

DETERMINATION THAT THE PROVIDER OF THE ON DEMAND PROGRAMME SERVICE “THE URBAN CHICK SUPREMACY CELL” WAS IN BREACH OF ATVOD’S RULE 11 AND THEREBY CONTRAVENED SECTION 368E (2) OF THE COMMUNICATIONS ACT 2003 (“THE ACT”)

NB: FOLLOWING A REQUEST FROM THE SERVICE PROVIDER, AND IN ACCORDANCE WITH ATVOD’S BREACH PRODECURES, THIS DETERMINATION IS CURRENTLY THE SUBJECT OF A REVIEW BY THE ATVOD BOARD

1. Summary of Final Determination

1.1 BREACH OF RULE 11 (Harmful Material: protection of under-18’s) in relation to paid-for material: COMPLAINT UPHELD

This breach constitutes an infringement of the statutory requirement set out in section 368E (2) of the Communications Act 2003 (“the Act”) which states that *“If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it.”*

2. Service

The Urban Chick Supremacy Cell / UC-SC (“the Service”)

In this Determination we refer to the Service made available through the following outlets:

<http://uc-sc-femdom.com/>
<http://clips4sale.com/studio/50745>

3. Service Provider

Ms Itziar Urrutia (“the Service Provider”)

4. Introduction

- 4.1 The Service was the subject of a complaint submitted to ATVOD regarding potential breaches of Rule 1 and Rule 11. The complaint relating to Rule 1 is dealt with in a separate Determination.
- 4.2 ATVOD wrote to the Service Provider on 5 June 2013 informing them of the complaint and of the statutory obligation to notify provision of an On Demand Programme Service (“ODPS”) , and setting out the statutory criteria which define an ODPS. We advised them to refer to ATVOD’s ‘Guidance on who needs to notify’

which is available on our website (www.atvod.co.uk) and to seek legal advice if appropriate. The letter also informed the Service Provider of the requirement that the provider of an ODPS must ensure that under 18s do not normally see or hear material which might seriously impair their development. The Service Provider responded by email on 5 July 2013. Comments relevant to Rule 11 are copied below:

- *"Along with ATVOD, UCSC accepts - though admittedly without the fervour exhibited by your CEO Pete 'four out of five adults' Johnson, to the extent 'think of the children' might be felt to have become ATVOD's main raison d'être (and we entirely agree that is a very effective dog whistle & triggering soundbite) - material which might seriously impair the physical, mental or moral development of persons under the age of eighteen must be made available in a manner which secures that such persons will not normally see or hear it.*

Putting aside our belief that exposure to our material might actually improve rather than impair perceptions in a patriarchal hegemony, and exactly how abnormal it would be to locate & purchase any of our material, we selected a card processor who clearly states that credit cards are required...which we understood met applicable requirements. There are times when a concession to the prevailing orthodoxy is pragmatic"

- *"UCSC is primarily an art project...USCS is clearly not a conventional adult site".*

5. Initial assessment

- 5.1 In view of the fact that ATVOD considered that the Service was an ODPS and was therefore covered by the ATVOD Rules & Guidance¹, the ATVOD Executive considered that the Service may raise issues under Rule 11. ATVOD's Guidance on this rule describes material likely to fall within its scope, and the types of access control required to protect under-eighteens from exposure to such content. At the material time the ATVOD guidance to service providers in relation to the rule was as follows:

"Rule 11: Harmful Material: Protection of Under-18s

If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it.

¹ http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.0_May_2012.pdf

GUIDANCE: In its response² to the Ofcom report on Sexually Explicit Material and Video On Demand Services³, Government stated that it intended to address this issue comprehensively in the 2011 Communications Review of the current regulatory framework to support the communications sector. Government further stated that there is a good case that the existing Regulations require a precautionary approach and requested that Ofcom and ATVOD take any steps necessary in the interim period to ensure that children remain adequately protected under the ATVOD Rules, in the knowledge that Government could bring forward further Regulations in the short term if it proved necessary to support this position.

In light of this, and given the importance of protecting children and young people from harmful content, ATVOD has confirmed its precautionary approach to its interpretation of the wording of the Act and service providers should have this in mind when applying Rule 11 to the content of their services for the purpose of ensuring compliance. Ofcom has made clear that it supports ATVOD's precautionary approach.

In considering any particular case, ATVOD's approach in the first instance will be to determine whether the content in question falls within the high statutory test contained in this requirement.

Clearly, content that is illegal (e.g. criminally obscene or indecent) may not be included in an on-demand programme service since the provision of such material is unlawful.

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

However, adopting a precautionary approach, ATVOD's guidance is that "material which might seriously impair the physical, mental or moral development of minors" when provided as part of an on-demand programme service may include content that has been classified 'R18' by the BBFC, or material equivalent⁴ to content classified in that category.

Therefore 'R18' material or 'R18'-equivalent content 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. Service providers should also be aware that the provision of 'R18' material or 'R18'-equivalent content in a manner which allows children to access it may constitute a criminal offence under the Obscene Publications Act 1959 & 1964. See the relevant section of the Crown

² <http://www.culture.gov.uk/images/publications/EVletter-to-ed-richards-3aug2011pdf.pdf>

³ <http://stakeholders.ofcom.org.uk/binaries/internet/explicit-material-vod.pdf>

⁴ Where this Determination refers to "'R18'- equivalent" content this should be taken to include content which goes beyond that classified 'R18' by the BBFC. Note that content which is in breach of the Obscene Publications Act or other UK legislation may not be included in an on-demand programme service.

Prosecution Service Legal Guidance to Prosecutors at http://www.cps.gov.uk/legal/l_to_o/obscene_publications/).

'Material which might seriously impair the physical, mental or moral development of persons under the age of eighteen' may also include the types of material listed below. (This is not intended to be an exhaustive list and is open to review from time to time.):

- *content which is illegal, e.g. criminally obscene or indecent;*
- *content which promotes illegal or harmful activity;*
- *highly sexualised portrayals of children ;*
- *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.*

Provided the material is not illegal, content which ATVOD considers falls under this Rule (i.e. 'material which might seriously impair the physical, mental or moral development of persons under the age of eighteen') may be made available in an on demand programme service provided access is controlled in a manner which secures that persons under eighteen 'will not normally see or hear' such material.

ATVOD's provisional 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 eighteen or over at the point of registration or access by the mandatory use of technical tools for age verification and, if age verification does not take place each time the user returns to the service, controls further access to such content when the user returns to the service by the use of mandatory security controls such as passwords or PIN numbers.

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

- *Confirmation of credit card ownership or other form of payment where mandatory proof that the holder is eighteen or over is required prior to issue.*

- *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.*

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

As regards who is responsible for any required CAC Systems, including ensuring they are operating effectively, ATVOD's 'Guidance on who needs to notify' explains how to determine the person with 'editorial responsibility' for the on demand programme service."

Importantly, the Guidance included the following footnote in relation to CAC Systems:

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

- 5.2 After its initial assessment of the Service the ATVOD Executive considered that the Service raised issues under Rule 11 and subsequently conducted a full investigation on 19-20 August 2013. On 6 September 2013, ATVOD issued its preliminary view that on 19-20 August the Service Provider was in breach of Rule 11 (Harmful Material: Protection of the Under-18's) in relation to the Service. Video capture evidence of the Service at the time of ATVOD's initial investigation is set out in Annexes 1 to 3.
- 5.3 In accordance with ATVOD's published procedures, the provider of the service was given 10 working days in which to make written representations to ATVOD.

6. Provider Representations

- 6.1 On 20 September 2013 the Service Provider submitted representations to ATVOD. The relevant representations are summarised below. Representations relevant to Rules 1 and 4 are discussed in a separate Determination.
- The Service is not an ODPS (representations relating to this point are discussed in a separate Determination).
 - ATVOD does not take into account Obscene Publications Acts ('OPA') rulings, describing various UC-SC material as going beyond R18 when the Service Provider's previous correspondence referred to a high court case covering this topic, where the material was found not obscene.
 - ATVOD's Preliminary View does not mention that a credit card number is clearly asked for on the payment pages. The Service Provider "was horrified

to hear that under 18s can subscribe for my videos [...] I chose that card processor precisely because they claimed to service adult sites, which I assumed met good practice guidelines (in addition to the adult content warnings throughout the site)". The Service Provider is "currently remonstrating with the card processor and...demanding action".

- ATVOD's age verification requirements are unreasonable and unlawful – they go beyond ensuring that children will not 'normally' be able to view.
- ATVOD's precautionary approach is unlawful in misapplying the statutory test of 'seriously impair' by effectively omitting the 'seriously' (the representations also refer to a report from Ofcom to DCMS citing lack of research evidence of any impairment).
- However, the ability to join UC-SC has been disabled pending resolution. The card processor led UC-SC to believe that only over 18s could access the material. The Service Provider asks ATVOD to take these factors into account if it makes a determination that there has been a breach.

7. Further Assessment

- 7.1 ATVOD notes that the Service Provider's representations disputed the key facts set out in ATVOD's Preliminary View and the preliminary finding that the service had been operating in breach of Rule 11 on 19-20 Aug 2013.
- 7.2 Therefore ATVOD conducted a further investigation on 30 September 2013.

8. Further Investigation

- 8.1 Since the date of ATVOD's original investigation the Service appears to have been changed and it was no longer possible to purchase (and therefore access) video content as at 30 September 2013. However, it remains ATVOD's view that at 19-20 Aug 2013 the Service was in breach of ATVOD's Rule 11, for the reasons set out below:

8.2 Nature of the Service and content at 19-20 August 2013

The ATVOD executive found on 19-20 August 2013 that entering the url <http://uc-sc-femdom.com/> into a browser took them to the homepage of the service. An image of a female wearing a mask and holding a gun were displayed on the page with a disclaimer 'This is the hard edge of femdom, male scum'. On the right of this page was a list of features which members could access and the fee required for joining the site, below this there was a link to the 'Clips4Sale' version of the service. A subscription to the site could be purchased which afforded access to this site only. Once ATVOD had logged onto the site, ATVOD was taken to a member's area,

where ATVOD could choose from a selection of videos which focused on male humiliation techniques and strong fetish material. Text was present accompanying each video which outlined the content of the video.

Clicking on the 'clips4sale' link took ATVOD to another version of the service which was available on the 'Clips4Sale' platform. This version of the service could also be accessed by entering the URL <http://clips4sale.com/studio/50745> into a browser. The homepage of the service contained an image at the top of the page, with text written in black and red 'welcome to the members' area, male scum, below are the latest updates'. This was followed by further text; 'we upload new femdom agitprop clips every Friday. You will surrender!' Below this were text boxes which described the ordering process and refund policy. A search facility was available for users to search for videos which could be purchased individually. The clips4sale store contained 4 pages of video material. Scrolling down the page allowed ATVOD to view the videos available for purchase including the length and price of the videos.

As the free to view content made clear that further content was available to view to subscribers and/or members, on 19 August 2013 ATVOD test purchased a subscription/membership using a debit card for www.uc-sc.com and ATVOD also purchased 3 videos from <http://clips4sale.com/studio/50745> using a debit card. Both transactions were successful using a debit card.

Having obtained membership ATVOD could view videos which were 'R18' equivalent (hard-core or strong fetish content appearing in a work the primary purpose of which is sexual arousal or stimulation), or on some occasions stronger containing, for example explicit sight of strong fetish material which mainly focused on male humiliation techniques;

- The video 'Deep probe urethral emasculation' portrayed deep penetration of the male's penis. This material goes beyond that which is likely to be classified by the BBFC at any category including R18.
- The video 'Fight Cell: Anal Hook 01' portrayed a 'victim' who is bound, handcuffed with a hood over his face, with another female sitting nearby holding a gun, which was occasionally waved in his direction, whilst the restrained 'victim' is being tortured. The victim appeared unable to free himself or indicate withdrawal of consent. Being handcuffed, and bound with a rope that's attached to a ceiling, it is not clear if he is gagged but it is not clear if he is free to speak either. This material goes beyond that which is likely to be classified by the BBFC at any category including R18.

Ofcom's appeal findings in relation to ODPS containing adult content⁵ confirm that 'R18' equivalent programmes may be considered television-like in this context.

The Service Provider's representations suggest that in its Preliminary View, ATVOD did not take into account recent court rulings in relation to the OPA when it described

⁵ <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/DemandAdult.pdf>
<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Climax3Uncut.pdf>

UC-SC material as going beyond R18. However, ATVOD made and makes no comment on the legal status of the material in relation to the OPA. ATVOD's point is that the material as described is equivalent to or beyond that normally passed 'R18' by the BBFC.

Since content available on the Service included content equivalent to that rated 'R18' by the BBFC and material which would not be classified by the BBFC in any category including R18, its provision falls within the scope of Rule 11. Specifically, ATVOD was satisfied that the content met the high statutory test of material which might "seriously impair the physical, mental or moral development of persons under the age of eighteen", and that ATVOD's precautionary approach meant an effective CAC System was required.

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

8.3 Access to content at 19-20 August 2013

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

i. Paid access to full video catalogue on www.uc-sc.com – subscription

- a. Once an account had been created and a subscription paid, the full catalogue of videos could be viewed.
- b. Subscription could be paid for via one online payment processing service operated by Zombaio. On 19 August 2013 ATVOD used a debit card to purchase a subscription via the 'credit card' option.

ii. Paid access to individual programmes on: <http://clips4sale.com/studio/50745>

- a. Programmes could be purchased individually via an online payment processor, USA E Pay. On 19 August 2013 ATVOD purchased 3 individual programmes using a debit card. Clips4sale also offers two other payment methods – "Clip Cash" and "SoFort".

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

- i. In relation to paid access, neither payment system constituted a CAC System verifying that the user was aged eighteen or over at the time of registration/subscription, because:
 - a. The payment processes used by the Service Provider accepted debit card payments, and no further age verification measures were in place. Since a debit card can be held by a person under the age of eighteen, ATVOD has made clear in guidance that possession of such a card cannot be regarded as confirming age. Any young person with a debit card could access all of the Service's content without being challenged by any age verification process. In addition, the "Clip Cash" and "Sofort" payment methods offered by Clips4Sale allow any young person with a bank account in specified countries (and in the case of Clip Cash, cash) to pay for content on the Service without being challenged by any age verification process.

The Service Provider's representations state that it is the card processor, not the Service Provider, who is responsible for claims that only credit cards are accepted as payment. However, this notwithstanding, it is the Service Provider's responsibility to ensure an adequate CAC System is in place for the relevant material.

- 8.4 It is therefore ATVOD's view that on 19-20 Aug 2013 the Service did not have in place an effective CAC System which verified that the user was aged eighteen or over at the point of registration or access by the mandatory use of technical tools for age verification. Specifically, the 'paywall' which can be constructed to exclude under-eighteens from accessing potentially harmful material, could be easily circumvented by minors and could therefore not be regarded as being effective in securing that such persons will not normally see or hear the relevant paid-for material.
- 8.5 The Service Provider's representations state that ATVOD's age verification requirements are unreasonable and unlawful, and go beyond ensuring that children will not 'normally' be able to view. However, the guidance relating to age verification as laid out in 5.1 above are in line with those organisations with similar duties (for example the Gambling Commission). ATVOD's requirements do not, as the Service Provider suggests, exclude those with poor credit ratings. Confining payments to credit cards only is not the only means of ensuring that an adequate age verification and CAC System is in place.
- 8.6 The Service Provider's representations also state that ATVOD's precautionary approach is unlawful in misapplying the statutory test of 'seriously impair' by effectively applying only 'impair'. However, ATVOD's interpretation of the relevant legislation is shared by Ofcom (see recent sanctions imposed on adult service providers⁶) and reflects a broad consensus - particularly given the ethical problems in

⁶ http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Demand_Adult.pdf
http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Playboy_TV_Sanction.pdf

establishing conclusive research evidence in relation to serious impairment to children – that the question cannot be resolved (either way) by empirical evidence. In such circumstances, the regulator is entitled to adopt a precautionary approach when the risk concerns harm to children.

9. Determination

- 9.1 ATVOD's view is that on 19-20 Aug 2013 the Service included material which might seriously impair the physical, mental or moral development of persons under the age of eighteen and that such material was made available in a manner which failed to secure that persons under the age of eighteen would not normally see or hear it.

9.2 ATVOD's Determination is that

On 19-20 August Ms Itziar Urrutia was in breach of Rule 11 in relation to paid access to material on the Service. This breach constitutes an infringement of the statutory requirement set out in section 368E (2) of the Act, which states that *"If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it."*

- 9.3 ATVOD acknowledges that changes were made to the service following the issue of ATVOD's preliminary view on 6 September 2013 and that those changes appear to have brought an end to the breach of Rule 11 on or before 30 September 2013. However, the action taken by the Service Provider following receipt of ATVOD's preliminary view does not alter the facts relating to the Service as it existed on 19-20 August.