

The logo for the Authority for Television On Demand (ATVOD) features the letters 'ATVOD' in a bold, white, sans-serif font. The 'A' is stylized with a wide, flat top. The letters are set against a solid black rectangular background.

THE AUTHORITY FOR TELEVISION **ON DEMAND**

UKCCIS Parental Controls Consultation

**The submission of the Authority for
Television On Demand (“ATVOD”)**

18 September 2012

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1. Executive summary

- 1.1 The Authority for Television On Demand (“ATVOD”) is the independent co-regulator for the editorial content of UK media services which have as their principal purpose the provision of ‘tv-like’ programmes on-demand. The statutory Rules we apply require, among other things that if a regulated service contains material which might seriously impair the development of persons under the age of 18, such material is only made available in a manner which secures that such persons will not normally see or hear it.
- 1.2 Under this Rule, ATVOD requires regulated services which provide hardcore porn material to place such material behind effective access control systems which prevent children from seeing the content. However, ATVOD has no power to impose similar restrictions on hardcore porn websites operating from outside the UK but accessible from within the UK, including by UK children.
- 1.3 In addition to taking strong action in regard to services within our remit, ATVOD:
 - Works with UKCCIS on initiatives relating to online age verification;
 - Supports relevant media education initiatives, including Safer Internet Day;
 - Supports initiatives to improve the uptake and effectiveness of parental controls, including by working with UKCCIS on parental controls for connected TVs;
 - Supports active enforcement of existing laws designed to protect children.
- 1.4 ATVOD recognises the near impossibility of protecting all children from all online harm all of the time, but takes the view that a policy designed to protect a significant number of children from a significant amount of harm a significant amount of the time is worthwhile. ATVOD therefore supports ‘Active Choice’ and further considers that a refinement of ‘active choice’, in which some obviously harmful content, such as hardcore pornography, is pre-selected for blocking for those who choose to activate parental controls (but with an option to de-select), would be a further positive step.
- 1.5 However, future public policy in this area should also take account of:
 - Existing evidence of the significant current limitations of such controls, especially the degree to which such systems ‘overblock’ and ‘underblock’ selected types of content (e.g. McAfee Internet Security was found to have an underblocking rate of 50% in relation to ‘adult content’);
 - Opportunities for using existing legislation to take action against service providers offering unrestricted access to hardcore pornography in light of Crown Prosecution Service (“CPS”) guidance that such provision is likely to be in contravention of the Obscene Publications Act. ATVOD notes that, despite the CPS guidance, convictions under the Obscene Publications Act declined from 81 in 2000 to just 7 in 2010.
 - Future evidence of the actual impact of ‘Active Choice’ (and any refinement) on the uptake of parental control systems not only on the main family computer using a fixed line broadband connection, but also in relation to other devices and means of internet access commonly used by children.

2. About ATVOD

- 2.1 The Authority for Television On Demand (“ATVOD”) is the independent co-regulator for the editorial content of UK media services which have as their principal purpose the provision of ‘tv-like’ programmes on-demand. As a co-regulator, it maintains a close dialogue with the UK video on-demand industry.
- 2.2 ATVOD was Designated by Ofcom in March 2010 to perform this function following amendments to the Communications Act 2003 which implemented the EU Audio Visual Media Services Directive (“the AVMS Directive”) in the UK.
- 2.3 The scope of the regulations we enforce is defined by the statutory definition of On-Demand Programme Services (“ODPS”), as set out in section 368A(1) of the Communications Act 2003 (“the Act”). The definition of an ODPS is deliberately platform-neutral, which means an ODPS may be delivered via internet, cable, satellite, mobile phone network or any other electronic communications network. In a Determination made in September 2010, and subsequently upheld By Ofcom on appeal in May 2011, ATVOD established that services offering hardcore pornographic programmes cannot claim to be outside the scope of the video on demand regulations solely on the grounds that the content they provide is too explicit to be broadcast on UK television (and therefore are not ‘tv-like’).
- 2.4 However, ATVOD has no powers in relation to services which are operated from outside the UK, even if such services are accessible from within the UK (e.g. via the internet).
- 2.5 The Rules we apply to ODPS are set out in sections 368D-E and 368G-H of the Act. In summary, in addition to determining which services fall within the statutory definition of an ODPS, our role is to ensure that such UK based video on demand services comply with their statutory obligations in relation to the ‘editorial content’ to which they provide access. Those obligations include a number of administrative duties (including the duty to notify ATVOD of the intention to provide an ODPS) and four content-based rules which:
- Prohibit the inclusion of any material likely to incite hatred based on race, sex, religion or nationality;
 - Require that if the service contains material which might seriously impair the development of persons under the age of 18, such material is only made available in a manner which secures that such persons will not normally see or hear it;
 - Impose conditions relating to sponsorship of the service or sponsorship of a programme;
 - Impose conditions relating to product placement in programmes.
- 2.6 Adopting a precautionary approach, ATVOD considers that “material which might seriously impair the physical, mental or moral development of minors” may include the types of material listed below:

- content which promotes illegal or harmful activity;
- highly sexualised portrayals of children ;
- hardcore pornography;
- other pornographic content which:
 - > is likely to encourage an interest in sexually abusive activity, for example through the simulation or description of acts of paedophilia, incest or non-consensual sexual activity,
 - > involves an act which may cause lasting physical harm,
 - > involves an act of penetration by any object associated with violence or
 - > likely to cause physical harm, or
 - > involves strong physical or verbal abuse;
- sexual violence which endorses or eroticises the behaviour with insufficient contextual justification;
- portrayals of sadistic violence or torture with insufficient contextual justification;
- graphic images of real injury, violence or death presented with insufficient contextual justification.

2.7 Some such content may contravene laws prohibiting obscene material (including extreme pornography), indecent images of children or non-photographic images of child sex abuse. Provided the material is not otherwise illegal, content which might seriously impair the development of minors should only be made available in on-demand programme services in a manner which secures that persons under the age of eighteen will not normally see or hear it.

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

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

- Confirmation of credit card ownership or other form of payment where mandatory proof that the account holder is 18 or over is required prior to issue¹.
- A reputable personal digital identity management service which uses checks on an independent and reliable database, such as the electoral roll.
- Other comparable proof of account ownership which effectively verifies age.

2.10 In accordance with its Designated duties and powers, ATVOD has taken tough action aimed at protecting children from hardcore porn videos online.

2.11 More than 20 UK porn video services have been investigated in recent months. In January 2012 the online service 'Bootybox.tv' closed after ATVOD issued an

¹ ATVOD does not regard confirmation of ownership of a Debit, Solo or Electron card or any other card where the account holder is not required to be 18 or over to be verification that a user of a service is aged 18 or over

enforcement notification requiring the operators to either remove the hardcore porn content from the service or put it all behind effective access controls which would ensure that only adults could see it.

- 2.12 Since then, ATVOD has launched pro-active investigations into 23 more notified 'adult' services and found 13 to be in breach of the statutory rules because they featured hardcore porn material which could be accessed by under 18's. Two of those found to be in breach have now closed and eight have become compliant by placing all hardcore material behind an effective access control mechanism. Four services which had failed to make changes within a specified time to ensure that under-18s cannot normally see hardcore material have been referred to Ofcom so the back-stop regulator can consider whether to impose a financial penalty or restrict or suspend the service. Ofcom's decision was outstanding at time of drafting this submission. One of the services referred to Ofcom has subsequently made the required changes.
- 2.13 Although we have made good progress in ensuring that UK operators of regulated VOD services comply with rules designed to protect children from harmful content, we are not complacent and will continue to monitor relevant services and act as required. Our recent enforcement activity has sent a clear message that UK providers of hardcore pornography on demand must take effective steps to ensure that such material is not accessible to under 18s. Asking visitors to a website to click an 'I am 18' button or enter a date of birth or use a debit card is not sufficient – if they are going to offer explicit sex material they must know that their customers are 18, just as they would in the 'offline' world. It is worth noting in this context that hardcore pornography which is distributed on a DVD can only be supplied to adults who visit a licensed sex shop and that the Ofcom Broadcast Code prohibits the transmission of such content in television broadcast services under any circumstances.
- 2.14 In addition to taking action on services based in the UK, ATVOD has been monitoring how other EU Member states regulate hardcore porn services. However we do not have powers to regulate hard core porn provided online from countries outside the UK. Consequently, as a co-regulator concerned in particular with the protection of under 18s from harmful material on video on demand services, we take a keen interest in how young people can best be protected from online services which currently lie outside the scope of the statutory regulations we enforce, but which offer children access to material which might cause them harm.

3. ATVOD's approach to protecting children online

- 3.1 From its position as the co-regulator for the editorial content of UK media services which have as their principal purpose the provision of 'tv-like' programmes on-demand, ATVOD considers, in line with the conclusions of reports by Tanya Byron, Linda Papadopoulos, Reg Bailey and others, that there is no single 'silver bullet' solution to the problem of children accessing age-inappropriate and/or harmful

material and services online. Parents, educators, online service providers, ISPs, regulators and Government all have to play their part.

- 3.2 ATVOD believes that the public policy response should be multi-faceted, proportionate and realistic. The response is also likely to need to be reviewed and revised in light of experience and in light of technological and behavioural change. ATVOD recognises the impossibility of protecting all children from all online harm all of the time, but takes the view that a policy designed to protect a significant number of children from a significant amount of harm a significant amount of the time is worthwhile. We further note that the Byron Report identified three interlinking strategic objectives in making the online world safer for children:

“Objective 1: Reduce Availability – Reduce the availability of harmful and conduciveness of platforms to harmful and inappropriate conduct;

Objective 2: Restrict Access – Equip children and their parents to effectively manage access to harmful and inappropriate content, avoid incidences of harmful and inappropriate contact and reduce harmful and inappropriate conduct;

Objective 3: Increase Resilience – Equip children to deal with exposure to harmful and inappropriate content and contact, and equip parents to help their children deal with these things and parent effectively around incidences of harmful and inappropriate conduct by their children.”²

- 3.3 As a content regulator dealing with certain online services within a tightly defined statutory remit, ATVOD’s focus is on restricting children’s access to material which might cause serious harm. Because other forms of material which might seriously impair the development of children have not to date been provided on services subject to ATVOD regulation, the issue we highlight in this submission concerns restricting children’s access to hardcore pornography. However, many of the points made may apply equally to other types of harmful content.
- 3.4 As set out above in the section headed ‘About ATVOD’, we take tough and effective action in relation to UK providers of hardcore pornography, requiring that such content is provided in a manner which secures that children cannot normally see it by means of an effective Content Access Control System (“CAC System”) which verifies that the user is aged 18 or over at the point of registration or access by the mandatory use of technical tools for age verification.
- 3.5 However, ATVOD has no power to impose similar restrictions on hardcore porn websites operating from outside the UK but accessible from within the UK, including by UK children. Such websites include ‘tube sites’ whose business model is to create traffic by offering free (often pirated) hardcore porn content and generate revenue by selling banner ads and driving that traffic to their own and third party pay sites. Such ‘tube sites’ depend on maximising the number of visitors and therefore provide no barriers to viewing the free hardcore porn content they offer, often eschewing even a token ‘warning’ landing page. The top 100 websites visited by people in UK include five such sites offering free hardcore material without any

² Safer Children in a Digital World - The Report of the Byron Review, para 3.99

access controls³. By contrast, no regulated UK porn service features in the top 10,000 websites visited by people in the UK⁴. Without effective action to limit children's access to such non-UK porn services, regulation of UK porn services is therefore likely to have a limited impact on UK children's exposure to hardcore pornography.

- 3.6 Research has shown that the extent of exposure of UK children to sexual images online is significant. In the UK, 22% of 13-16 year old boys and 6% of 9-12 year old boys say they have seen sexual images on websites; 6% of 11-16 year olds (boys and girls) say they have seen images of people having sex⁵.
- 3.7 It is also clear that many children have internet access which is not effectively controlled by parents. The use of parental control software in households with children is relatively low, and has not been rising. Filtering software is in place in just 39% of households where a child aged 5-15 uses the internet at home and this percentage has declined since 2008⁶. 43% of 12-15 year olds and 14% of 8-11 year olds have an internet connected PC or laptop in their bedroom⁷. Recent rapid increases in smart phone penetration means under 18s are also increasingly able to access the internet through unfiltered public wi-fi networks outside the home. 41% of 12-15 year olds now have a smartphone⁸.
- 3.8 Taking account of developments over recent years, ATVOD has developed a policy position with the following tenets:
- Hardcore pornographic material poses a risk of serious harm to children
 - ATVOD acts to ensure that UK providers of hardcore porn videos online keep such material out of reach of children
 - There is a significant risk of children being exposed to such material on websites based outside the UK (and therefore outside ATVOD's jurisdiction), especially via access to the major porn 'tube sites' operating from the USA and Canada
 - Leaving it to parents to take pro-active steps is not sufficient as too many children are left unprotected
 - Reducing child exposure to hardcore pornographic material is an achievable goal even if eradicating such exposure is not
 - The ability of the determined child to bypass protections is not a good enough reason to refrain from taking steps to minimise exposure resulting from accidental or casual online activity
 - There is no 'magic bullet' solution: reducing exposure will need to be achieved through a variety of measures, and those measures may need to change over time as behaviour and technology changes

- 3.9 In practical terms, ATVOD therefore:

³ Source: <http://www.alexa.com/topsites/countries/GB> March 2012

⁴ Source: Alexa traffic rank data accessed 22/08/12

⁵ Source: Sonia Livingstone - UK Kids Online (Dec 2010)

⁶ Source: Ofcom Children and parents: media use and attitudes report (Oct 2011).

⁷ Source: Ofcom Children and parents: media use and attitudes report (Oct 2011).

⁸ Source: Ofcom Children and parents: media use and attitudes report (Oct 2011).

- Takes strong action in regard to services within our remit
- Works with UKCCIS on initiatives relating to online age verification
- Supports relevant media education initiatives, including Safer Internet Day
- Supports initiatives to improve the uptake and effectiveness of parental controls, including by working with UKCCIS on parental controls for connected TVs
- Supports active enforcement of existing laws designed to protect children

4. Parental controls and their limitations

4.1 As noted above, ATVOD supports initiatives to improve the take up of parental controls, not least because it is aware that the use of filtering software by parents is significantly lower than might be desired, and has not been rising. It is not clear why more than 6 out of 10 households with child internet users do not use parental control software, but as such software is often pre-installed or available free as part of a contract with an ISP, it is unlikely that cost is a significant factor. Although research⁹ has indicated that parents who are regular and confident internet users, and who say they worry a lot about their children seeing inappropriate material online, and who have younger children, are more likely to use parental control software, there appears to be a lack of clarity about the reasons why so many parents do not. ATVOD therefore recommends that consideration is given to undertaking research designed to identify the reasons why parents do not make use of parental control software. The results might usefully inform not just future public policy but also future media education initiatives.

‘Active choice’

- 4.2 To the extent that lack of uptake is caused by lack of awareness or by inertia, initiatives such as ‘active choice’ which provide an unavoidable prompt to consider activating parental controls, are a welcome addition to the spectrum of policy responses. To that end, ATVOD participates as a member of the UKCCIS working party looking at the possibilities for ‘active choice’ initiatives on internet connected TVs.
- 4.3 ATVOD further considers that a refinement of ‘active choice’, in which some obviously harmful content, such as hardcore pornography, is pre-selected for blocking for those who chose to activate parental controls (but with an option to de-select), would be a further positive step.
- 4.4 We note that the four ISPs who have committed in a Code of Practice to provide ‘Active Choice’ (BT, TalkTalk, Virgin Media and Sky) have given that undertaking in relation to new customers only and that existing customers will instead *“receive a regular reminder with links to help/advice on Controls at least annually, through a range of widely accepted customer communications channels”* [para 3.5]. We further note that, although BT, TalkTalk, Virgin Media and Sky have a very significant

⁹ Livingstone, S., Ólafsson, K., O’Neill, B., and Donoso, V. (2012) *Towards a better internet for children: findings and recommendations from EU Kids Online for the CEO Coalition*. LSE, London: EU Kids Online. <http://eprints.lse.ac.uk/44213/>

proportion of the fixed line ISP market, the Code of Practice does not cover other means of accessing the internet used by children, including fixed line broadband offered by other ISPs and the large number of public wi-fi networks.

- 4.5 ATVOD therefore considers that the impact of the 'Active Choice' initiative (and of any refinement) on the uptake and use of parental controls should be kept under review so that the efficacy of the initiative can be properly assessed and refinements made to policy as appropriate. We note and support the commitment of BT, TalkTalk, Virgin Media and Sky to an annual independent review and public report of progress made against objectives set out in the Code.
- 4.6 As uptake of parental controls is only one aspect of the multi-faceted approach required in order to make children safer online, ATVOD takes the opportunity of this consultation to make some further observations on the issues.

The efficacy of parental control software

- 4.7 The usefulness of parental control software depends not only on its uptake but also on its effectiveness. This is especially important if parents who use parental control software are not to be lulled into a false sense of security about the extent to which their children have been protected when using the internet. ATVOD therefore considers that the public debate around 'active choice' should also focus on the limitations of parental controls software both in terms of their ability to protect across all devices and means of access to the internet, and in terms of their efficacy in blocking inappropriate content on protected devices or networks.
- 4.8 The 'Active Choice' signatories offer different types of parental controls: device level and network level. If controls are 'device level' then they must be set individually for each device, including for each laptop, tablet, smartphone and iPod touch. An increase in take up of parental controls in households with children will therefore only indicate an increase in the protection offered to children if the particular devices they use have had parental controls activated. By contrast a control set at the network level applies the same level of protection to all devices using that network through a particular broadband connection. This offers simplicity, but also has drawbacks. A household with adults and children must accept a single level of controls for all devices, and the protections do not apply when the internet is accessed away from the home, e.g. through a public wi-fi network.
- 4.9 Attention also need to be given to the effectiveness of the software itself when installed and activated. ATVOD notes that in the four years since the Byron Report recommended a BSI Kitemark for such software only one product¹⁰ carries the relevant Kitemark. ATVOD further notes that EU Commission research¹¹ suggests that the filters themselves when set to block 'adult' content suffer from relatively high rates of over-blocking (accidentally blocking non-adult sites) and underblocking

¹⁰ Netintelligence, PAS74 Internet Safety- Access Control Systems for the protection of children on line

¹¹ Source: Benchmarking of parental control tools for the online protection of children SIP-Bench II – EU Safer Internet Programme (2011) Table 10, page 26

(failure to block adult sites). The underblocking rate varies greatly, from 9% to 54% and those with lower underblocking rates tend to have higher overblocking rates. Some of the best know filtering options had significant failure rates. For example:

- MacAfee Internet Security was found to underblock 50% of the time, and overblock 27% of the time;
- Net Nanny was found to underblock 41% of the time, and overblock 1% of the time;
- Windows Live Family Security was found to underblock 9% of the time, and overblock 54% of the time

Overall, the study concluded that *“In general, [PC parental control] tools have a low effectiveness.”*¹².

- 4.10 ATVOD considers that both ‘overblocking’ and ‘underblocking’ are of concern. Underblocking because it allows children to access material which is supposed to be blocked, and overblocking because by restricting access to legitimate content it undermines confidence in the software. ATVOD notes that parents are much more likely to have anti-virus software enabled than to have parental controls enabled (67% compared with 39% according to Ofcom research¹³) and some of this differential may result from parents disabling a parental control system when it is found to overblock.
- 4.11 Efforts to improve take up of parental controls in households with children should therefore be balanced by efforts to improve the efficacy of the systems available to parents.

5. Active enforcement of existing laws designed to protect children

- 5.1 As noted above, ATVOD favours a multi-faceted approach to make children safer on line and supports media education initiatives and efforts to encourage parents to use tools such as parental controls software. While necessary, we do not consider that such measures are sufficient in themselves since even a dramatic rise in the uptake and efficacy of parental controls software would still leave many children inadequately protected from harmful online content such as hardcore pornography.
- 5.2 ATVOD considers that existing laws can and should be used to protect children online, wherever possible. To that end, we have detailed above how ATVOD enforces section 368D-E of the Communications Act 2003 to ensure that UK providers of hardcore porn videos on demand put in place effective access controls to prevent children from seeing hardcore porn material on their services.

¹² Source: Benchmarking of parental control tools for the online protection of children SIP-Bench II – EU Safer Internet Programme (2011) Key findings, page 22

¹³ Source: Ofcom Children and parents: media use and attitudes report (Oct 2011)

- 5.3 In considering the statutory framework, ATVOD has also noted that the current Crown Prosecution Service (“CPS”) guidance for prosecutors on the interpretation of the Obscene Publications Act (“OPA”) states that

“where children are likely to access material of a degree of sexual explicitness equivalent to what is available to those aged 18 and above in a licensed sex shop, that material may be considered to be obscene and subject to prosecution. This applies to material which is not behind a suitable payment barrier or other accepted means of age verification, for example, material on the front page of pornography websites and non-commercial, user-generated material which is likely to be accessed by children and meets the threshold. see R v Perrin, [2002] EWCA Crim 747”¹⁴

- 5.4 Given this advice, ATVOD questions why prosecutions under the OPA in relation to online content in recent years appear to have been limited to websites offering material which is more extreme than would be available in a licensed sex shop. ATVOD can find no recent example of a prosecution for publishing material of a degree of sexual explicitness equivalent to what is available to those aged 18 and above in a licensed sex shop but which is not behind a suitable payment barrier or other accepted means of age verification. Furthermore, OPA convictions for distribution of more extreme content (i.e. content which would not be classified by the BBFC in any category, including R18) have declined dramatically in recent years, from 81 in 2000 to just 7 in 2010¹⁵.
- 5.5 ATVOD considers that the disparity between the CPS guidance and actual enforcement activity under the OPA could usefully be addressed by Government and the enforcement agencies in order to strengthen the protections for children online.

6. Conclusion

- 6.1 ATVOD takes strong action in relation to services within our remit, but that remit is limited in geographical scope and does not allow us to act to protect children from hardcore pornography on sites operated from outside the UK. Such non-UK porn sites account for the vast majority of hardcore porn viewing by people in the UK .
- 6.2 We therefore work with UKCCIS on initiatives relating to online age verification and in relation to parental controls for connected TVs, and supports relevant media education initiatives, including Safer Internet Day.
- 6.3 In light of existing gaps in the research base, ATVOD recommends that consideration is given to undertaking research designed to identify the reasons why parents do not make use of parental control software. The results might usefully inform not just future public policy but also future media education initiatives

¹⁴ CPS legal guidance on charging practice: http://www.cps.gov.uk/legal/l_to_o/obscene_publications/#a07

¹⁵ Source: Justice Statistics Analytical Services – Ministry of Justice [Ref: 249-12]

- 6.4 In relation to the specific issue which is the subject of this consultation, ATVOD supports 'Active Choice' and would welcome its refinement to offer users pre-set options which can be accepted or deselected at set up.
- 6.5 However, ATVOD notes the real limitations of existing parental control solutions and cautions against any assumption that a significantly greater uptake would so materially change the landscape as to absolve others of their responsibility to take action to make children safer online.
- 6.6 In ATVOD's view, this should include action by Government and relevant enforcement agencies to ensure active enforcement of existing laws designed to protect children, including the Obscene Publications Act which is not being used effectively to protect children from hardcore pornography despite CPS guidance that pornographic websites which offer hardcore material meet the threshold for prosecution if they do not have in place effective controls to prevent access by children.