

# Ofcom Content Sanctions Committee

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It is Ofcom policy to describe the material and language broadcast by licensees who are the subject of a sanction decided upon by the Content Sanctions Committee where it is relevant to the case. Some of the broadcast material described in this decision may therefore cause offence.

## **Consideration of sanction against:**

RHF Productions Limited in respect of certain of its services (Red Hot 40+, Red Hot Amateur, Red Hot Girl Girl, Red Hot Just 18, Red Hot DD, and Red Hot Fetish); and Portland Enterprises (C.I.) Limited in respect of its service Television X2<sup>1</sup>.

## **For:**

Breaches of Ofcom's Broadcasting Code ("the Code") in respect of:

### RHF (website references)

Rule 1.2: "In the provision of services, broadcasters must take all reasonable steps to protect people under eighteen";

Rule 1.3: "Children must also be protected by appropriate scheduling from material that is unsuitable for them";

Rule 2.1: "Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material"; and

Rule 2.3: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...Such material may include, but is not limited to, offensive language...[and] sex...".

### Portland Enterprises (R18 material)

Rule 1.25: "BBFC R18-rated films or their equivalent must not be broadcast".

## **On:**

### RHF

Between 21 July 2008 and 28 August 2008.

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<sup>1</sup> Since 30 October 2008, TVX2, has been known as "Television X Amateur".

Portland Enterprises

4 September 2008.

**Decision:**

To impose a financial penalty (payable to HM Paymaster General) of **£25,000** in respect of the breaches by RHF and **£27,500** in respect of the breach by Portland Enterprises.

## 1. Summary

- 1.1 For the reasons set out in section 8, under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee ("the Committee"), the Committee has decided to impose a statutory sanction on RHF Productions Limited ("RHF") and Portland Enterprises (C.I.) Limited ("Portland Enterprises").<sup>2</sup> This is in light of the serious (and, in relation to RHF, repeated) failure of RHF and Portland Enterprises to ensure compliance with the Code in their services as discussed at paragraphs 1.3-1.14 below. All editorial compliance decisions regarding both RHF and Portland Enterprises are taken by a centralised compliance team ("Portland Compliance").

### RHF (website references)

- 1.2 In Broadcast Bulletin 114 dated 21 July 2008, Ofcom published a breach Finding ("the 21 July Finding"<sup>3</sup>) against RHF. Free-to-air trailers broadcast in February 2008 from 20:00 onwards on Red Hot TV included verbal and on-screen text references to RHF's website address [www.redhottv.co.uk](http://www.redhottv.co.uk) and Portland Enterprises' website address [www.televisionx.co.uk](http://www.televisionx.co.uk) ("the Website URLs"). The websites to which the Website URLs led, featured content equivalent to BBFC R18-rated material ("R18-rated equivalent material") which could be viewed without registration. Breaches of Rules 1.2, 1.3, 2.1 and 2.3 of the Code were recorded. As a result of the 21 July Finding, it was the responsibility of all Licensees (including RHF) to take all appropriate and immediate steps to comply with the Code.
- 1.3 On 14 August 2008, Ofcom received a complaint about explicit sexual content being shown in daytime in promotional graphics on the Red Hot Channels<sup>4</sup>. The still pictures referred to did not show any explicit content but did include references to the Website URLs. The Website URLs led to websites which, although they included a warning on their front page, contained extremely explicit sexual material (equivalent to BBFC R18-rated material). This did not require registration to view and could be seen by under-eighteens.
- 1.4 Portland Compliance informed Ofcom that immediately on receipt of the 21 July Finding, its compliance team had requested changes to be made to the websites so that no R18-rated equivalent material was accessible to users on the two websites to which the Website URLs led, without users first having to log on and have their age checked. However, these changes were not implemented. On being contacted by Ofcom on 28 August 2008, however, RHF took immediate steps to ensure the removal of the Website URLs from the Red Hot Channels. This was achieved on 28 August 2008.
- 1.5 Ofcom noted that (as the 21 July Finding had made clear), whilst the content of the websites, to which the Website URLs led, was not broadcast material, and therefore not subject to the Code, the on-air references to the Website URLs were clearly broadcast content and must comply with the Code. The on-air references to the Website URLs did not comply with the Code because they led users to websites allowing unrestricted access to R18-rated equivalent material. Ofcom therefore recorded breaches of Rules 1.2 (protection of under-eighteens), 1.3 (protection of

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<sup>2</sup> RHF and Portland Enterprises are owned by Portland Media Group UK Limited ("Portland Media"). All editorial compliance decisions regarding both RHF and Portland Enterprises are taken by a centralised compliance team, based at Portland Media's offices in London. This compliance team ("Portland Compliance") is part of a further subsidiary of Portland Media, called Portland Enterprises Limited. The latter is a different entity from Portland Enterprises (C.I.) Limited.

<sup>3</sup> Ofcom Broadcast Bulletin 114 dated 21 July 2008 ([http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb114/issue111.pdf](http://www.ofcom.org.uk/tv/obb/prog_cb/obb114/issue111.pdf)).

<sup>4</sup> In this decision the Red Hot Channels are: Red Hot 40+ (Sky EPG channel 905), Red Hot Amateur (channel 919), Red Hot Girl Girl (channel 920), Red Hot Just 18 (channel 921), Red Hot DD (channel 922), and Red Hot Fetish (channel 923).

children by appropriate scheduling), 2.1 (generally accepted standards) and 2.3 (offensive material must be justified by context) of the Code against RHF for the broadcast of the Website URLs on the Red Hot Channels between 21 July 2008 and 28 August 2008.

### Portland Enterprises (R18)

- 1.6 Ofcom received a complaint that the programme *Bathroom Bitches* (“the Programme”) broadcast on Television X2 (“TVX2”) on 4 September 2008 at 21:53, although encrypted, contained R18 equivalent material. The Programme included prolonged and explicit scenes of a woman masturbating, some of which were shown in close-up and depicted vaginal penetration using a dildo. Ofcom considered that the content broadcast was equivalent to BBFC R18-rated material because of the sexual explicitness detailed above.
- 1.7 Portland Compliance admitted the Code breach stating that: “Regrettably, the programme contained such footage [R18-rated equivalent material]”. Ofcom therefore recorded a breach of Rule 1.25 (R18-rated equivalent material must not be broadcast) against Portland Enterprises for transmitting the Programme.

### RHF and Portland Enterprises: Summary of Committee’s Decision

- 1.8 The Committee decided that these cases were sufficiently serious, and in relation to RHF repeated, to be considered for a statutory sanction. The Committee held a hearing on 27 April 2009 to consider its decision. Representatives of the Licensees attended the hearing to make oral representations.
- 1.9 After considering all the evidence and all the representations made to it, the Committee decided that the Breaches of the Code by RHF and Portland Enterprises were so serious, and in relation to RHF repeated, as to attract a financial penalty.
- 1.10 The breaches were serious firstly, because they involved explicit R18-rated equivalent material. In relation to RHF, the Red Hot Channels broadcast free-to-air promotional references during the daytime to the Website URLs. These encouraged viewers to visit websites which gave access to R18-rated equivalent material i.e. viewers (and in particular children) could view very explicit sexual material without any prior need for registration or any equivalent form of protection. In relation to Portland Enterprises, TVX2, although encrypted, broadcast the equivalent of R18-rated material (namely images of actual vaginal penetration). Broadcasting such material has the potential to cause harm to under-eighteens and children in particular.
- 1.11 Second, the Committee was concerned that the seriousness of the breaches was compounded by the fact that they occurred following previous and recent instances of Ofcom regulatory intervention and guidance specifically concerning Portland Compliance. In relation to RHF, the breach involving the Website URLs occurred following publication of the 21 July Finding. In relation to Portland Enterprises, the breach occurred only a few weeks after publication on 23 July 2008 of the Committee’s decision to impose a fine of £25,000 on Portland Enterprises for a breach of the same Code Rule 1.25 (“the Portland Adjudication”)<sup>5</sup>.

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<sup>5</sup> Decision of the Committee concerning Portland Enterprises in respect of its service Television X – the Fantasy Channel, dated 23 July 2008 (See [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/portland.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/portland.pdf)).

- 1.12 Third, the Committee considered that the Breaches showed evidence of weak compliance processes. In relation to RHF, the Website URLs were broadcast on the Red Hot Channels for nearly six weeks after publication of the 21 July Finding. As a result of the 21 July Finding, Portland Compliance had requested changes to limit access to the websites to which the Website URLs led. These were not made but the Website URLs continued to be broadcast. In relation to Portland Enterprises, *Bathroom Bitches* was broadcast only about six weeks after the Portland Adjudication. The Committee was concerned that this contravention had occurred despite Portland Enterprises' submissions to the Committee in the Portland Adjudication case, in which Portland Enterprises had assured the Committee of measures it had taken to improve compliance<sup>6</sup>.
- 1.13 The breach in relation to RHF was serious because of the content the broadcast directed viewers to, and repeated nature. RHF allowed the Red Hot Channels to broadcast promotional references to the Website URLs on various occasions during the period 21 July 2008 to 28 August 2008.
- 1.14 Having regard to the serious and, in relation to RHF repeated, nature of the breaches, and having regard to the Licensees' representations and Ofcom's Penalty Guidelines, the Committee decided it was appropriate and proportionate in the circumstances to impose:
- a financial penalty on RHF of **£25,000** (payable to HM Paymaster General); and
  - a financial penalty on Portland Enterprises of **£27,500** (payable to HM Paymaster General).

## 2. Background

- 2.1 RHF is the licensee for the "Red Hot Channels" - Sky EPG channels 905 (Red Hot 40+), 919 (Red Hot Amateur), 920 (Red Hot Girl Girl), 921 (Red Hot Just 18), 922 (Red Hot DD), and 923 (Red Hot Fetish). The website [www.redhottv.co.uk](http://www.redhottv.co.uk) is run by RHF. The Licence for TVX2 (TLCS 685) is held by Portland Enterprises, and since 30 October 2008 has been known as "Television X Amateur". Portland Media Group UK Limited ("Portland Media") owns RHF and Portland Enterprises, and also Portland Enterprises Limited ("Portland Compliance"), which in turn provides compliance for both the Red Hot Channels and TVX2. The website [www.televisionx.co.uk](http://www.televisionx.co.uk) is run by Portland Enterprises.

### RHF (website references)

- 2.2 In Ofcom's Broadcast Bulletin 114 dated 21 July 2008, Ofcom published a breach Finding ("the 21 July Finding"<sup>7</sup>) against RHF. Free-to-air trailers broadcast in February 2008 from 20:00 onwards on Red Hot TV had included verbal and on-screen text references to the websites [www.redhottv.co.uk](http://www.redhottv.co.uk) and [www.televisionx.co.uk](http://www.televisionx.co.uk). These websites featured several instances of R18-rated equivalent material which could be viewed without registration. The 21 July Finding made clear that in: "no circumstances may such websites contain unprotected R18-rated equivalent material if they are promoted on a licensed service". Adequate protection would be, for example, the need to purchase access to the stronger material by using a credit card or similar means that allows an age check to be

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<sup>6</sup> See paragraph 8.16 of the Portland Adjudication.

<sup>7</sup> See footnote 3

carried out. Breaches of Rules 1.2, 1.3, 2.1 and 2.3 of the Code were recorded. As a result of the 21 July Finding, it was the responsibility of all Licensees (including RHF) to take all appropriate and immediate steps to comply with the Code. Ofcom decided that, although serious, this breach was the first by any licensee in this area, and therefore did not merit consideration for a statutory sanction.

### Portland Enterprises (R18)

2.3 On 23 July 2008, Ofcom decided to impose a statutory sanction on Portland Enterprises in respect of Television X – the Fantasy Channel<sup>8</sup> (“the Portland Adjudication”<sup>9</sup>). In summary, Ofcom decided to fine Portland Enterprises £25,000 for breaching Rules 1.24, 1.25, 2.1 and 2.3 of the Code. As part of its decision, the Committee found that: “the showing of ‘R-18’-rated material at any time on an encrypted channel is...unacceptable and a serious breach of the Code”<sup>10</sup>. Although this decision concerned material shown on a channel not involved in the present case, Portland Enterprises also holds the licence for Television X – the Fantasy Channel and this channel is also complied by Portland Compliance.

## **3. Legal Framework**

### **The Communications Act 2003**

- 3.1 Ofcom has a duty under section 319 of the Communications Act 2003 (“the Act”) to set standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives. The standards objectives are set out in section 319(2) of the Act. They include that: persons under eighteen are protected (section 319(2)(a)); and generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material (section 319(2)(f)).
- 3.2 In discharging its functions, Ofcom’s principal duties are to further the interests of citizens in relation to communications matters and the interests of consumers (section 3(1)) and to secure a number of other matters. These include the application in the case of all television and radio services of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services (section 3(2)(e)).
- 3.3 In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, a number of other considerations including:
- the need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g)); and
  - the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection (section 3(4)(h)).

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<sup>8</sup> Since October 2008, “Television X – the Fantasy Channel” has been known as “Television X”.

<sup>9</sup> See footnote 5.

<sup>10</sup> See Paragraph 8.17 of the Committee’s Adjudication .

- 3.4 Under section 325 of the Act, every programme service licensed by a Broadcasting Act licence includes conditions for securing that the standards set by Ofcom under section 319 are observed. If Ofcom is satisfied that the holder of a licence to provide a television licensable content service has contravened a condition of the licence, it may impose the following sanctions:
- issue a direction not to repeat a programme;
  - issue a direction to broadcast a correction or a statement of Ofcom’s findings;
  - impose a financial penalty; and/or
  - revoke a licence (not applicable to the BBC, S4C or Channel 4).

### **The Human Rights Act 1998**

- 3.5 Under section 6 of the Human Rights Act 1998, there is a duty on Ofcom (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention of Human Rights (“the Convention”).
- 3.6 Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster’s right to “impart information and ideas” and also the audience’s “right to receive information and ideas without interference by public authority”. Such rights may only be restricted if the restrictions are: “prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary” (Article 10(2) of the Convention).
- 3.7 Ofcom must exercise its duty in light of these rights and not interfere with the exercise of these rights in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

### **Ofcom Broadcasting Code**

- 3.8 Standards set by Ofcom in accordance with section 319 of the Act are set out in Ofcom’s Broadcasting Code (“the Code”) which came into force on 25 July 2005.
- 3.9 Accompanying Guidance Notes to each section of the Code are published and from time to time updated, on the Ofcom website. The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Code.

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

- 3.10 Rule 1.2: “In the provision of services, broadcasters must take all reasonable steps to protect children under eighteen”.
- 3.11 Rule 1.3: “Children must also be protected by appropriate scheduling from material that is unsuitable for them”.
- 3.12 Rule 1.25: “BBFC R18-rated films or their equivalent must not be broadcast”.

- 3.13 Rule 2.1: “Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material”.
- 3.14 Rule 2.3: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context”.

#### **Remedial action and penalties**

- 3.15 Section 236 of the Act provides Ofcom with the power to direct the holder of a Television Licensable Content Service (TLCS) licence to broadcast a correction or statement of findings (or both) or not to repeat a programme on contravention of a licence condition.
- 3.16 Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence of a maximum of whichever is the greater of £250,000 and 5% of its qualifying revenue.
- 3.17 Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence.

#### **4. Ofcom’s investigation and RHF and Portland Enterprises’ responses**

##### RHF (website references)

- 4.1 On 14 August 2008, Ofcom received a complaint that a ‘slate’ loop (i.e. a series of still shots) showing graphic sexual content was being broadcast free-to-air on the Red Hot Channels at around 10:30 on 14 August 2008. Ofcom found no evidence of graphic sexual content was being broadcast, free-to-air on the Red Hot Channels at this time but noted that these ‘slates’ included the Website URLs i.e. [www.redhottv.co.uk](http://www.redhottv.co.uk) and [www.televisionx.co.uk](http://www.televisionx.co.uk). On 28 August 2008, these websites found at those URLs contained material, which was the equivalent of R18-rated ‘adult’ content, and which was accessible without the need for prior registration or any form of age verification. Ofcom alerted Portland Compliance to this issue on 28 August 2008.
- 4.2 Ofcom wrote to Portland Compliance in September 2008 asking for comments under the following Rules of the Code, in relation to broadcast of the Website URLs on the Red Hot Channels: 1.2 (ensuring protection of under-eighteens), 1.3 (appropriate scheduling), 2.1 (generally accepted standards), and 2.3 (material that may cause offence must be justified by the context).
- 4.3 In its responses, Portland Compliance informed Ofcom that, in the light of the 21 July Finding, all references to the Website URLs had been removed from the Red Hot Channels on 28 August 2008. Portland Compliance stated that a request for changes to be made to the websites to ensure compliance with the Code had been made immediately after it became aware of the 21 July Finding, but these changes were not implemented for various administrative and personnel reasons. Portland Compliance also stated that it believed that Ofcom needed to issue a “specific direction” requiring immediate compliance with a published finding for it to be obliged straightaway to comply with it.
- 4.4 Ofcom noted that (as the 21 July Finding had made clear), whilst the content of the websites, to which the Website URLs led, was not broadcast material, and therefore not subject to the Code, the on-air references to the Website URLs were clearly

broadcast content, and had to comply with the Code. The on-air references to the Website URLs did not comply with the Code because they led users to websites allowing unrestricted access to R18-rated equivalent material. Ofcom also pointed out that it was not required to issue any formal direction for licensees to be required to comply with a finding immediately: this occurred automatically and immediately on publication.

#### Portland Enterprises (R18)

- 4.5 A complainant informed Ofcom that R18-rated equivalent material had been included in *Bathroom Bitches*, broadcast on the encrypted channel, TVX2, on 4 September 2008 at approximately 21:30. According to the complainant, the Programme included sequences of dildos and fingers being inserted into a woman's vagina.
- 4.6 Ofcom found that the Programme, although broadcast encrypted, included prolonged and explicit scenes of a woman masturbating, some of which was shown in close-up and which explicitly depicted scenes of vaginal penetration using a dildo.
- 4.7 Ofcom wrote to Portland Compliance on 8 October 2008 asking for comments under Rule 1.25 (R18-rated equivalent material must not be broadcast) of the Code in relation to the inclusion of R18-rated equivalent material in *Bathroom Bitches*.
- In response, on 17 October 2008, Portland Compliance informed Ofcom that in this case "regrettably" R18-rated equivalent sequences of vaginal penetration had been broadcast in the Programme. Portland Compliance apologised for the lapse in compliance that led to the Programme being broadcast, and gave assurances that: changes to compliance processes would "eradicate to the fullest extent possible the risk of any similar further compliance lapse"; and, in future, encrypted 'adult' content would not be shown on any Portland Media channel before 22:00.

### **5. Ofcom's decision that RHF and Portland Enterprises were in breach of the Code**

#### RHF (website references)

- 5.1 On 17 December 2008, having carefully considered the representations made by RHF, Ofcom found that the broadcast of the Website URLs on the Red Hot Channels between 21 July 2008 and 28 August 2008 was in breach of the following Code Rules:
- Rule 1.2 (ensuring protection of under-eighteens);
  - Rule 1.3 (appropriate scheduling);
  - Rule 2.1 (generally accepted standards); and
  - Rule 2.3 (material which may cause offence must be justified by the context).
- 5.2 Ofcom considered that the promotion of the Website URLs on a free-to air channel breached: Rule 1.2 of the Code, because RHF had not taken all reasonable steps to protect people under eighteen from the equivalent of R18-rated material; Rule 1.3, because children had not been protected by appropriate scheduling from material

that was unsuitable for them; Rule 2.1, because adequate protection was not provided for members of the public from the inclusion in the Red Hot Channels of harmful and/or offensive material; and, Rule 2.3, because offensive material was included in the Red Hot Channels that could not be justified by the context.

#### Portland Enterprises (R18)

- 5.3 On 17 December 2008, having noted the response made by Portland Enterprises, Ofcom found that the broadcast of *Bathroom Bitches* was in breach of Rule 1.25 (R18-rated equivalent material must not be broadcast) of the Code in relation to the inclusion of R18-rated equivalent material in the Programme.
- 5.4 Ofcom considered that the broadcast of the Programme breached Rule 1.25 of the Code which specifically prohibits the transmission (whether encrypted or unencrypted) of content equivalent to R18-rated material. R18 is the strongest sexual material legally available in the UK and can only be purchased from licensed adult sex shops, by people over the age of 18. Ofcom concluded that the sexual activity featured in *Bathroom Bitches* was equivalent to R18-rated material and should not have been transmitted.

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

#### **Portland Compliance's written representations on the recommendation to refer the breaches to the Committee**

- 6.1 Portland Compliance made a series of written submissions to Ofcom on the proposed decision to refer the breaches of the Code by RHF and Portland Enterprises to the Committee.

#### RHF (website references)

- 6.2 In summary the main points put forward by Portland Compliance to argue that this case did not warrant a statutory sanction were that:
- Ofcom's remit in the regulation of website URLs was "a grey area" prior to the 21 July Finding because, in the opinion of Portland Compliance "there was no previous guidance or decisions on the issue". Further, Portland Compliance said that it was under the impression that Ofcom operated under the so-called "two-click" rule, whereby Ofcom would not examine non-broadcast (i.e. on-line) content which was more than "two clicks" away from broadcast content;
  - the Website URLs breach did not involve verbal references and trailers for programmes, as was the case with the 21 July Finding. Therefore, in Portland Compliance's opinion, the broadcast content leading to the Website URLs breach was different to that with regard to the 21 July Finding;
  - the R18-rated equivalent material found in the websites to which the Website URLs led was limited in extent and duration, comprising of three video clips, each of under 60 seconds duration;
  - there was no evidence of actual harm suffered as a result of the broadcasting of the Website URLs; and

- the delay in Portland Compliance ensuring compliance with the contents of the 21 July Finding was due to a “highly exceptional combination of unfortunate circumstances”, such as the departure of Portland Media’s Technical Director.

### RHF and Portland Enterprises

6.3 In summary the main points put forward by Portland Compliance to argue that neither case warranted a statutory sanction were that:

- the breaches were accidental and not deliberate;
- whilst the breaches shared some characteristics with earlier breaches, they were not simply repetitions of earlier breaches. Rather, they related to different areas of Portland Media’s business and compliance processes;
- the complaints in relation to the breaches had, in Portland Compliance’s opinion, originated from commercial competitors to Portland Media, as opposed to members of the viewing public; and
- the breaches should be seen in the context that Portland Compliance has to comply approximately 2,600 hours of content per week. Portland Media licensees had “only been found in breach of the Code on five occasions, and were subject to a statutory sanction only once”. Therefore, Portland Compliance considered that its compliance processes were not weak.

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

6.4 Having taken account of all the representations made by Portland Compliance, the Ofcom Executive concluded that the breaches of the Code were sufficiently serious, and in relation to RHF repeated, to refer the case to the Committee for the consideration of a statutory sanction.

6.5 The Committee, having reviewed the decision of the Ofcom Executive to refer the current breaches to it, and having viewed all the relevant material, accepted that the contraventions of the Code were sufficiently serious, and in relation to RHF repeated, that they should be considered for statutory sanction. Accordingly, RHF and Portland Enterprises were invited to attend a hearing before the Committee.

## **7. Sanctions Hearing**

7.1 The Committee held a hearing to consider this case on 27 April 2009. Two representatives (“the Representatives”) attended the hearing, jointly on behalf of RHF, Portland Enterprises and Portland Compliance. These were Paul Dunthorne, Managing Director, Portland Media Group, and Marcus Lee, Legal Director and Company Secretary, Portland Media Group. At the hearing, the Representatives made oral representations to the Committee before the Committee put questions to the Representatives.

7.2 The Representatives emphasised points that Portland Compliance had made previously in written correspondence. With regard to RHF (website references), on being notified of the contents of the 21 July Finding, Portland Compliance gave instructions for the websites to which the Website URLs led to be changed so that no R18-rated equivalent content was accessible on them without the user first

having to log on and be age-checked. The broadcast of the Website URLs would then have been compliant with the Code. The departure of Portland Media's Technical Director the day after the instructions were given meant that this did not happen, and Portland Compliance only became aware of this fact when Ofcom contacted Portland Compliance on 28 August 2008. Since then, new compliance guidelines have been put in place to ensure that no references to website URLs are broadcast by channels complied by Portland Compliance.

- 7.3 In mitigation, the Representatives made a number of points in relation to the Website URLs. First, no offensive material had been broadcast. The websites to which the Website URLs led contained child protection safeguard measures that went beyond industry standards. The length of free-to-view clips of R18-rated equivalent material found on the websites in question was limited to about 30 seconds before age verification checks and payment were required.
- 7.4 With regard to Portland Enterprises (R18), the Representatives said that, due to human error, *Bathroom Bitches* had been incorrectly labelled, which meant that scheduling staff had wrongly assumed that the relevant tape of the Programme had been complied. Further, the poor quality of the Programme content, meant that the explicit content in breach of the Code was not spotted at the transmission stage. Following the broadcast of *Bathroom Bitches*, the Programme had been deleted from programming servers and not been broadcast since 4 September 2008.
- 7.5 In mitigation, in relation to *Bathroom Bitches*, the content was encrypted and only available to over-eighteens. Portland Compliance had introduced a new paperless system to certify all content to ensure it only played out in the correct scheduling slot. Finally, whilst the broadcast of the Programme was due to human error, the earlier Portland Adjudication dealt with a breach of the Code caused by the deliberate actions of individual programming staff.
- 7.6 In relation to the breaches by both RHF and Portland Enterprises, the Representatives made the following points: Portland Compliance had fully cooperated with Ofcom's investigations; the breaches had not been deliberate; no financial gain had accrued to any Portland Media business as a result of the contraventions; there was no evidence of actual harm to members of the viewing public; and, according to Portland Compliance, the complaints originated with industry competitors, who were jointly monitoring all of Portland Media's broadcast output. The Representatives considered that Portland Compliance's compliance systems remained "fit for purpose" and among the most robust in the adult television industry.
- 7.7 When Portland Enterprises and Portland Compliance had appeared before the Committee on 27 June 2008 as regards the *Television X – the Fantasy Channel* case they gave certain assurances to the Committee about improved compliance<sup>11</sup>. The Committee questioned the Representatives about the current breaches in light of these assurances. With regard to the Website URLs, the Representatives said it was a "matter of regret" that the Code breaches by RHF had not been spotted by compliance staff before notification by Ofcom, and that the need to comply with the 21 July Finding had not been followed through by Portland Compliance, following the departure of Portland Media's Technical Director in mid-July 2008. This was especially the case in light of Portland Compliance having been previously relocated to be amongst Portland Media's production team, as had been highlighted to the Committee as part of oral evidence in the *Television X – the Fantasy Channel* case.

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<sup>11</sup> See footnote 5.

Further, the Representatives confirmed that no meetings or follow-up communications could take place between Portland Compliance and the replacement Technical Director who only started work with Portland Media in September 2008. All this meant that no changes had been made to the websites to which the Website URLs led in the period up until 28 August 2008. In summary, the Representatives admitted that more could, and should, have been done to ensure compliance with the 21 July Finding before 28 August 2008.

7.8 When asked by the Committee to clarify the background to the *Bathroom Bitches* breach, the Representatives confirmed that programming staff had failed to pick up the fact that R18-rated equivalent material was being broadcast. The Representatives said however that they were confident that the new paperless programme certification system would remove human error in scheduling. Further, a full-time compliance officer would be responsible for the new system. This person would on average be certifying about 10 hours of new content each week.

7.9 In response to a query from the Committee, the Representatives clarified that they did not consider the breaches to be less serious just because they believed they originated with industry competitors to Portland Media. Rather, the Representatives underlined their belief that there was no evidence of actual harm caused by the breaches of the Code.

## 8. Decision by the Committee

8.1 The Committee may impose a sanction which may be a financial penalty and/or revocation of the licence. In this case, having viewed the material and having considered all the other evidence and representations before it, the Committee decided that, on balance and taking account of all the facts, it was appropriate to impose by way of statutory sanction:

- on RHF, a financial penalty of **£25,000**; and
- on Portland Enterprises, a financial penalty of **£27,500**.

8.2 In deciding on the level of financial penalty the Committee had regard to Ofcom's Penalty Guidelines.<sup>12</sup>

### The seriousness of the breaches

8.3 Having viewed the material, and taken account of all the evidence and the representations of RHF, Portland Enterprises and Portland Compliance, the Committee considered that: with regard to RHF, the breaches of Code Rules 1.2, 1.3, 2.1 and 2.3 were serious and repeated; and with regard to Portland Enterprises, the breach of Rule 1.25 was serious. This was for the following reasons.

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<sup>12</sup> Ofcom's Penalty Guidelines are available at <http://www.ofcom.org.uk/about/accoun/pg/>. Section 392 of the Communications Act 2003 requires Ofcom to prepare and publish a statement containing guidelines it proposes to follow in determining the amount of any penalties imposed by Ofcom, which Ofcom must have regard to in setting any penalty.

## RHF (website references)

- 8.4 Firstly, these breaches involved R18 equivalent material, featured on the promoted websites. The Red Hot Channels broadcast free-to-air promotional references to the Website URLs during daytime. These provided information leading viewers to visit websites which gave free unrestricted access to R18-rated equivalent material i.e. viewers (and in particular children) could view the material without any prior need for registration or any equivalent form of protection. The Committee considered these breaches to be serious because the R18-rated equivalent material contained in the websites, to which the Website URLs led, had the potential to cause harm to children.
- 8.5 The broadcast of the Website URLs, which linked to websites granting access to R18-rated equivalent material without registration, did not in the Committee's opinion provide adequate protection to under-eighteens, and in particular children, bearing in mind that references to the Website URLs were repeatedly broadcast free-to-air over a considerable period of time and notably during daytime. The Committee noted that this conclusion is supported by Ofcom's research into sexual imagery on television, where viewers expressed concern if children might come across sexual material unawares<sup>13</sup>.
- 8.6 Second, the seriousness of these breaches is compounded by the fact that they followed previous and recent Ofcom regulatory guidance to Portland Compliance on this issue. Specifically, the breaches occurred following publication of the 21 July Finding, published on 21 July 2008. In the wake of that finding, it was the responsibility of all licensees, including Portland Compliance, on behalf of RHF, to ensure that they took all appropriate and immediate steps to comply with the Code and the 21 July Finding. Ofcom had made clear over time, and specifically to Portland Compliance in July 2008, that the promotion of links to websites with unrestricted access to R18-rated equivalent material is completely unacceptable.
- 8.7 Third, the fact that, in the wake of the 21 July Finding, the Website URLs continued to be broadcast on the Red Hot Channels for nearly six weeks was indicative of weak compliance processes.
- 8.8 The Committee noted the various representations on behalf of RHF arguing that the breaches were either not serious enough to be considered for statutory sanction or only merited a minimal sanction. The Committee did not however believe that these arguments had any substance. For example:
- whatever the position before 21 July 2008, it was clear that the regulation of broadcast references to 'adult' website URLs was not a regulatory "grey area" following publication of the 21 July Finding;
  - the Committee could not see any material difference from a regulatory point of view between verbal and other references to 'adult' website URLs in free-to-air promotional trailers and text references to such websites on 'slates' ie promotional stills;
  - although the sample clips obtained by Ofcom from the websites to which the Website URLs led were relatively limited in length they were – as RHF admitted – clearly of highly explicit R18-rated equivalent material. Ofcom does not regulate the content of websites but does regulate broadcast references to

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<sup>13</sup> <http://www.ofcom.org.uk/research/radio/reports/bcr/language.pdf>. See page 61.

them. Once the R18-rated equivalent status of the material available unrestricted on the websites was established, its length was largely irrelevant to the issue of seriousness in this case<sup>14</sup>;

- in fulfilling its statutory duties to ensure that members of the public are provided with adequate protection from offensive and harmful material and the under-eighteens are protected, Ofcom does not require evidence of actual harm or offence. In this case, as already described, the Code was breached and the Committee was clear that broadcast of the Website URLs had the potential to cause harm to children in particular and considerable offence to viewers; and
- the Committee noted the “highly exceptional” circumstances put forward by Portland Compliance to explain the delay in ensuring compliance with the 21 July Finding. The Committee however considered that the delay of almost six weeks was inexcusable and took account of the admission by RHF at the oral hearing that more could, and should, have been done to ensure compliance with the 21 July Finding before 28 August 2008.

### Portland Enterprises (R18)

8.9 Firstly, this breach relating to *Bathroom Bitches* also involved R18-rated equivalent material. On TVX2, although encrypted, the equivalent of R18-rated material (namely actual vaginal penetration) was broadcast. Under Rule 1.25 of the Code, the broadcast of R18-rated equivalent material is never permitted under the Code, whether encrypted or unencrypted. By enforcing Rule 1.25, Ofcom aims to fulfil its statutory duties to protect persons under the age of eighteen, and to provide adequate protection to members of the public from offensive and harmful material in television services. In the Committee’s view, the breach is made more serious by the fact that the R18-rated equivalent material was shown before 22:00. It noted that under Rule 1.24 of the Code ‘adult-sex’ material, which is less explicit than R18-rated equivalent content, may only be shown after 22:00 if the necessary protections are in place.

8.10 Second, the seriousness of the breaches is compounded by the fact that they followed previous and recent instances of Ofcom regulatory intervention and guidance specifically concerning Portland Compliance. Specifically, the breach occurred following publication of the Portland Adjudication concerning a breach of Rule 1.25 on Television X – the Fantasy Channel<sup>15</sup>. As part of this decision, the Committee found that: “the showing of ‘R18’-rated material at any time on an encrypted channel is...unacceptable and a serious breach of the Code”.

8.11 Third, the fact that the Programme was broadcast only about six weeks after the Portland Adjudication on Rule 1.25 was indicative of weak compliance processes.

### **Repeated breaches**

8.12 Breaches of Rules 1.2, 1.3, 2.1 and 2.3 were recorded against RHF by Ofcom concerning the broadcast of the Website URLs on the Red Hot Channels between 21 July 2008 and 28 August 2008. RHF had therefore also repeatedly breached the Code during this period.

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<sup>14</sup> Its relevance would go only to whether the content was equivalent to R18-rated material eg one exceptionally brief shot of an explicit sexual image may mean such content would not be considered as equivalent to R18-rated material.

<sup>15</sup> See footnote 5.

## Precedent

- 8.13 The Committee noted that with regard to RHF, there were no comparable sanction precedents concerning references to 'adult' websites containing unprotected R18-rated equivalent material.
- 8.14 In relation to Portland Enterprises, the Committee took account of three precedents which involved the encrypted broadcast of R18 equivalent material in breach of Rule 1.25 of the Code (or the relevant provisions in its predecessor code). The details of the cases are as follows: Playboy TV UK/Benelux Limited in respect of its service Playboy TV UK, £25,000 (published on 10 February 2005)<sup>16</sup>; Digital Television Production Company Limited in respect of its service XplicitXXX, £35,000 (published on 8 December 2006)<sup>17</sup>; and the Committee's Adjudication against Portland Enterprises in respect of its service Television X – the Fantasy Channel, £25,000.<sup>18</sup> The Committee noted that although each of these cases dealt with the broadcast of R18-rated equivalent material, each also took account of the various individual factors that were relevant. With the last case for example, only part of the £25,000 fine related to the breach of Rule 1.25. The Committee noted that in all these cases the breaches were considered so serious that they warranted the imposition of a financial penalty.
- 8.15 The Committee also carefully considered the other representations made by Portland Compliance on seriousness applicable to both RHF and Portland Enterprises. In summary, the Committee concluded that these arguments lacked substance and that the current contraventions of the Code clearly merited referral to the Committee and also a substantial financial penalty. For example:
- the breaches may not have been deliberate, but they were avoidable and resulted from weak compliance processes;
  - there were of course differences of fact between the breaches in the current case and those related to the 21 July Finding and the Portland Adjudication, but both of these previous cases provided Portland Compliance with specific regulatory guidance shortly before the present breaches occurred;
  - the complaints relating to the present breaches had, Portland Compliance suggested, originated not from members of the viewing public, but a commercial competitor to Portland Media.<sup>19</sup> The Committee's view is that the origin of a complaint is irrelevant to the seriousness of breaches of the Code; and
  - the broadcast output of licensees complied by Portland Compliance may be comparatively large but this is no excuse for serious breaches of the Code.

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<sup>16</sup> In this case the broadcaster was found in breach of sections 1.1 and 1.4(d) of Ofcom's (ex-ITC) Programme Code (See [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/adj-playboytv.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/adj-playboytv.pdf)).

<sup>17</sup> Breach of Rule 1.25 (See [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/xplicitxxx.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/xplicitxxx.pdf)).

<sup>18</sup> This decision concerned breaches of Rules 1.24, 2.1 and 2.3 of the Code as well as Rule 1.25 (See [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/portland.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/portland.pdf)).

<sup>19</sup> Portland Compliance had referred to a previous adjudication of the Committee, Digital Television Production Company Limited in respect of its service XplicitXXX, published on 27 July 2004. This stated that: "The Committee also noted that Ofcom had received no complaint from any member of the public about the 'freeview' broadcast on the 8 April 2004. Ofcom became aware of the issue through an informal approach from a competitor of DPTC". See Summary of Decision, paragraph 4 (See [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/adj\\_20040727.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/adj_20040727.pdf)).

- 8.16 In summary, in the Committee's opinion, referral of both the breaches of the Code by RHF and by Portland Enterprises to the Committee and the imposition of a financial penalty in both cases, were appropriate.

### **Deterrent**

- 8.17 In deciding on the appropriate size of a financial penalty in this case, the Committee considered it should be sufficiently significant to act as a deterrent against a repeat of these or similar breaches by RHF and Portland Enterprises. The Committee was also concerned that other licensees who choose to operate in the 'adult' market should understand that breaches of the Code of a serious nature could lead to the imposition of a statutory sanction. The Committee therefore considered a substantial financial penalty to be merited as regards each of RHF and Portland Enterprises partly for this reason.

### **Other factors**

- 8.18 In considering the appropriate size of a financial penalty for RHF and Portland Enterprises, the Committee also took account of other criteria relevant to each licensee.

#### RHF (website references)

- 8.19 There was no evidence that RHF made any financial gain from its repeated breaches of the Code; the amount of potential harm or offence, especially to children, was considerable; RHF was a licensee of some size with considerable turnover and qualifying revenue; the compliance errors were avoidable and under the control of Portland Compliance; the breaches continued for almost six weeks after notification of the 21 July Finding; and the audience watching a free-to-air 'slate' during day time would not have expected references to be broadcast to websites giving unrestricted access to R18-rated equivalent material.

#### Portland Enterprises (R18)

- 8.20 There was no evidence that Portland Enterprises made any financial gain from its contravention the Code; there was potential for offence to be caused by R18-rated equivalent content being shown, albeit under encryption; Portland Enterprises was a licensee of some size with considerable turnover and qualifying revenue; the compliance error in this case was avoidable and under the control of Portland Compliance; and the audience watching an encrypted 'adult' service would not have expected R18-rated equivalent material to be broadcast in breach of Rule 1.25.

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

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

- 8.22 The Committee took account of the fact that:

#### RHF (website references)

- there were repeated breaches of the Code by RHF allowing the Website URLs to be broadcast over a period of almost six weeks after notification of the 21 July Finding;

- these contraventions continued after Ofcom notified RHF of the 21 July Finding;
- bearing in mind that these breaches continued for such an extended period, senior management ought to have known they were occurring;
- there was a clear failure of internal compliance mechanisms to allow these breaches to continue for almost six weeks;

#### Portland Enterprises (R18)

- the fact that R18-rated equivalent material could have been broadcast at all in this case and its broadcast not spotted on transmission, points to the absence or ineffectiveness of the licensee's compliance procedures at that time as regards the labelling and play out of content;
- the management of Portland Media and its subsidiaries should have been aware that such a compliance failure could occur; and
- Portland Enterprises had given assurances to the Committee on a previous occasion – the Portland Adjudication case – that it had taken measures to improve compliance (see footnote 4).

#### **Mitigating Factors**

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

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

#### RHF (website references)

- with regard to the Website URLs, on being notified of the complaint, Portland Compliance took immediate if ineffective steps to restrict access to the R18-rated material on the websites to which the Website URLs led; and when it was notified by Ofcom on 28 August 2008 that the Website URLs were still being broadcast, Portland Compliance removed the Website URLs the same day;

#### Portland Enterprises (R18)

- with regard to *Bathroom Bitches*, on being notified of the complaint, Portland Compliance admitted the breach and took the steps described at paragraph 7.4 above to ensure that the Programme had been deleted from its programming servers and therefore would not be repeated; and
- in the wake of the breach involving *Bathroom Bitches*, Portland Compliance had given an undertaking not to show encrypted 'adult' content on any channel before 22:00.

#### RHF and Portland Enterprises

- Portland Compliance had cooperated with Ofcom's investigation; and

- Portland Compliance had taken various and further steps to improve compliance, including the appointment of a full-time compliance officer and the introduction of a new paperless tape labelling and transmission system.

## Conclusion

- 8.25 Licensees must ensure that they do not broadcast references to websites which give access to R18-rated equivalent material without appropriate protection. By taking action against broadcasters who broadcast such references, Ofcom fulfils its statutory duties to protect persons under the age of eighteen, and to provide adequate protection to members of the public from offensive and harmful material in television services.
- 8.26 The Committee underlines that Ofcom welcomes all measures taken by 'adult' websites to ensure adequate protection from explicit sexual material on their sites for members of the public and in particular children. In this case, however, although there were, for example, warnings to visitors to the sites, this protection was manifestly insufficient.
- 8.27 The broadcast of R18-rated equivalent material, or website URLs whose websites lead to R18-rated equivalent material, is totally unacceptable. It has the potential to cause offence to the audience and harm to under-eighteens, and children in particular, especially those who come across such material unawares.
- 8.28 All channels operating in the 'adult' market must take careful note of Ofcom's concerns about the need for robust compliance in this area. Should such cases be referred to the Committee in future, the Committee will continue to regard them very seriously.
- 8.29 Having considered the relevant facts as outlined above and all the representations made by RHF, Portland Enterprises, and Portland Compliance, the Committee decided to impose the following financial penalties, which it considered to be proportionate and appropriate in all the circumstances :
- on RHF, a financial penalty of **£25,000** (payable to HM Paymaster General); and
  - on Portland Enterprises, a financial penalty of **£27,500** (payable to HM Paymaster General).

## Content Sanctions Committee

Philip Graf  
 Anthony Lilley  
 Kath Worrall

18 May 2009