom of the Code Rules concerning 'adult' material and their interpretation had changed recently. It believed that the rules were now being interpreted in a more restrictive way than formerly. In the Licensee's view the Code breaches looked worse than they really were because "the line" had been moved by Ofcom as regards free-to-air content. However, it said that it was not attending the hearing to challenge this (alleged) change, as it welcomed restricted access to free-to-air 'adult' material because this helped drive subscription to its encrypted channels.
- 7.3 Playboy One continued that Playboy TV US has for many years supplied Playboy titles to a number of mainstream UK channels including Five and various channels controlled by Virgin Media. These channels are widely available on a number of platforms such as Freeview, Virgin and Sky. Playboy TV said these channels had shown similar material without intervention by Ofcom. It said that, by comparison, the programmes it

transmitted on Playboy One and which were found in breach of the Code were on a specialist channel located in the adult section of Sky's EPG. In addition, it considered that there was a clear distinction between 'adult chat' channel material where girls sat on sofas titillating the audience to drive PRS revenue and Playboy One's higher production values in the content broadcast.

- 7.4 The Licensee said that over the course of Ofcom's investigation it toned down the content of Playboy One and this had a significant financial impact on the Channel. In September 2008 Playboy TV took Playboy One off-air and re-launched it as Paul Raymond TV, an encrypted channel. It said that as a result it lost advertising revenue and the loss of the opportunity to "up-sell" to its encrypted channels from a free-to-air service. In response to a question from the Committee, however, the Licensee stated that the principal reason for closing the Channel was that, being unable any longer to show such strong sexual material as previously as a result of Ofcom's intervention, it no longer had a large enough supply of suitable 'adult' programmes to broadcast free-to-air. The drop in advertising revenue was also a factor however.
- 7.5 Turning to the individual programmes under consideration for a statutory sanction, the Licensee accepted that the programme "*Jenna's American Sex Star*" should never have been transmitted unencrypted and free-to-air. It said that the consequence of this error was that a member of staff had had his employment terminated and new compliance procedures were put in place. With regard to the other six programmes, the Licensee said when they were transmitted Playboy TV believed they were in line with the Code.
- 7.6 The Committee questioned the Licensee as to what it considered constituted "prolonged" and "sustained" sex material. The Licensee replied that this was clearly a matter of interpretation and that, because the Channel had stopped broadcasting, it was not attending the hearing to defend these programmes.
- 7.7 When asked by the Committee to clarify Playboy One's licence application which had stated that the Channel would contain "general entertainment" and "lifestyle features", the Licensee responded that a number of Playboy One's programmes had been "lifestyle" features when it had first launched in the general section of the Sky EPG. Later it was moved, by Sky, into the 'adult' section of the EPG. The Committee reminded the Channel that responsibility for compliance always remains with the broadcaster and it is not dependent on where a channel is located on the EPG. The Licensee responded that it considered that "context" can depend to some extent on where a channel is located on the EPG, although it acknowledged that the compliance burden does ultimately rest with the Licensee.

## **8. Decision by the Committee**

- 8.1 The Committee may impose a sanction which may be 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 the balance of all the facts, it was appropriate to impose by way of statutory sanction a financial penalty of £22,500.

- 8.2 In deciding on the level of financial penalty the Committee had regard to Ofcom's Penalty Guidelines.<sup>9</sup>

### **The seriousness of the breaches**

- 8.3 Having viewed the material, and taken account of all the evidence and the representations of the Licensee, the Committee considered that the breaches of Code Rules 1.24, 2.1 and 2.3 when taken together were serious. This was for the following reasons.
- 8.4 First, the nature of the content. Depending on the individual programme, there was, in the view of the Committee, a high level of sexual explicitness in some of the material broadcast – both in some of the images of various sexual acts such as intercourse and oral sex and sexual language (detailed in paragraph 5.2 above). Each of the programmes which are the subject of this sanctions case featured sexual material some of which was a combination of content so graphic, strong and/or sustained that it was in the view of the Committee unacceptable when shown free-to-air and unencrypted. In particular there were examples of graphic depictions of oral sex, sexual intercourse (whether simulated or real), masturbation and full nudity including labial detail. Further, a number of these sequences were of considerable duration, and the Committee noted they had little or no qualifying narrative to justify their inclusion on a free-to-air service. The Committee also took account in particular of the very strong sexual language used in *Jenna's American Sex Star* in particular (see paragraph 5.2 above). The Committee noted that the Licensee expressly admitted that *Jenna's American Sex Star* broadcast on 26 September 2007 (which was part of a series shown on Playboy One) was “unsuitable for broadcast” and that it investigated this “compliance failure”.
- 8.5 There was no doubt in the Committee's opinion that a reasonable person would conclude that the material shown in the various programmes which breached the Code was unacceptable for broadcast on a free-to-air channel unencrypted. The content was ‘adult-sex’ material to which Rule 1.24 of the Code applied. The channel's position within the ‘adult’ sector of the EPG could not justify broadcasting material of this nature unencrypted.
- 8.6 Second, the Committee was concerned about the harm and offence which such graphic sexual material could cause to viewers, and in particular children, when shown unencrypted. Viewers could have come across this content unawares and it was important to protect them from it, and especially children, through encryption and the other restrictions set out in Rule 1.24.
- 8.7 Third, the seriousness of the breaches is compounded by the fact that the breaches occurred following Ofcom's advice and guidance to licensees about Rule 1.24 and ‘adult-sex’ material, and to Playboy TV in particular. This included: *The Extreme Truth / Men & Motors* breach finding published in March 2007<sup>10</sup> on Rule 1.24; and the specific information and guidance

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<sup>9</sup> 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.

<sup>10</sup> [http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb81/issue81.pdf](http://www.ofcom.org.uk/tv/obb/prog_cb/obb81/issue81.pdf). The Committee noted that this programme was originally made by Playboy TV (the production company), and that therefore the Licensee must have been aware of its content and familiar with the series.

Ofcom provided in May 2007 to the Licensee about showing sexual material on the Channel, and the Licensee's undertaking to ensure their services would comply with the Code.<sup>11</sup> This advice and guidance pre-dated any of the breaches that occurred.

- 8.8 The Committee also noted additional guidance contained in decisions of Ofcom published in Broadcast Bulletin 95 on 22 October 2007<sup>12</sup> and by the Committee on 30 November 2007 in the *Babeworld / Connection Makers Ltd* case<sup>13</sup>. The Committee noted in particular that in this last decision it stated (at paragraph 1.11) that “[f]or the avoidance of doubt, broadcasters operating in the adult section of the EPG should be clear that compliance with requirements of the Code applicable to this area, as clarified and explained in decisions of Ofcom, is mandatory. Should such cases be referred to Ofcom’s Content Sanctions Committee in future, it will regard them very seriously.” The Committee considered that all this advice and guidance, although written in some respects in general terms, was relevant to Playboy TV and did provide the Licensee with assistance for compliance purposes.
- 8.9 The Committee had regard to the Licensee’s submissions about Ofcom’s administrative error in Bulletin 99 on 17 December 2007 (see paragraphs 4.7-4.9) and delays in bringing this case. Concerning the error, the Committee noted that this occurred *after* all the Code breaches being considered by the Committee in this case had taken place. It could not have been taken into account by Playboy TV in complying any of the material that was broadcast before 17 December 2007. Also Playboy TV had informed Ofcom by this date that it had already decided to “tone down” the sexual material it broadcast. Concerning the delays, the Committee agreed they were highly regrettable and noted that Ofcom had apologised for them. The Licensee had not however produced any convincing evidence to show that delay had caused it any material loss or damage.

### **Repeated breaches**

- 8.10 Breaches of Rules 1.24, 2.1 and 2.3 were recorded against the Licensee by Ofcom concerning material broadcast on Playboy One in seven separate programmes on five calendar dates between September and December 2007 (although on three separate occasions overnight). The Licensee had therefore also repeatedly breached the Code on these dates.
- 8.11 In light of all the circumstances, the Committee found that the breaches when taken together demonstrated a serious and repeated failure by the Licensee to ensure compliance with the Code.

### **Precedent**

- 8.12 The Committee noted the representations made by the Licensee that it was not appropriate to consider imposing a sanction on Playboy TV in respect of the Channel because previous Ofcom decisions concerning ‘adult-sex’ material cited by Ofcom were not relevant. The Licensee referred in particular to a published Finding of a breach of the Code against a programme called *The Extreme Truth*, broadcast on Men & Motors, and to

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<sup>11</sup> See paragraph 2.3 above

<sup>12</sup> [http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb95/issue95.pdf](http://www.ofcom.org.uk/tv/obb/prog_cb/obb95/issue95.pdf)

<sup>13</sup> [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/babeworld.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/babeworld.pdf)

Ofcom's decisions against 'adult sex chat' channels which it argued are "in a totally different context to that in which Playboy One operated." Playboy TV argued this is because the sole purpose of 'adult sex chat' channels is to titillate and drive PRS revenue, and because 'adult chat' channels contain no editorial material at all.

- 8.13 Members of the Committee had already viewed (in the context of previous sanctions cases) material relating to the cases highlighted by the Licensee. The Committee took account of all the circumstances and context surrounding these cases and the representations made by Playboy TV. In the Committee's opinion, compared to those cases, the breaches in the present case are more serious and warrant sanction for the reasons set out in this adjudication. As regards for example *The Extreme Truth* (published in Broadcast Bulletin 81 – see paragraph 8.7 above), there were various objective reasons why it was not appropriate for this case to be referred to the Committee for consideration of a sanction. These included: the fact that *The Extreme Truth* was an isolated and not a repeated breach; that the licensee in that case had not been specifically warned in advance about showing such content; and other points of mitigation not found in the case of the Licensee.
- 8.14 Regarding decisions concerning 'adult sex chat' channels, the Committee acknowledged that there were distinctions between the material broadcast on 'adult sex chat' channels and that shown on Playboy One and found in breach of the Code. The Committee however believed there are also useful parallels with the current case, such as: breaches of the same Rules of the Code; the fact that the 'adult sex chat' channels are broadcast free-to-air, and are also situated, as Playboy One was, in the 'adult' part of the EPG; and that these cases all involved the broadcast of graphic, strong and/or sustained sexual material some of which (depending on the facts of the individual case) was analogous to that in the present case. The Committee therefore concluded that, although there were some differences, Ofcom's decisions about content on 'adult sex chat' channels were *not* made "in a totally different context" to those related to material shown on Playboy One and found in breach of the Code.
- 8.15 In the Committee's opinion, referral of this case to the Committee and the imposition of a financial penalty, were appropriate and not inconsistent with the other cases.

### **Deterrent**

- 8.16 In deciding on the appropriate size of a financial penalty in this case, the Committee considered it should be sufficiently significant to act as a deterrent against a repeat of these or similar breaches. It was particularly concerned that this incentive to comply would be effective against other licensees broadcasting sexual material free-to-air because Playboy One was no longer broadcasting unencrypted (see footnote 3 above).
- 8.17 The Committee was concerned that licensees, especially those who choose to operate in the 'adult' and free-to-air market, should understand that breaches of the Code of a serious nature could lead to the imposition of a statutory sanction. The Committee therefore considered a financial penalty to be merited in this case partly for this reason.

### **Factors tending to increase the level of penalty**

8.18 The Committee then considered whether there were any factors which aggravated or tended to increase the level of any financial penalty it might impose.

8.19 The Committee took account of the fact that:

- such sexually explicit material could have been broadcast and not corrected by the Licensee without intervention by Ofcom, points to the absence or ineffectiveness of its compliance procedures and faults in compliance judgments at that time; and
- senior management knew, or ought to have known, that contraventions would occur as a result of the guidance on Rule 1.24 published by Ofcom and also provided specifically to the Licensee, both before any of the breaches occurred and during the relevant period while they were occurring. The guidance of May 2007 specifically warned the Licensee against broadcasting explicit sexual content which breached the Code. The Licensee undertook to ensure compliance.

### **Mitigating Factors**

8.20 The Committee then considered whether there were any factors which in its view might limit or decrease the level of financial penalty.

8.21 The Committee noted all the submissions as to mitigation made by the Licensee. In particular, the Committee took account of the following:

- the Licensee took some steps to improve compliance following broadcast of *Jenna's American Sex Star* on 26 September 2007, ensuring for example that a compliance manager checked all decisions taken by compliance viewers, and deciding to “tone down” the overall output of Playboy One from around November 2007. It decided later to replace all of the Playboy One schedules from 4 February 2008.

### **Conclusion**

8.22 The broadcast on an unencrypted channel of content showing people engaged in explicit sexual activity, such as intercourse, oral sex and masturbation (especially when accompanied by strong sexual language), and that contains insufficient editorial justification for the inclusion of such images, is totally unacceptable. It has the potential to cause offence to the audience and harm to under-eighteens, and children in particular, especially those who come across such material unawares.

8.23 The Committee notes that it has recently imposed statutory sanctions against ‘adult chat’ and ‘adult’ channels generally for broadcasting explicit content. All these channels must take careful note of Ofcom’s concerns about the need for robust compliance in this area. Should such cases be referred to the Committee in future, the Committee will continue to regard them very seriously.

- 8.24 The Committee wishes to make clear that if graphic sexual material is broadcast without editorial justification on a free-to-air channel on a single occasion it can be a very serious breach of the Code. To contravene the Code repeatedly as in this case however clearly compounds the seriousness of the compliance failure.
- 8.25 Having considered the relevant facts as outlined above and all the representations made by Playboy TV, the Committee decided to impose a financial penalty on the Licensee of **£22,500** (payable to HM Paymaster General) which it considered to be a proportionate and appropriate penalty in all the circumstances.

### **Content Sanctions Committee**

Philip Graf  
Anthony Lilley  
Kath Worrall

2 April 2009