

Sanction: Decision by Ofcom**Imposed on Just4Us TV Limited and Playboy TV UK/ Benelux Limited**

For the broadcast of various adult sex chat advertisements between 2 April 2011 and 13 April 2011.

Consideration**of Sanction against:**

Just4Us TV Limited (“Just4Us”) (a wholly owned subsidiary of Playboy TV UK/Benelux Limited) in respect of its service **Red Light 1** (TLCS-1123) and Playboy TV UK/Benelux Limited (“Playboy TV”) in respect of its services **Red Light 2** (TLCS-335) and **Red Light 3** (TLCS-1434).

Just4Us TV Limited and Playboy TV UK/Benelux Limited together are “the Licensees”.

For:

Breaches of the UK Code of Broadcast Advertising (“the BCAP Code”) in respect of:

Rule 4.2: “Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards.”

Rule 32.3 “Relevant timing restrictions must be applied to advertisements that, through their content, might harm or distress children of particular ages or that are otherwise unsuitable for them.”

On:

Red Light 1, 3 April 2011 23:53 to 01:00
 Red Light 1, 9 April 2011, 21:00 to 21:35
 Red Light 1, 10 April 2011, 00:00 to 01:00
 Red Light 1, 13 April 2011, 21:03 to 21:45
 Red Light 1, 13 April 2011, 22:00 to 23:00
 Red Light 2, 2 April 2011, 00:05 to 01:00
 Red Light 2, 12 April 2011, 22:12 to 23:00
 Red Light 2, 13 April 2011, 00:11 to 01:00
 Red Light 3, 6 April 2011, 22:00 to 23:00
 Red Light 3, 10 April 2011, 22:10 to 23:00

Decision:

To impose a financial penalty (payable to HM Paymaster General) of **£60,000 on Just4Us and £50,000 on Playboy TV** for breaches of the BCAP Code by the Licensees.

Summary

1. For the reasons set out in paragraphs 41 to 92, Ofcom has decided to impose statutory sanctions on the Licensees.
2. The services Red Light 1, 2 and 3 all carry televised interactive 'adult chat' advertisements broadcast from 21:00. Viewers are invited to contact onscreen female presenters via premium rate telephony services ("PRS").
3. The licence for Red Light 1 is owned and operated by Just4Us TV Limited ("Just4Us"); and the licences for Red Light 2 and Red Light 3 are owned and operated by Playboy UK TV Limited/ Benelux Ltd ("Playboy TV"). Just4Us is a wholly owned subsidiary of Playboy TV. Playboy TV is responsible for the compliance of Red Light 1, Red Light 2 and Red Light 3. These services are available freely without mandatory restricted access on Sky channel numbers 911, 902 and 948 respectively and are in the 'adult' section of the Sky Electronic Programme Guide ("Sky EPG").
4. In Ofcom's finding published on 4 July 2011 in Broadcast Bulletin 185¹, the Executive found that ten adult sex chat advertisements broadcast by Just4Us and Playboy breached the following BCAP Code Rules:
 - 4.2: (Advertisements must not cause serious or widespread offence against generally accepted standards.)
 - 32.3: (Relevant timing restrictions must be applied to advertisements that are unsuitable for children).
5. The finding highlighted a number of examples of broadcast material that was clearly inconsistent with the Chat Service Guidance², such as images of the presenters:
 - spitting on their bodies to emulate ejaculate;
 - using a cupped hand and on one occasion a telephone to cover their genital area, resulting in clear pressure between their hand or telephone and the genital area;
 - pouring oil onto their buttocks and genital area; and
 - wearing clothing that did not adequately cover their genital area (in one case outer labia were clearly visible).
6. Ofcom considered this material should not have been broadcast within the context of 'adult chat' advertisements that were freely available without mandatory restricted access.
7. Therefore Ofcom recorded the following breaches of Rule 4.2 of the BCAP Code:

Red Light 1, 3 April 2011 23:53 to 01:00
Red Light 1, 10 April 2011, 00:00 to 01:00

¹ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb185/obb185.pdf>

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

<http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/bcap-guidance.pdf> (a revised version was published on 28 July 2011)

Red Light 1, 13 April 2011, 22:00 to 23:00
Red Light 2, 2 April 2011, 00:05 to 01:00
Red Light 2, 12 April 2011, 22:12 to 23:00
Red Light 2, 13 April 2011, 00:11 to 01:00
Red Light 3, 6 April 2011, 22:00 to 23:00
Red Light 3, 10 April 2011, 22:10 to 23:00

8. With regards to two broadcasts on 9 and 13 April 2011 between 21:00 and 21:45, Ofcom noted that on a number of occasions between 21:00 and 21:30 the female presenters adopted sexually provocative positions, sometimes for prolonged periods and regularly stroked and massaged their breasts and mimicked sexual intercourse.
9. In Ofcom's opinion, viewers (and in particular parents) would not expect such material to be broadcast so soon after 21:00. Further, the broadcast of such relatively strong sexualised content was inappropriate to advertise adult sex chat so soon after the 21:00 watershed.
10. Ofcom therefore recorded the following breaches of BCAP Code Rule 32.3:

Red Light 1, 9 April 2011, 21:00 to 21:35
Red Light 1, 13 April 2011, 21:03 to 21:45

Summary of Ofcom's Sanction Decision

11. Ofcom decided that this case was sufficiently serious to be considered for a statutory sanction.
12. After considering all the evidence and all the representations made to it by the Licensees, Ofcom decided that the BCAP Code breaches were serious and repeated and therefore a financial penalty should be imposed in accordance with Ofcom's Procedures for the consideration of statutory sanctions in breaches of broadcast licenses ("Sanction Procedures")³. Ofcom then also considered the level of the fine to be imposed, in accordance with Ofcom Penalty Guidelines⁴.
13. Having regard to the serious and repeated nature of the breaches and having regard to the Licensee's representations and Ofcom's Penalty Guidelines, Ofcom decided it was appropriate and proportionate in the circumstances to impose a financial penalty of **£60,000** on Just4us and **£50,000** on Playboy TV in respect of the Code breaches (payable to HM Paymaster General).

Legal Framework

General

14. In discharging its functions, Ofcom's principal duties set out in section 3(1) of the Communications Act 2003 ("the Act") are to further the interests of citizens in relation to communications matters and the interests of consumers and to secure a number of other matters. These include the application in the case of all television and radio services of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services (section 3(2)(e)).

³ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/854750/statutory-sanctions.pdf>

⁴ <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

15. Ofcom has a specific duty under section 319 of the Act to set standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives set out in section 319(2). One of those objectives is that “the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.” (Section 319(2)(h)).
16. In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, to have regard to a number of other considerations including:
 17. 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
 18. the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection (section 3(4)(h)).

The Human Rights Act 1998

19. Under section 6 of the Human Rights Act 1998, there is a duty on Ofcom (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention of Human Rights (“the Convention”).
20. Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster’s right to “impart information and ideas” and also the audience’s “right to receive information and ideas without interference by public authority” (Article 10(1) of the Convention). Such rights may only be restricted if the restrictions are: “prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary” (Article 10(2) of the Convention).
21. Ofcom must exercise its duty in light of these rights and not interfere with the exercise of these rights in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.
22. As regards freedom of expression, in Ofcom’s opinion, the advertising content of ‘adult chat’ services has less latitude than is typically available to editorial material in respect of context and narrative. A primary intent of advertising is to sell products and services, and consideration of acceptable standards must take that context into account.

The UK Code of Broadcast Advertising

23. Standards set by Ofcom in accordance with section 319(2)(h) of the Act relating to advertising are set out in the BCAP Code. The BCAP Code is drawn up and

published by the Broadcast Committee of Advertising Practice Ltd (“BCAP”) pursuant to contracting out arrangements entered into between Ofcom and BCAP⁵.

24. However, Ofcom remains responsible for the regulation of long-form PTV advertising. This class of advertising includes telecommunications-based chat services – such as ‘adult chat’.
25. As mentioned above, Ofcom has published a guidance note to assist licensees who carry ‘adult chat’ material to understand the likely interpretation of the BCAP Code that Ofcom will apply. The Chat Service Guidance includes references for example to the type of images that should not be broadcast during ‘adult chat’ advertisements.

Remedial Action and Penalties

26. Under section 325 of the Act, every programme service licensed under the Broadcasting Act 1990 or 1996 (“a Broadcasting Act Licence”) must include conditions for securing that the standards set under section 319 are observed by the licensee. In the case of a television licensable content service (“TLCS”) licence, Condition 6 of the licence requires the licensee to ensure that the provisions of any Code made under section 319 are complied with. Where Ofcom has identified that a Condition of a TLCS licence has been contravened, its powers to take action are set out in sections 236 to 238 of the Act insofar as relevant to the present case.
27. 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.
28. 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 per cent of its qualifying revenue on each occasion that a contravention of a Condition of the licence has occurred.
29. Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence where a licensee is in contravention of a condition of a TLCS licence or direction thereunder.

Code Breaches

30. The services Red Light 1, 2 and 3 all carry televised interactive ‘adult chat’ advertisements broadcast from 21:00. Viewers are invited to contact onscreen female presenters via premium rate telephony services (“PRS”).
31. Since 1 September 2010 all PRS-based ‘daytime chat’ and ‘adult chat’ television services have no longer been regulated as editorial content by Ofcom but as long-form advertising i.e. teleshopping. From 1 September 2010 the relevant standards code for such services became The UK Code of Broadcast Advertising (the “BCAP Code”) rather than the Ofcom Broadcasting Code.

⁵ Further details of the contracting out arrangements are contained in the Memorandum of Understanding between Ofcom and the ASA and BCAP and Basbof (published May 2004) which can be found at: http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/mou.pdf

32. In Ofcom's finding published on 4 July 2011 in Broadcast Bulletin 185⁶, the Executive found that ten adult sex chat advertisements broadcast by Just4Us and Playboy breached the following BCAP Code Rules:

4.2: "Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards."

32.3: "Relevant timing restrictions must be applied to advertisements that through their content, might harm or distress children of particular ages or that are otherwise unsuitable for them."

33. On 28 January 2011 Ofcom published detailed guidance⁷ on the Advertising of telecommunications-based sexual entertainment services and PRS daytime chat services (the "Chat Service Guidance"). This guidance note is intended to assist licensees who carry 'daytime chat' and/or 'adult chat' advertising material to understand the likely interpretation of the BCAP Code that Ofcom will apply. The Chat Service Guidance includes references for example to the type of images that should not be broadcast as part of 'adult chat' advertisements.

34. The finding highlighted a number of examples of broadcast material that was clearly inconsistent with the Chat Service Guidance, such as images of the presenters:

- spitting on their bodies to emulate ejaculate;
- using a cupped hand and one occasion a telephone to cover their genital area, resulting in clear pressure between their hand or telephone and the genital area;
- pouring oil onto their buttocks and genital area; and
- wearing clothing that did not adequately cover their genital area (in one case outer labia were clearly visible).

35. Ofcom noted that in conjunction with those images the presenters performed various other actions including: stroking their bodies; gyrating their hips; massaging oil into their breasts; and mimicking sexual intercourse. The combination of these images and actions resulted in prolonged and frequent scenes of a strong sexual material. Ofcom was also concerned at the degree of offence likely to be caused to viewers who might come across this material unawares. Additionally, Ofcom considered this material should not have been broadcast within the context of 'adult chat' advertisements that were freely available without mandatory restricted access.

36. Therefore Ofcom recorded the following breaches of Rule 4.2 of the BCAP Code:

Red Light 1, 3 April 2011 23:53 to 01:00
Red Light 1, 10 April 2011, 00:00 to 01:00
Red Light 1, 13 April 2011, 22:00 to 23:00
Red Light 2, 2 April 2011, 00:05 to 01:00
Red Light 2, 12 April 2011, 22:12 to 23:00
Red Light 2, 13 April 2011, 00:11 to 01:00
Red Light 3, 6 April 2011, 22:00 to 23:00

⁶ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb185/obb185.pdf>

⁷ Published on 28 January 2011: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/bcap-guidance.pdf>.

<http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/bcap-guidance.pdf> (a revised version was published on 28 July 2011)

Red Light 3, 10 April 2011, 22:10 to 23:00

37. With regards to two broadcasts on 9 and 13 April 2011 between 21:00 and 21:45, Ofcom noted that on a number of occasions between 21:00 and 21:30 the female presenters adopted sexually provocative positions, sometimes for prolonged periods and regularly stroked and massaged their breasts and mimicked sexual intercourse.
38. Ofcom noted on several occasions during the broadcast on 9 April 2011 the presenter clearly gave the impression that she was touching her genital area. Ofcom also noted that the presenter in the broadcast on 13 April 2011 was not wearing clothing that adequately covered her genital area or breasts and on one occasion her left nipple was visible. In Ofcom's view, the revealing clothing, sexual positions and actions of the presenters were intended to be sexually provocative in nature and Ofcom therefore concluded that under BCAP Code Rule 32.3 the material was unsuitable for children.
39. In Ofcom's opinion, viewers (and in particular parents) would not expect such material to be broadcast so soon after 21:00. Further, the broadcast of such relatively strong sexualised content was inappropriate to advertise adult sex chat so soon after the 21:00 watershed.
40. Ofcom therefore recorded the following breaches of BCAP Code Rule 32.3:

Red Light 1, 9 April 2011, 21:00 to 21:35

Red Light 1, 13 April 2011, 21:03 to 21:45

Ofcom's Decision to Impose a Statutory Sanction

41. As set out in the Sanctions Procedures the imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly, or recklessly breached a relevant requirement.
42. In this case, Ofcom issued a preliminary decision ("Preliminary View"), that the Licensees had seriously and repeatedly breached the Code and that a statutory sanction should be imposed. Ofcom sent a copy of the Preliminary View to the Licensee on 2 September 2011, indicating that it was minded to impose a financial penalty of £60,000 on Just4Us and £50,000 on Playboy TV. The Licensees were given the opportunity to provide written and oral representations on the Preliminary View. The Licensee provided its written representations ("Written Representations") to Ofcom on 23 September 2011 and attended a hearing at Ofcom on 17 October 2011 to provide oral representations ("Oral Representations"). These are summarised below.
43. In reaching its final decision, Ofcom is not bound by the Preliminary View. Ofcom therefore has taken into account all the evidence and representations from the Licensees, and has had regard to the Sanctions Procedures and to Ofcom's Penalty Guidelines.

Seriousness of the Breaches

44. In its Preliminary View, Ofcom considered that firstly, each of the two breaches relating to advertising material shown soon after the 21:00 watershed concerned content which was highly unsuitable for children, such as images of the presenters: mimicking sexual intercourse; stroking their breasts; lying on their backs with their

legs wide open to camera, sometimes for prolonged periods; and wearing clothing that did not adequately cover their genital area or breasts. The revealing clothing, sexual positions and actions of the presenters were intended to be sexually provocative in nature. In Ofcom's opinion, broadcasting such material at that time had the potential to cause distress or harm to any child viewers and each breach is therefore of a particularly serious nature.

45. As regards the material shown after 22:00, the breaches concerned broadcast advertising material which had the potential to cause serious or widespread offence against generally accepted standards. These broadcasts contained images that are not permitted in adult chat broadcast advertisements that are available freely without mandatory restricted access.

46. The broadcasts on Red Light 1 on 3, 10 and 13 April 2011 included images of:

- presenters using saliva to emulate ejaculate;
- presenters gyrating their hips whilst applying pressure with a cupped hand to cover the genital area;
- presenters touching their genital area;
- prolonged, physically intrusive, intimate shots of presenter's genital areas; and
- presenters wearing clothing that did not adequately cover the genital area.

47. The broadcasts on Red Light 2 on 2, 12 and 13 April 2011 included images of:

- presenters using saliva to emulate ejaculate;
- genital areas, which were of an intrusive nature;
- presenters pouring oil onto their genital areas; and
- presenters wearing clothing that did not adequately cover their genital areas.

48. The broadcasts on Red Light 3 on 6 and 10 of April 2011 included images of:

- presenters wearing clothing that did not adequately cover their genital areas;
- presenters touching their genital areas and in one case the anal area;
- presenters using saliva to emulate ejaculate; and
- in one case bunching a thong that resulted in genital contours being visible.

49. The images of the female presenters broadcast were sexualised and strong, particularly in conjunction with the various other actions the presenters were carrying out, such as mimicking sexual intercourse, gyrating their hips and massaging oil onto their breasts. Ofcom considered the combination of these images resulted in strong sexual material and should not have been broadcast within the context of 'adult chat' advertisements that were freely available without mandatory restricted access. In Ofcom's view the post 22:00 breaches are all of an equally serious nature and should be considered accordingly.

50. In Ofcom's view there is a significant difference between programming and advertising, in that the advertising content of 'adult chat' services is afforded less latitude than is typically available to editorial material in respect of context and narrative. A primary intent of advertising is to sell products and services, and consideration of acceptable standards must take that context into account.

51. Second, Playboy and Just4Us appeared to have wholly insufficient compliance arrangements in place, as demonstrated by the breaches in this case. Given the extensive information provided to the Licensees about what was acceptable as

regards 'adult chat' content under the BCAP Code (including Ofcom's detailed Chat Service Guidance published on 28 January 2011), the Licensee ought to have known that a breach of the BCAP Code was occurring or would occur, and failed to take appropriate steps to prevent the contraventions happening. This extensive information included the following:

- Broadcast Bulletin 165 published on 13 September 2010. This contained a note to broadcasters regarding the new regulatory regime under which long-form advertising predicated on premium rate telephone services (including 'adult chat' services) would be regulated by Ofcom from 1 September 2010 under the BCAP Code.
- A meeting for all adult sex chat broadcasters on 14 December 2010 at Ofcom (attended by the Licensees) when Ofcom outlined its forthcoming guidance on the BCAP Code and answered questions from licensees.
- A Note to all broadcasters in the 'adult chat' sector in Broadcast Bulletin 172 published on 20 December 2010 stated that Ofcom will not tolerate repeated breaches of the BCAP Code by services operating in this sector and will not hesitate to take appropriate enforcement action where necessary⁸.
- In the BCAP Code breach finding against Just4Us published on 24 January 2011 in Broadcast Bulletin 174⁹, Ofcom warned Just4Us and Playboy TV that it would not expect further breaches of the BCAP Code to occur again.
- Ofcom's Chat Service Guidance, published on 28 January 2011, gave detailed advice on what type of material is unacceptable during 'adult chat' broadcasts.
- On 24 February 2011 the Ofcom Executive met with Playboy TV following the publication of breach findings under the BCAP Code concerning content broadcast in October and November 2010 on various 'adult chat' services controlled by Playboy TV and Just4Us (published in Broadcast Bulletin 174). The aim of the meeting was for the Licensees to explain to Ofcom the measures they had taken since publication of the findings to ensure compliance with the BCAP Code.

52. Third, Ofcom took into account the compliance history of both Licensees. Most recently, Playboy TV was found in breach of the Broadcasting Code Rule 1.17¹⁰ on 7 February 2011 for material broadcast in July 2010 (this was referred for consideration of a sanction, although none was finally imposed); and a breach of the BCAP Code on 23 May 2011 for content broadcast on Extreme (Sky channel number 961) on 23 February 2011. In addition, previous sanctions proceedings for other compliance failures recorded against Playboy TV have resulted in two statutory sanctions being imposed by Ofcom (in 2005 a fine of £25,000; and in 2009 a financial penalty of

⁸ See Note to Broadcasters, Broadcast Bulletin 172, published 20 December 2010, available at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb172/issue172.pdf>

⁹ Published 24 January 2011: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb174/issue174.pdf>

¹⁰ Ofcom Broadcasting code Rule 1.17: "Material equivalent to the British Board of Film Classification (BBFC) R18-rating must not be broadcast at any time." For further details of this breach and its referral for sanction see paragraph 78 below.

£22,500). In relation to Just4US, Ofcom recorded five breaches of the BCAP Code on 24 January 2011 for material broadcast on a Red Light service in October and November 2010. These breaches relate to BCAP Code Rules 4.2 and 32.3¹¹. Other previous breaches of the Broadcasting and BCAP Codes are also noted against Playboy TV and Just4Us in paragraph 78.

53. Fourth, the breaches are serious because they were repeated. The breaches in this case occurred on ten separate occasions between 2 April and 13 April 2011 inclusive.

Licensee's Written Representations and Oral Representations

54. Playboy TV provided Written and Oral Representations for both Licensees. In their Written Representations and Oral Representations the Licensees did not dispute the breaches themselves. Indeed in their Oral Representations, the Licensees specifically accepted the breaches and said they had since taken steps to improve compliance and had no wish to act outside the Code and relevant guidance pertaining to 'adult chat' services.
55. Playboy TV did however put forward in their Representations various points which they believed reduced the seriousness of the breaches. These were in summary as follows.
56. First, Rule 4.2 required advertisements, as a matter of fact, to have caused "serious or widespread offence". Playboy TV said there was no such evidence in this case, and pointed to the fact that there had only been one complaint regarding each of the sequences of the broadcast material shown by the Licensees that had been found to have contravened the BCAP Code.
57. Ofcom considered that it is not necessary for broadcast material to have in any particular case or in general actually caused widespread offence or for Ofcom to have proof of such offence, but rather that the material risked doing so. In fact, it is clear from research¹² carried out by Ofcom in both 2005 and 2009 that members of the public find 'adult chat' material offensive. Further, Ofcom has made clear in numerous published findings¹³ after 1 September 2010 that BCAP Code Rule 4.2 is substantially equivalent to Ofcom Broadcasting Code Rule 2.1 which provides that "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." Broadcasters are therefore required to ensure adequate protection is in place prior to broadcasting

¹¹ For further details of these breaches please see paragraph 78 below.

¹² Published October 2009

<http://stakeholders.ofcom.org.uk/binaries/consultations/participationtv3/research.pdf>

Published September 2005 <http://stakeholders.ofcom.org.uk/binaries/research/radio-research/language.pdf>

¹³ For example:

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

Published 20 December 2010

<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb174/issue174.pdf>

Published 24 January 2011

<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb179/obb179.pdf>

published 4 April 2011

potentially offensive content. Generally accepted standards as regards offensive material are in turn applied by means of Rule 2.3. This rule does not require (and nor does BCAP Code Rule 4.2) Ofcom to prove either in any particular case or in general that any type of broadcast material caused offence in fact before recording a breach of this rule. Rule 2.3 specifically refers to “material which may [emphasis added] cause offence”.

58. Second, Playboy TV said “generally accepted standards” have changed and for example sexual imagery comparable to that found to have breached the BCAP Code in this case can be widely found on mainstream media in music videos, and on the front pages of magazines on open display in chains of respectable newsagents.
59. In considering this point Ofcom noted that its research published in 2005¹⁴ showed that audiences considered ‘adult chat’ material, particularly of a strong sexual nature, had the potential to cause offence. The research published in 2009¹⁵ showed that although audiences supported the promotion of ‘adult chat’ services on dedicated channels, appropriate limits on language and nudity and the risk of offence continue to be important factors for such content. Ofcom has no evidence to suggest that audience attitudes have shifted significantly from this position with regards to ‘adult chat’ material. Further, this type of content has since September 2010 been classified as advertising and as such, much less latitude is afforded to advertising in terms of its level of offensiveness than is typically available to editorial material in respect of context and narrative. A primary intent of advertising is to sell products and services, and consideration of acceptable standards will take that context into account. The contextual factors that justify potentially problematic content in editorial material, such as a music video, are significantly different to an advertisement for a premium rate service. With regards to sexual imagery on the front pages of magazines, Ofcom considers the regulatory regime surrounding magazines is significantly different to that which governs broadcast television and is not an appropriate comparison.
60. Third, Playboy argued the public were given protection from the material found in breach of the BCAP Code in this case through the Red Light services being positioned in the ‘adult’ section of the Sky EPG. In its Representations Playboy TV highlighted that given the location of the services (i.e. in the adult section of the Sky EPG) the “material was unlikely to be viewed by anyone not deliberately wanting to access sexually-orientated content, most typically far stronger than those contained in these advertisements.”
61. Ofcom considered in response to this point that the position of the channel within the adult section of the EPG is an important mitigating factor; however it does not provide enough protection on its own. Viewers and children in particular, do not navigate channels via the EPG only; some will, for instance, use the numerical key pad either intentionally keying in a particular channel number or accidentally doing so. In this case, regardless of the positioning of the channels in the EPG, Ofcom considered the broadcasts in question contained in the words of the breach decision “strong sexual material” that should not have been broadcast within the context of adult chat advertisements freely available without mandatory restricted access.

¹⁴ <http://stakeholders.ofcom.org.uk/binaries/research/radio-research/language.pdf>

Published September 2005

¹⁵ <http://stakeholders.ofcom.org.uk/binaries/consultations/participationtv3/research.pdf>

Published October 2009

62. Ofcom noted that research in its most recent media literacy report¹⁶ highlights that 44% of households with multichannel television services have set access controls through a PIN or password to protect children. However, this underlines that a significant proportion of households with children do not have protections in place to ensure child viewers are protected from material that is potentially unsuitable for them.
63. Fourth, Playboy said the broadcasts were all made live as part of “24/7” broadcasting and Ofcom should give special consideration to this factor as in other Ofcom cases e.g. offensive language broadcast from a live press conference or live from a football match.
64. Ofcom considered in response that it expects all broadcasters to comply with the Code and relevant guidance whether their content is pre-recorded or live. Ofcom noted the Licensees entered the adult participation TV market in August 2009. According to Playboy TV’s Oral Representations the Licensees have since increased the number of live chat services they operate to approximately seven in total. Since 1 September 2010 there have been seven BCAP Code breaches (two by Playboy TV and five by Just4Us) and one breach of the Ofcom Broadcasting Code (by Playboy TV). Ofcom considered therefore that this indicated that the Licensees had not given sufficient consideration to compliance challenges posed by live broadcasting of ‘adult chat’ advertising channels before widening its participation in this area of broadcasting.
65. Live ‘adult chat’ content is significantly different to pre-recorded material that is broadcast under encryption and as such requires a different approach to compliance. The Licensees were operating in this sector prior to 1 September 2010 (the date when the Code applicable for regulating adult chat services changed from the Ofcom Broadcasting Code to the BCAP Code) and, therefore, should have already had sufficient compliance procedures in place to meet the requirements of the BCAP Code in order to ensure the live material broadcast was not at odds with generally accepted standards. Ofcom noted that the Licensees in their Oral Representations highlighted that they did not amend their internal compliance procedures following the change in the regulatory regime on 1 September 2010. Given the extent of the BCAP Code breaches after 1 September 2010, the Licensees’ compliance procedures were clearly insufficient to deal with this type of content. This was underlined by the volume of similar contraventions over a twelve day period which are the subject of the current sanction and should have been noted and addressed sooner by the Licensees.
66. Fifth, Playboy TV argued that some of the breaches were more clear cut than others and some resulted from the Licensees “coming to terms with the new [Ofcom] guidelines” [i.e. the Chat Service Guidance], which in some respects the Licensees argued were unclear.
67. In response Ofcom noted that Ofcom’s Chat Service Guidance - to which Playboy TV referred - was published in January 2011. However since the regulatory regime changed on 1 September 2010 the provision of extensive information was provided to all broadcasters in this sector as well as specific guidance to Playboy TV to aid

¹⁶ Children and Parents: media use and attitudes report - http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/oct2011/Children_and_parents.pdf
Published 25 October 2011

their understanding of the requirements of the BCAP Code and guidance, specifically with regards to mimicking sexual acts (see paragraph 51 above).

68. With regards to the material broadcast immediately after the 9pm watershed, Ofcom has made it clear in the Chat Service Guidance, that “after 9pm any move towards stronger – but still very restrained – material containing sexual imagery should be gradual and progressive. There should not for example be any miming of sexual acts between 9pm and 10pm.” In this case, the broadcasts immediately after the watershed included images of the presenters: mimicking sexual intercourse; stroking their breasts; lying on their backs with their legs open to camera, sometimes for prolonged periods; and wearing clothing that did not adequately cover their breasts or genital areas.
69. In conclusion, in view of the factors set out above Ofcom considered that the breaches are sufficiently serious and repeated as to warrant the imposition of a statutory sanction; and sufficiently serious and repeated for the reasons set out above that the statutory sanction should be in the form of a financial penalty.

Imposition of a Financial Penalty

70. Under section 237 of the Act, the maximum level of financial penalty that can be imposed on the holder of a TLCS licence in respect of each breach of a TLCS Licence in this case is up to £250,000 or five per cent of the Licensees qualifying revenue relating to its last accounting period, whichever is greater.
71. Qualifying revenue is calculated by adding together revenue gained from advertising, sponsorship and subscription. It does not include revenue gained from interactive services, such as premium rate phone calls.
72. Ofcom’s Penalty Guidelines state that “Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement.” Ofcom has taken full account of the need to ensure that any penalty acts as a deterrent and has also taken account of the specific factors set out at paragraph 4 of the Penalty Guidelines.

Factors Taken into Account in Determining the Amount of a Penalty

73. In considering the appropriate amount of a financial penalty for each of the breaches, Ofcom took account of relevant factors in accordance with Ofcom’s Penalty Guidelines, as set out below. In particular, Ofcom has considered the extent to which any penalty acts as a deterrent to future contraventions of the BCAP Code by Playboy TV and Just4Us.
74. The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants

The Code breaches by the Licensees concerned two rules of the BCAP Code, Rule 4.2 and Rule 32.2.

Rule 4.2

With regards to Rule 4.2, broadcasters are required to ensure that advertisements do not cause serious or widespread offence against generally accepted moral, social or cultural standards. Ofcom noted that the material included prolonged and frequent scenes of a strong sexual nature. Ofcom considered this material should not have been broadcast within the context of 'adult chat' advertisements that were freely available without mandatory restricted access and had the potential to cause considerable offence, especially to viewers who came across the material unawares.

Rule 32.3

In the published breach finding Ofcom noted that two of the advertisements were broadcast on a channel without mandatory restricted access in the period immediately after the 21:00 watershed, when some children may have been available to view, some unaccompanied by an adult. In Ofcom's opinion, viewers (and in particular parents) would not expect such material to be broadcast so soon after 21:00. Further, the broadcast of such relatively strong sexualised content was inappropriate to advertise adult sex chat so soon after the 21:00 watershed. In particular, the breaches of BCAP Code Rule 32.3 were problematic because inappropriate advertising material was broadcast without access restrictions when children were likely to be available to view. In Ofcom's view the breaches immediately after the 21:00 watershed had the potential to cause distress or harm to child viewers and therefore merit a higher penalty than the breaches which occurred after 22.00.

75. The duration of the contravention

Ofcom noted the recorded breaches were in relation to ten advertisements broadcast between 2 April 2011 and 13 April 2011 inclusive.

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

There is insufficient evidence to show that either of the Licensees made any financial gain from repeated breaches of the BCAP Code.

77. Any steps taken for remedying the consequences of the contravention

Ofcom's breach finding published in Broadcast Bulletin 185 on 4 July 2011, set out the formal comments received from Playboy TV in response to the ten breaches of the BCAP Code. In that response Playboy TV outlined the compliance measures it would take to ensure similar breaches did not occur again. Those compliance measures comprised: ensuring the female presenters wear adequate underwear that covers their genital areas sufficiently leading to a reduction in the "intrusive feel" to the shots; stopping presenters cupping their genitals (as opposed to using a flat hand to cover their genital area) until they have further clarity on the issue; restricting more sexual behaviour to later in the evening; instructing camera operators to restrict the shots to mid-range shots only (as opposed to close-up or extreme close up shots); and ensuring the presenters do not spit or let saliva drip onto their bodies as if to emulate ejaculate.

In their Oral Representations Playboy explained that following the publication of the finding in Broadcast Bulletin 185, nine camera operators/producers were dismissed, five presenters were dismissed and three presenters were suspended.

The Compliance Officer explained in Oral Representations that there are presently three individuals (including him) who carry out monitoring of the live output of the Playboy TV and Just4Us services that broadcast adult chat material. He explained that Playboy TV is in the process of expanding the number of people monitoring live output to ensure better compliance in future.

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

Just4Us

Sanctions against Just4Us: Ofcom has not previously considered Just4Us for a statutory sanction.

Recorded Broadcasting Code
Breaches not leading to sanction: No breaches

Recorded BCAP Code breaches
not leading to sanction: Five BCAP Code breaches were recorded against Just4Us on 24 January 2011 in Ofcom Broadcast Bulletin 174¹⁷. These were as follows:

Breaches of BCAP Code Rules 4.2 (harm and offence) and 32.3 (appropriate scheduling to protect children): Red Light Lounge, 13 October 2010 11:00 to 13:00; Red Light Lounge, 2 November 2010, 08:55 to 10:10; Red Light Lounge, 10 November 2010, 10:45 to 11:20; Red Light Lounge, 13 November 2010, 18:20 to 19:00.

Breach of BCAP Code Rule 4.2 (harm and offence): Red Light Central, 6 November 2010, 21:48 to 22:30.

Playboy TV

Sanctions against Playboy TV (Under the Ofcom Broadcasting Code only)

Playboy TV, 10 February 2005¹⁸: Playboy TV broadcast encrypted material from an R18 version film in breach of the absolute prohibition in Ofcom's (ex-ITC) Broadcasting Code ("the Code"). It also broadcast images pre-watershed which though encrypted, were of an 18 standard (equivalent to BBFC 18 certificate standard), in breach of section 1.4 (c) of the Code which provided that this material should only be broadcast after 10pm. Playboy

¹⁷ Published 24 January 2011: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb174/issue174.pdf>

¹⁸ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/adj-playboytv.pdf> (Published 10 February 2005)

TV UK also broadcast promotional material on a free to air (unencrypted) basis at 20:21 which was more explicit than would be acceptable under the Code, also in breach of section 1.4 (c).

Fine: £25,000

Playboy One, 2 April 2009¹⁹:

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 found the broadcasts in breach of Rule 1.24, 2.1 and 2.3 of the Broadcasting Code.

Fine: £22,500

In addition, the breach of Broadcasting Code Rule 1.17 (prohibition on the broadcast of R18 equivalent material) recorded on 7 February 2011 against Playboy TV was referred to the then Ofcom Broadcasting Sanctions Committee ("BSC") for consideration of a sanction. This last breach of the Code did not result in the imposition of a sanction however. Playboy TV was warned by the BSC on 14 May 2011 that this breach would remain on its compliance record and would be taken into account should further breaches occur.

Recorded Broadcasting Code

breaches not leading to sanction:

Three breaches were recorded on 23 August 2010 in Broadcast Bulletin 164²⁰:

Breach of Rules: 1.18 (Adult sex material), 2.1 (generally accepted standards) and 2.3 (Offence): Bang Babes, Tease Me TV 2, 22 May 2010.

One breach was recorded on 7 February 2011 in Broadcast Bulletin 175²¹:

Breach of 1.17 (prohibition on the broadcast of R18 equivalent material): Climax 3-3, Channel Climax 3-3, 1 July 2010, 22:15 to 22:45.

Recorded BCAP Code breaches not leading to sanction:

One breach was recorded on 23 May 2011 in Broadcast Bulletin 182²²:

¹⁹ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/playboytv.pdf> (Published 2 April 2009)

²⁰ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb164/issue164.pdf> (Published 23 August 2010)

²¹ <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb175/> (Published 7 February 2011)

²² <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb182/obb182.pdf> (Published 23 May 2011)

Breach of BCAP Code Rule 32.3 (appropriate scheduling to protect children): Red Light Central, Extreme, 23 February 2011 21:00 to 21:50.

One breach was recorded on 20 December 2010 in Broadcast Bulletin 172²³:

Breach of Rules 4.2 (harm and offence) and 32.3 (appropriate scheduling to protect children): 19 October 2010, 17:00 to 18:00.

Despite these various code breaches and sanctions, the Licensees told Ofcom in Oral Representations that they were licensees “of long standing with a record of good compliance” and more than that they, are cooperative licensees which take “compliance extremely seriously.”

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

Ofcom is aware that the relevant services are complied by a dedicated compliance officer and his colleagues at Playboy TV. That representative was responsible for the day to day compliance of the relevant services. In his capacity as Ofcom’s primary contact regarding the three services, he was fully aware on behalf of the Licensees of the need to comply with requirements of the BCAP Code and Chat Service Guidance.

Playboy TV informed Ofcom that a “third party studio facility” based in Bristol produces the content that is broadcast on Red Light 1, Red Light 2 and Red Light 3. The Licensees explained that their Compliance Officer will telephone, email or visit the studios as necessary to ensure that the relevant individuals (such as presenters, camera operators, producers and production manager) are made aware of the need to comply with the requirements of BCAP Code and Chat Service Guidance. He and two other members of staff monitor the output of the services that carry adult chat material on a daily basis.

In its Oral Representations Playboy TV explained that when the regulatory regime changed on 1 September 2010 it was not particularly clear what changes if any, were necessary with regards to the content of the material broadcast on the services carrying adult chat material. Consequently Playboy TV explained that it did not provide revised guidance to the staff at the studio facility when the regulatory regime shifted on 1 September 2010.

Ofcom notes that on 23 February 2011 Playboy TV attended a meeting with the Ofcom Executive following the publication of the finding in Broadcast Bulletin 174 (published 24 January 2011). After that meeting the Compliance Officer explained that a number of measures had been taken to improve compliance, including: an increased number of staff to carry out compliance checks and regular meetings with

²³ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb172/issue172.pdf>
(Published 20 December 2010)

the producers, managers and presenters to provide them with guidance on what actions are acceptable and unacceptable during 'adult chat' broadcasts.

Broadcast Bulletin 182 (published 23 May 2011), included a formal response from the Compliance Officer which explained that compliance measures had been further improved, by for example, ensuring the presenters in future wear underwear that adequately covers their genital areas.

In their Oral Representations Playboy TV explained that the production company had had no practical experience producing live 'adult chat' material prior to supplying the content to Playboy and Just4Us for the Red Light channels. Playboy TV added that "there have been a number of changes to the way in which adult participation TV is regulated, and this all came at a time when Playboy TV had only just started business in this area."

Ofcom noted that Playboy TV had extensive experience in complying pre-recorded 'adult' material for broadcast before developing the portfolio of 'adult chat' advertising channels which it currently controls and complies. Ofcom expects all broadcasters to comply with the Code and relevant guidance whether their content is pre-recorded or live. Ofcom noted the Licensees entered the adult participation TV market in August 2009. According to Playboy TV's Oral Representations the Licensees have since increased the number of live chat services they operate to approximately seven in total (between them). Since 1 September 2010 there have been seven BCAP Code breaches (two by Playboy TV and five by Just4Us) and one breach of the Ofcom Broadcasting Code by Playboy TV. Ofcom considered therefore that this indicated that the Licensees had not given sufficient consideration to compliance challenges posed by live broadcasting of 'adult chat' advertising channels before widening its participation in this area of broadcasting. This type of content is significantly different to pre-recorded material that is broadcast under encryption in that there is no opportunity to comply the material prior to broadcast. The Licensees' compliance procedures were insufficient to deal with the broadcast of live 'adult chat' advertisements and this failure was compounded by their reliance on a third party production company that also had limited experience of complying live broadcast material of this nature.

It is clear, that despite the steps taken by the Licensees to ensure appropriate compliance arrangements were in place, they went on to broadcast material that was clearly in breach of the requirements BCAP Code. In some cases those breaches related to actions or images already highlighted as unacceptable in previous published Ofcom findings against the Licensees in question. In Ofcom's view this is a significant aggravating factor.

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

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

Further, as already pointed out above (paragraph 51), the Licensees should have been aware of:

- The BCAP Code breach finding against Just4Us published on 24 January 2011 in Broadcast Bulletin 174²⁴, in which Ofcom warned Just4Us and Playboy TV that it would not expect further breaches of the BCAP Code to occur again;
- The Chat Service Guidance published on 28 January 2011, which gave detailed advice on what type of material is unacceptable during 'adult chat' broadcasts; and
- The advice given by Ofcom to the Licensees on 24 February 2011 when Ofcom met with the Licensees to discuss their compliance arrangements following the publication of breach findings under the BCAP Code concerning content broadcast in October and November 2010 on various 'adult chat' services controlled by Playboy TV and Just4Us (published in Broadcast Bulletin 174).

Ofcom considered senior management therefore ought to have been fully aware of the provisions of the BCAP Code and accompanying guidance, and should have ensured that procedures were in place to ensure effective compliance. Ofcom noted with some concern that the Licensees failed to recognise that the material was obviously problematic under the BCAP Code at the time of broadcast and that it was in clear contravention of the Chat Service Guidance. In Ofcom's view this demonstrated a poor level of compliance.

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

The contraventions continued over a twelve day period in April 2011.

In their Oral Representations Playboy TV outlined various measures they had taken or were planning to take since the contraventions to improve compliance, such as recruiting extra compliance staff. In Ofcom's opinion, it was too early to assess the extent to which any measures taken by the Licensees were timely and effective.

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

Ofcom noted the reported revenue figures for Just4Us are significantly lower than the revenue figures submitted to Ofcom in relation to Playboy TV. Nonetheless, Ofcom considers that the financial penalty imposed on Just4Us in this case is proportionate on the basis that whilst this represents a significant proportion of the turnover of this individual licensee, Just4Us is a wholly owned subsidiary of Playboy TV and therefore forms part of a corporate group that has significant revenue. Just4US is operated and complied by Playboy TV. Ofcom noted that Just4Us, although registered as a separate company to Playboy TV, does not have any separate revenue stream associated with it being a standalone company. Taking all this into account, Ofcom considers the penalty is proportionate, taking into account the need to ensure that any penalty imposed acts as a deterrent to future contraventions of the BCAP Code.

²⁴ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb174/issue174.pdf>
(Published 24 January 2011)

With regards to the penalty imposed on Playboy TV, Ofcom considers this to be proportionate as it achieves the appropriate level of deterrence (taking into account that this is the third sanction imposed on Playboy TV) and is unlikely to place the Licensee in a financially precarious position.

Precedent

83. In accordance with the Penalty Guidelines, Ofcom has also had regard to relevant precedents set by previous cases.
84. In this instance, there are no direct precedent cases because this is the first case involving 'adult chat' channels referred for consideration of sanction under the BCAP Code (and accompanying Chat Service Guidance) rather than the Broadcasting Code. This case however relates to material shown on 'adult chat' channels without mandatory restricted access which raises issues of: protection of children from offensive sexual material during the period immediately after the 21:00 watershed; and the showing of strong sexual images later in the schedule which breaches of generally accepted standards.
85. The most relevant precedent cases are therefore those which raise analogous issues in the context of 'adult chat' channels without mandatory restricted access. Ofcom considers there are two relevant precedents in this category – see immediately below. (Recent sanctions concerning for example 'adult' channels normally showing 'adult sex material' under encryption, free to air trailers for such services shown on these channels, and on screen promotional references to websites containing R18 material are not sufficiently analogous to be helpful precedents.)
86. **26 February 2010: Springdoo Media Limited (Friendly TV)**²⁵ – Sanction against a 'daytime chat' / 'adult sex chat' channel of a total £24,000. This figure comprised £6,000 for a breach of rules 1.6 (transition to more adult material), 2.1 and 2.3 of the Ofcom Broadcasting Code; and £6,000 and £12,000 for two breaches for retention and provision of recordings to Ofcom (under Television Licensable Content Service Licence Condition 11) respectively.
87. **29 July 2010: Bang Channels Limited and Bang Media (London) Limited (Tease Me, Tease Me 2, Tease me 3, Tease Me TV)**²⁶ – Sanction against various 'daytime chat' / 'adult sex chat' channels controlled by the Bang companies of a total of £145,250 for various breaches of Broadcasting Code Rules 1.3, 1.24, 1.25, 2.1, 2.3. In this case the Sanctions Committee considered the contraventions committed by the Licensees to be of such a serious and repeated nature as to amount to recklessness. It considered that such recklessness was indicative of a wholly inadequate compliance system. The contraventions referred for sanction took place over a five month period, and the Bang Licensees had previously been found to have breached the Code on five separate occasions. Some of these contraventions occurred despite Ofcom providing the Licensees with clear guidance on a number of occasions. The Committee concluded this sexual material was clearly unacceptable and in breach of generally accepted standards for a licensed service which transmits without restrictions or safeguards.

²⁵ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/springdoo.pdf> (Published 26 February 2010)

²⁶ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/bangchannels.pdf> (Published 29 July 2010)

88. At the oral hearing, the Licensees contested how relevant the Bang sanction was as a precedent. They said in their Oral Representations that the Code breaches recorded against Bang Media Limited were considered “extremely serious” by Ofcom and occurred over a long period of time. In contrast, the breaches recorded in Broadcast Bulletin 185 against the Licensees occurred over a twelve day period and cannot reasonably be compared to the type of content broadcast by Bang Media limited.
89. Taking these representations into consideration, Ofcom noted the systematic poor compliance record of Bang Channels Limited and Bang Media (London) Limited and acknowledged that the current case did not involve such systematic compliance failures. Ofcom considered that the breaches recorded against the Licensees in this case were particularly serious nonetheless as they occurred over a twelve day period, the breaches were repeated, and compliance staff had failed to take timely and appropriate action to address the problematic content. It was clear that the compliance measures in place were insufficient to deal with material broadcast in the evenings and overnight.
90. Ofcom is satisfied that the level of penalty proposed in this present case is consistent with the precedent cases, taking due account of the factors outlined in the Penalty Guidelines and the seriousness of the breaches in this case.

Cooperation

91. In accordance with the Penalty Guidelines, Ofcom may increase the penalty where a licensee has failed to cooperate with Ofcom’s investigation.
92. The Licensees were cooperative throughout the investigation. Ofcom does not therefore consider it appropriate to increase the penalty on account of a failure to cooperate in this case.

Conclusion

93. Ofcom concluded that the breaches of Rule 4.2 by the Licensees were serious and repeated for the reasons set out earlier in this decision. In particular, material found in breach of the BCAP Code was broadcast on numerous separate occasions despite clear guidance from Ofcom setting out what would be acceptable and what would not be acceptable in relation to such material. Further, the breaches occurred against a background of poor recent compliance by the Licensees in the area of ‘adult sex’ chat broadcasting. Above all, the material had the potential to cause considerable offence, especially to viewers, and particularly children in relation to the breaches immediately after the watershed, who came across the material unawares. Ofcom was also concerned that the Licensees had not given sufficient consideration to compliance challenges posed by live broadcasting of ‘adult chat’ advertising channels before widening its participation in this area of broadcasting.
94. In view of the factors set out above, Ofcom deemed that the breaches were sufficiently serious to warrant the imposition of a statutory sanction of **£60,000** on Just4Us and **£50,000** on Playboy TV.

9 November 2011