

## **DETERMINATION THAT THE PROVIDER OF THE ON DEMAND PROGRAMME SERVICE “BOOTYBOX.TV” WAS IN BREACH OF RULE 11.**

### **Summary of Determination**

- i. BREACH OF RULE 11 (Harmful Material: protection of under-18's): COMPLAINT UPHELD
- ii. BREACH OF RULE 11 (Harmful Material: protection of under-18's): ESTABLISHED BY ATVOD INQUIRY

Each breach constitutes an infringement of the statutory requirement set out in section 368(E) (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.*”.

### **Service**

Bootybox.tv ATVOD ref. ODPS00190

### **Service Provider**

Paul Carder, Managing Director, Bootybox.tv

### **Introduction**

Bootybox.tv is a website on-demand adult programme service, notified to ATVOD as having been available since November 2010. The service provider describes its content as “generic and mostly BBFC compliant UK porn available on-line.”

### **The complaint (ATVOD ref 20110629 - 104)**

On June 26 2011 a parent complained that a son had used this service and other web based services to access pornographic videos “... *that have no parental control on and are far too strong to be allowed even under UK law* ...”

The parent complained about four named website services, including Bootybox.tv, and ATVOD has conducted detailed inquiries in relation to each of them. It has established that, other than Bootybox.tv, none of the services falls within UK jurisdiction. Two of the services appear to fall within the jurisdiction of other EU Member States and the complaint has been referred to the relevant regulatory authorities in those Member States.

### **Initial assessment**

On the basis of the information provided by the complainant and after a preliminary assessment of the service, in view of the fact that the service is covered by the ATVOD Rules & Guidance the ATVOD Executive decided that the complaint did raise issues under Rule 11, which states:

## *“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.*

ATVOD’s Guidance on this rule describes material likely to fall within its scope, and the types of access control required to protect under-18’s from exposure to such content. At the material time the ATVOD guidance to service providers in relation to the rule was as follows:

### GUIDANCE

*Service providers should be aware that Ofcom has been asked by Government to consider whether the new Regulations (as now implemented in the amended Act) provide sufficient protection for children and young people with regard to sexually explicit content, and to produce a report to Government in the autumn of 2010. Ofcom has asked ATVOD to assist in the preparation of that report.*

*This section of the Guidance is therefore interim only and is based on ATVOD’s provisional interpretation, taking a precautionary approach, of the requirements in Rule 11 which is subject to amendment, as appropriate, following the Government’s current review.*

*In light of this and given the importance of protecting children and young people from harmful content, ATVOD is adopting a 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.*

*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 interim 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 equivalent 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 Prosecution Service Legal Guidance to Prosecutors at [http://www.cps.gov.uk/legal/l\\_to\\_o/obscene\\_publications/](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 may consider on an interim basis 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 18 or over at the point of registration or access by the mandatory use of technical tools for age verification and, if age verification does not take place each time the user returns to the service, controls further access to such content when the user returns to the service by the use of mandatory security controls such as passwords or PIN numbers.

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

- Confirmation of credit card ownership or other form of payment where mandatory proof that the holder is 18 or over is required prior to issue.
- 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.”*

## **Investigation**

### *Nature of service and content*

The service was viewed by a sub-committee of the ATVOD board. It offered a pay per view and subscription access to a range of adult videos.

The service had been notified to ATVOD but the committee nevertheless confirmed that it did constitute an On Demand Programme Service, comprising the whole of the website at the domain [www.bootybox.tv](http://www.bootybox.tv). The landing page on which a warning appears offers nothing but access to ‘UK Porn’. Past this ‘landing page’ is a ‘main’ page which offers access to video content (including a ‘promo’ for the service as a whole under the heading ‘Click here for a little taste of us’), a range of subscription and payment packages for accessing the video content, and an advert for what appears to be another pornographic website. The main menu has further two options (“Titles” and “Girls”) each of which leads to a catalogue of pornographic video content which is available to view in full and on-demand once the appropriate payment has been made and for which trailers can be viewed without payment.

The principal purpose of the service is clearly the provision of television-like programmes, specifically comparable in form and content to adult television programmes. Ofcom’s appeal findings in relation to certain other adult on-demand services serve to confirm that “R18” level content may be considered television-like in this context.

Programmes generally appeared to be “R18” level sex works (hardcore works the primary purpose of which is sexual arousal or stimulation) and featured explicit sight of clearly un-simulated sexual activity including: cunnilingus, anilingus, penetration of vagina with fingers and penis, ejaculation onto face.

From a list of genres, it appeared that a subscriber “member” could also access some material which would not be passed by the BBFC even at “R18”.

The committee concluded that much of the content available on the service was equivalent to that rated “R18” by the BBFC (or stronger) and that its provision therefore fell within the scope of Rule 11. Specifically, the committee was satisfied that the content met the high statutory test of material which might seriously impair, and that ATVOD’s precautionary approach meant an effective Content Access Control system was essential.

The committee therefore examined how a consumer accessed the material and what access controls were in place.

### *Access to content*

The opening page of the website contained a “glamour” still, mainly depicting young women in lingerie, and a warning:

*“This site contains sexually explicit material”*

*“The sexually explicit material I am viewing is for my own personal use and I will not expose minors to the material. I desire to receive / view sexually explicit material. I believe that as an adult it is my inalienable right to receive / view sexually explicit material”*

The user then chose to “Enter” or “Leave” by clicking on one of two buttons.

The following “Main” page, accessed by clicking on “Enter”, contained stills which offered stronger sexual images and two options for viewing adult material.

- i. Free access to some material – no payment*
  - a. Any visitor could access here trailers containing material which would have been classified ‘R18’ by the BBFC e.g. trailer for ‘Tigerrs World of Cosplay – Scene 4: Lolita Maids’ which included explicit sight of clearly unsimulated sex (fellatio, cunnilingus, vaginal penetration with penis and dildo, anal penetration).
  - b. Visitors could also freely access a general promotion/ trail for the Bootybox service containing hardcore material includes material which would not be given even an ‘R18’ rating by the BBFC ( e.g. sight of woman performing fellatio whilst urinating).
  - c. The black and white image surrounding the ‘Main’ page also contained, at top left, a large and clear hardcore image of a woman licking an erect penis. Section 368 (E) (2) of the Act refers to “material which might seriously impair” and draws no distinction between a still and a moving image: the inclusion of such a still image within an on demand programme service is therefore seen by ATVOD as subject to the same restrictions as those applying to video/ moving images.
- ii. Paid access to full video catalogue – subscription*
  - a. Once an account was created and a subscription paid, the catalogue of videos could be downloaded. Payment options ranged from payment per ‘scene’ to unlimited (monthly) access to downloads. Although presented as ‘scenes’ from an individual work, videos appeared to be rather episodes of particular series (eg. ‘Ben’s Got Talent – UNCUT’, or ‘GILF Hunter’), each episode (‘scene’) of which had its own opening sequence, on-screen series title and opening credits.
  - b. Subscription could be paid for by one of two online payment processing services, CCBill.com or Epoch. Both could process debit card payments as well as credit card, and Epoch also had an option to use ‘UKash, an online payment system for those who do not wish to use or do not have access to a credit card or bank account.

The committee then considered whether a person under the age of 18 could have easily accessed any of the “R18” material provided by the service.

- (a) In relation to free access described above no age verification system was in place and any minor with access to an internet connection could have viewed the material described at i. (a), (b) and (c) above without obstruction.
- (b) In relation to paid access, the payment systems did not necessarily constitute a CAC System verifying that the user was 18 or over at the time of registration/ subscription, because:
  - i. CCBill.com and Epoch could process debit card payments. Since a debit card can be held by a person under the age of 18, ATVOD has made clear in Guidance that possession of such a card can not be regarded as confirming age.

Any young person with a debit card could have accessed all of the service's content without being challenged by any age verification process.

- ii. The UKash payment system fell short of being an effective content access control mechanism. Age verification took place only if the relevant vouchers were bought from one of the three possible types of retailer.

Frequently Asked Questions on the UKash website included the following:  
Do I Need to Be 18 to Get Ukash? *“Generally anyone can get and use Ukash. Merchants accepting Ukash may conduct their own age checking to prevent those underage being able to access their sites. Customers getting Ukash from PayPoint terminals in shops in the UK and Ireland may be asked to prove that they are over 18. If the customer can't prove that they are over 18 they are issued Ukash that cannot be spent at age restricted (18+) merchant websites.”*

This did not apply to the purchase of UKash vouchers from ePay and Payzone terminals. A young person buying UKash vouchers in this way could again have accessed all of the service's content without being challenged by any age verification process.

### **Preliminary view**

On 16<sup>th</sup> November 2011, ATVOD issued its Preliminary View that Bootybox.tv had committed two breaches of Rule 11 (Harmful Material: Protection of the Under-18's):

- i. The parental complaint would be UPHELD. Rule 11 requires that “R18” equivalent material 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. This service had BREACHED Rule 11 in relation to free access to material, in that a person under the age of 18 was easily able to access “R18”- level content, unprotected by any form of CAC System or age verification (the free content on the service).
- ii. ATVOD's inquiry revealed a second breach of Rule 11, in relation to paid access to material. Rule 11 requires that “R18” equivalent material 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. This service provider had BREACHED Rule 11 in failing to have in place an effective Content Access Control System which verified that the user was aged 18 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-18's from accessing potentially harmful material, could be easily penetrated by minors in one of two ways and could therefore not be regarded as being effective in securing that such persons will not normally see or hear the relevant material.

Each breach would constitute an infringement of the statutory requirement set out in section 368(E) (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.”*

In accordance with ATVOD's published complaints handling procedures, the provider of the service was given 10 working days (i.e. until close of business on 1 December 2011) in which to make written representations for ATVOD to take into account before it proceeded to a final determination. No such representations were received.

## Determination

**ATVOD has therefore determined that, as the provider of Bootybox.tv, Paul Carder has committed two breaches of Rule 11 (Harmful Material: Protection of the Under-18's):**

- i. The parental complaint is UPHELD. Rule 11 requires that "R18" equivalent material 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. This service had BREACHED Rule 11 in relation to free access to material, in that a person under the age of 18 was easily able to access "R18"-level content, unprotected by any form of CAC System or age verification (the free content on the service).
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