

Sanction: Decision by Ofcom

Imposed on Strictly Broadband Limited

For the provision of the On-Demand Programme Service “Strictly Broadband” (www.strictlybroadband.com) from 31 May 2012 to 1 August 2012.

Consideration of sanction
against:

Strictly Broadband Limited (the “Service Provider”) in respect of the On Demand Programme Service(s) (“ODPS”) “**Strictly Broadband**” (www.strictlybroadband.com) (the “Service”)

For:

Breaches of the Authority for Television On Demand (“ATVOD”) Statutory Rules for Providers of ODPS (the “ATVOD Rules”)

Rule 11: “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.”

Thereby being in contravention of section 368E(2) of the Communications Act 2003 (the “Act”).

Dates of contravention:

From 31 May 2012 to 1 August 2012

Decision:

To impose a financial penalty of **£60,000** (payable to HM Paymaster General).

Executive Summary

The Service and regulatory regime

1. For the reasons set out in this Decision, Ofcom has decided to impose a statutory sanction of **£60,000** on Strictly Broadband Limited.
2. The Service was at the time of the breach recorded herein an on-demand programme service (“ODPS”), notified to ATVOD under reference number ODPS00085. The Service Provider is Strictly Broadband Limited, whose ATVOD reference number is SP00052. The notification described the Service’s content as, *“A total of several thousand full length adult videos - the exact number varying as content is both added and removed from this site”*.
3. Such services are regulated under the terms of the Communications Act 2003 as part of a co-regulatory regime. Ofcom has designated ATVOD as the appropriate regulator in respect of editorial content for on-demand programme services.¹

Breaches of the ATVOD Rules: Rule 11 Guidance

4. ATVOD has published Rules and Guidance to ensure compliance of all notified ODPS with certain minimum standards in a document called “Statutory Rules and Non-Binding Guidance for Providers of ODPS”². Rule 11 of ATVOD’s Rules and Guidance reflects section 368E(2) of the Act and 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.”*
5. ATVOD’s Rules and Guidance state that ATVOD will interpret Rule 11 as requiring an effective Content Access Control System (“CAC System”) verifying the user is aged 18 or over where R18 equivalent material³ is made available. They state that confirmation of ownership of a card where the card holder does not need to be 18 or over (such as a Debit, Solo or Electron card) would not be sufficient for this purpose. They also state that if age verification does not take place each time the user returns to the service, further access to such R18 content when the user returns to the service should be controlled by the use of mandatory security measures such as passwords or PIN numbers.
6. ATVOD’s Preliminary View, issued to the Service Provider on 31 May 2012 set out ATVOD’s view that the Service Provider may, in respect of the Service, be in breach of section 368E(2) of the Act, as implemented by Rule 11 of the ATVOD Rules.
7. ATVOD considered that the Service Provider had breached Rule 11 by having no CAC system in place in relation to free material on the Service, and no effective CAC system in relation to paid access material on the Service. The Service provided R18 equivalent material without adequate measures to ensure that those under 18 would not normally see or hear it.

¹ Ofcom designated ATVOD as the “appropriate regulatory authority” to carry out certain functions under Part 4A of the Communications Act; under a designation published on the 14th September 2012 (“The Designation” see <http://www.atvod.co.uk/uploads/files/amended-designation140912.pdf>)

² As noted the document consists of both statutory rules and non-binding guidance which are collectively referred to in this document as “ATVOD’s Rules and Guidance” and where referred to as individual elements as “ATVOD’s Rules” or “ATVOD’s Guidance” as appropriate. See

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

³ “R18 equivalent” indicates sex works the primary purpose of which is sexual arousal or stimulation usually involving clearly unstimulated sexual activity. Further detail on what material is considered to be R18 or R18 equivalent is at paragraphs 30 - 31 below.

8. In particular ATVOD's investigations of the Service found:

a. R18 equivalent material available to view free without registration.

The homepage of the Service (which appeared without a warning page as to the nature of the site's content or other indication that the material was unsuitable for under 18s) included a significant quantity of free material including a banner window showing scrolling stills, a large number of thumbnail stills constituting links to available videos and movie trailers. These depicted R18 equivalent unsimulated sexual activity in explicit detail and could be viewed without registration or payment (i.e. there was no CAC System).

b. R18 equivalent material available to view free with registration.

On registration, users were provided with a free "ticket" to "rent" (i.e. view online) one full-length video for 14 days. Registered users could subsequently buy further "tickets". Videos included material which was clearly R18 equivalent material involving unsimulated sexual activity in explicit detail.

c. Lack of an effective Content Access Control system at point of purchase.

Purchases could be made by debit card or SMS text message, neither of which did ATVOD consider to constitute an effective CAC System. The material available to purchase was R18 equivalent and extensive.

9. In ATVOD's Final Determination⁴, issued to the Service Provider on 2 July 2012, ATVOD determined, in line with its Preliminary View and having taken due account of the Service Provider's representations, that Rule 11 of the ATVOD Rules had been breached.

10. ATVOD conducted two further investigations, one prior to issuing an Enforcement Notification in relation to the breaches dated 18 July ("Enforcement Notification") and another prior to referral to Ofcom for consideration of statutory sanctions. ATVOD concluded with each investigation that the Service continued to provide extensive open access to R18 equivalent without an effective CAC system.

11. On 13 August 2012, ATVOD wrote to Ofcom asking Ofcom to consider imposing a sanction on the basis that the Service was in breach of section 368E(2) of the Act (and Rule 11 of the ATVOD Rules) and the Service Provider had failed to comply with the Enforcement Notice by 2 August 2012.

12. The Service Provider had informed ATVOD on 1 August 2012 that it planned to transfer editorial responsibility for the service to a non-UK company. On 13 August 2012, ATVOD requested for further information and evidence in relation to that proposal to be provided within 21 days. ATVOD confirmed to Ofcom on 17 September 2012 that no response had been forthcoming, and it considered the Service remained an ODPS provided by the Service Provider⁵. The Service Provider replied to ATVOD on 4 October stating that the Service had been sold to an American company on 1 August 2012 and that the company Strictly Broadband Limited had been put into liquidation.

Ofcom's Sanction Decision

13. Ofcom considered whether the breaches are sufficiently serious, deliberate, repeated and reckless as to warrant the imposition of a statutory sanction on the Service Provider in this case. It concluded that the imposition of such a sanction was warranted.

⁴ http://www.atvod.co.uk/uploads/files/Determination_Strictly_Broadband_020712.pdf

⁵ <http://www.atvod.co.uk/regulated-services/scope-determinations/strictly-broadband>

14. **Having regard to the serious, repeated and reckless nature of the breaches and Ofcom's penalty guidelines, Ofcom decided it was appropriate and proportionate in the circumstances to impose a financial penalty of £60,000 on Strictly Broadband (payable to HM Paymaster General).**

Legal Framework

General

15. In discharging its functions, Ofcom's principal duties set out in section 3(1) of the Communications Act 2003 ("the Act") are to further the interests of citizens in relation to communications matters and the interests of consumers and to secure a number of other matters.
16. In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, to have regard to a number of other considerations including the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection (section 3(4)(h)).
17. Part 4A of the Communications Act 2003 ("the Act") is a statutory regime for the regulation of On-Demand Programme Services ("ODPS"). The statutory regime is a co-regulatory regime. Specifically, under section 368B, Ofcom may designate an "appropriate regulatory authority" for the purposes of any provision in Part 4A. Accordingly, Ofcom has designated ATVOD to carry out certain functions under Part 4A of the Act, but Ofcom has retained both concurrent powers and the backstop power to levy sanctions. ATVOD's original designation as the "appropriate regulatory authority" took effect on 18 March 2010, and an amended designation (the "Designation") was issued on 14 September 2012⁶.
18. Under section 368C(1) of the Act, the "appropriate regulatory authority" (which in this case is ATVOD as a result of paragraph 5(iv) of the Designation) is under a duty "to take such steps as appear to them best calculated to secure that every provider of an on-demand programme service complies with the requirements of section 368D". Section 368D in turn requires providers of on-demand programme services to comply with the requirements of sections 368E to 368H and these include, of particular relevance to the present case, a requirement under section 368E(2) 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."
19. In pursuance of its duty, and in accordance with its Designation, ATVOD published the ATVOD Rules and Guidance⁷ on 2 May 2012. The Rules are made for the purpose of securing that service providers comply with the relevant requirements of the Act. The Guidance is a non-binding aid to interpretation of those Rules.

Sanctions

20. The "appropriate regulatory authority" may do one or both of two things under section 368I(1) of the Act where it determines that the provider of an on-demand programme service is contravening or has contravened section 368D. Firstly, it may give an enforcement notice, which is a power designated to ATVOD under paragraph 6(xi) of the Designation. Secondly and additionally, it may impose a financial penalty in accordance with section 368J, such power being reserved to Ofcom, also under paragraph 6(xi) of the Designation. Where an enforcement notice issued under section 368I(1)(a) has not been complied with, it may impose a financial

⁶ <http://www.atvod.co.uk/uploads/files/amended-designation140912.pdf>

⁷ <http://www.atvod.co.uk/uploads/files/ATVOD Rules and Guidance Ed 2.0 May 2012.pdf>

Sanction 82(12) – Strictly Broadband

penalty under section 368I(9). Again, this power is reserved to Ofcom under paragraph 6(xi) of the Designation and must be exercised in accordance with section 368J.

21. Section 368J states that the amount of any financial penalty shall be that which the “appropriate regulatory authority” (in this case, Ofcom) considers appropriate and proportionate to the contravention in respect of which the financial penalty is imposed. It also states that the penalty must not exceed 5% of the provider’s “applicable qualifying revenue” as defined in section 368J(3) or £250,000 (whichever is the greater amount).
22. Ofcom published, on 15 August 2012, procedures for the consideration of statutory sanctions arising in the context of ODPS (the “Sanctions Procedures”)⁸. These set out the information Ofcom will provide when writing to a service provider setting out a preliminary view that sanctions may be appropriate, normally where Ofcom considers the service provider to have seriously, deliberately, repeatedly or recklessly contravened a relevant requirement.
23. The Procedures also set out the Service Provider’s opportunity to make written representations. The Procedures state that the time period for representations is 15 working days unless otherwise specified, but note that the time frame will depend on the nature and circumstances of the case and state that, in urgent cases, allowing 24 hours may be appropriate. Following the period for representations, the Procedures provide for either a disposal notification (where no sanction is considered appropriate), or a sanctions decision setting out what sanction Ofcom considers appropriate in the light of all the evidence and representations.
24. Ofcom has a duty under section 392 of the Act to publish a statement containing guidelines they propose to follow in determining the amount of any penalty imposed under the Act. Section 368J(2) requires that, in determining the amount of a penalty under section 368J, the appropriate regulatory authority (Ofcom) must have regard to that statement. The most recent version of Ofcom’s Penalty Guidelines was published on 13 June 2011⁹.

The Human Rights Act 1998

25. 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 on Human Rights (“the Convention”).
26. Article 10 of the Convention provides for the right to freedom of expression. It encompasses the Service Provider’s right to “impart information and ideas” and also the audience’s “right to receive information and ideas without interference by public authority” (Article 10(1) of the Convention). Such rights may only be restricted if the restrictions are: “prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary” (Article 10(2) of the Convention).
27. Ofcom must exercise its duty in light of these rights and not interfere with the exercise of these rights in broadcast services and ODPS unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

Ofcom’s Decision to Impose a Statutory Sanction

Details of the contravention(s)

28. As set out in paragraph 1.5 of the Sanctions Procedures the imposition of a sanction against an ODPS is a serious matter. Ofcom may, following due process, impose a sanction if it considers

⁸<http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/sanctions-procedures.pdf>

⁹<http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

Sanction 82(12) – Strictly Broadband

that an ODPS Provider has seriously, deliberately, repeatedly or recklessly breached a relevant requirement. Ofcom considers that the breaches in this case were sufficiently serious, repeated and reckless to warrant the imposition of a statutory sanction for the reasons set out below.

29. The first issue is whether the material included in the Service is, *“material which might seriously impair the physical, mental or moral development of persons under the age of eighteen”*, within the meaning of Rule 11. Ofcom has reviewed the evidence supplied by ATVOD as regards the nature of the material included on the Service, including that described in and annexed to its Preliminary View and Final Determination Documents.
30. The relevant material included, and includes, numerous depictions of unsimulated sexual activity for the purposes of sexual arousal or stimulation. In interpreting the question of whether such images may *“seriously impair the physical, mental or moral development of minors”* ATVOD’s Guidance states that:

“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 equivalent to content classified in that category.

31. In relation to this therefore Ofcom have considered the British Board of Film Classification’s (“BBFC”) “R18” classification guidance namely it’s:
- a. Description of *“Sex works (whose primary purpose is sexual arousal or stimulation)...”*;
 - b. Guideline that, *“Sex works containing clear images of real sex or other very strong sexual images will be confined to the ‘R18’ category....”*; and
 - c. Description of the R18 category as, *“.... a special and legally restricted classification primarily for explicit works of consenting sex involving adults. Films may only be shown to adults in specially licensed cinemas, and video works may be supplied to adults only in licensed sex shops.”*

It is clear, therefore, both in relation to free content available with and without registration and paid content, (e.g. still images illustrating programme content, previews of movies and full-length videos), that the Service included material equivalent to the BBFC’s classification of R18 and accordingly material which did not comply with the guidance in ATVODs Rules and Guidance.

32. Similarly, Ofcom also takes the view that it is sufficiently clear the material, *“....might seriously impair the physical, mental or moral development of persons under the age of eighteen.”* In adopting this view, Ofcom takes account of the following.
33. Ofcom has a statutory duty under Section 3 of the Communications Act 2003 to further the interests of citizens and consumers and in doing so, to have regard to the vulnerability of children. In fulfilling this duty, Ofcom (like the Government and ATVOD) endorse the adoption of a precautionary approach to protecting minors from the risk of harm from accessing R18 material on ODPS.
34. Considering again the relevance of the BBFC’s approach to its R18 classification, as referred to in ATVOD’s Rules and Guidance, the material would be classified by the BBFC as R18 on the basis that it should not be seen by those under that age (and only in restricted circumstances by those above it). That classification would take into account:

- a. the BBFC's guiding principle that, "... works should be allowed to reach the widest audience that is appropriate for their theme and treatment...."; and
 - b. its qualification of that principle, that in making a classification it will consider , "... whether the material may cause any harm at the category concerned. This includes any 'moral harm' that may be caused Especially with regard to children, harm may also include retarding social and moral development....."
35. In other words, material would be classified by the BBFC as R18 because of its potential for harm, including moral harm, to those under 18, who should accordingly not see it. In Ofcom's view the same principle would apply in its consideration of R18 equivalent material in relation to ATVODs Rules and Guidance.
36. The second issue is whether the material involved has nevertheless been, "*made available in a manner which secures that such persons [persons under the age of eighteen] will not normally see or hear it.*" Ofcom has reviewed the evidence supplied by ATVOD regarding the measures taken to restrict access to R18 equivalent material. Ofcom notes in particular at the time of ATVOD's review:
- a. The Service's home web page (www.strictlybroadband.com) could be accessed with no intervening warning page or any other indication that material may not be suitable for those under 18. The layout of the home page was designed to give unrestricted access to large quantities of R18 equivalent material. Such material included, a window showing scrolling stills, plus a large number of thumbnail stills constituting links to available videos. Both the scrolling menu and the thumbnail stills depicted R18 equivalent unsimulated sexual activity in explicit detail e.g. sight of fellatio and penetration, ejaculation on to face.
 - b. The Service's home web page included a link to a 'Parents' section which included text reading "If you are a parent and wish to prevent your children from viewing this site please visit one these sites:" This was followed by links to 'Netnanny', 'Surfwach', 'Cybersitter' and 'Cyberpatrol'. Although this gave parents or guardians some information about their options, it clearly did not fulfil the requirements of Rule 11 since it did not in itself secure under 18s will not normally see or hear R18 equivalent material.
 - c. Registration required users to provide an email address but did not require any proof of age. Registration with the site was free, enabled the viewer to then buy "tickets" to watch videos, and also gave access to one full-length free video. Again, these videos included R18 equivalent material.
 - d. Registered users could buy further tickets. Options to do so included payment by debit card or SMS text message. Neither of these methods constitutes an effective CAC System, since both debit cards and mobile telephones are available to under 18s (and indeed as widely held by under 18s) without proof of age requirements. The material available to purchase was R18 equivalent unsimulated sexual activity.
37. For the above reasons, Ofcom agrees with ATVOD that the Service was in breach of Rule 11.
38. Ofcom has considered the seriousness or otherwise of the breach and noted, in particular:
- a. The provision of R18 equivalent material appears to be the principal purpose of the Service, and consequently the breach allowed unrestricted access to a significant quantity of sexually explicit material delivered via a regulated ODPS (noting that the aim of relevant provisions in the Act is, as set out in the recitals to the Audiovisual Media Services Directive, to provide the regulatory protection audiences reasonably expect in relation to television-like on-demand services).

Sanction 82(12) – Strictly Broadband

- b. The breach is systemic, rather than one (or more) isolated event(s). It is a failure to meet requirements to have in place systems and procedures that should apply to the basic operation of the Service (for every user). It is also prolonged. The Service Provider failed to meet these requirements between 31 May 2012 and 1 August 2012.
 - c. ATVOD took a series of steps to make operators in the adult entertainment industry aware of the requirements of Rule 11. In particular, ATVOD's CEO, Pete Johnson, attended a meeting of the Adult Industry Trade Association ("AITA") on 13 June 2011 organised and chaired by the managing director of the Service Provider at which ATVOD's guidance on compliance with Rule 11 was discussed at length. ATVOD also invited ODPS service providers (including the Service Provider) to an industry seminar for providers of "adult" services. The managing director of the Service Provider accepted the invitation, but did not attend the seminar on 27 January 2012.
 - d. It appears clear that the Service Provider knew ATVOD's requirements. In a letter to ATVOD dated 29 March 2012 the managing director of the Service Provider, writing as a representative of AITA, acknowledged what ATVOD's requirements are in relation to Rule 11. The letter expresses concerns about the economic impact of complying with ATVOD's requirements, stating, *"...the requirement to age-verify before even photographic sales can be seen will simply drive most of our customers to sites outside ATVOD's scope. The one company to fully implement these rules to date, [name of company redacted], has seen an 80% fall in new business, and a 28% fall in overall revenue, since they complied. As I'm sure the board will appreciate, few businesses can survive such a decline, especially in the current economic climate."* The managing director of the Service Provider was subsequently invited to and attended an ATVOD Industry Forum meeting on 23 May 2012.
39. For the above reasons Ofcom considers that the breaches in paragraph 36 were serious and repeated and that the course of conduct as described in paragraph 38 above indicates the breaches were reckless.

Comments on any issue raised by the ODPS provider that is material to the case

- 40. The Service Provider informed ATVOD on 1 August 2012 that it was in the process of "transferring editorial responsibility" for the service to a non-UK company. On 13 August 2012, ATVOD requested for further information and evidence in relation to that proposal to be provided within 21 days; the Service Provider replied on 4 October 2012, a significant time after the deadline set by ATVOD.
- 41. Ofcom notes that its understanding is that the Service Provider is or was claiming to be about to stop providing an ODPS as that is defined in the Act prior to entering liquidation (although it may continue to provide an on-demand service subject to the laws of another country). Specifically, one of the five criteria in section 368A(1) of the Act, all of which must be fulfilled for a service to constitute an ODPS, states, *"that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive"* (section 368A(1)(e)). Ofcom notes that this is not precisely the same as "transferring editorial responsibility". The reference to *"that person"* is to the person making the service available under section 368A(1)(d), and the subsection must be read in parallel with Article 2 of the Audiovisual Media Services Directive, which makes it clear that the location where editorial decisions are taken is only one aspect relevant to jurisdiction.
- 42. The Service Provider contacted Ofcom on 9 October 2012 confirming that the business had been transferred to a non-UK company from 1 August 2012 and was itself entering voluntary liquidation. The Service Provider itself remained under UK jurisdiction for the purpose of imposing a financial penalty in relation to provision of the Service up to 1 August 2012. Ofcom considers that a financial penalty is still be appropriate given the factors referred to, but this would be a penalty under section 368I(1)(b).

Service Provider's Representations

43. Following written confirmation from the Service Provider on 9 October 2012 that it had entered liquidation, Ofcom corresponded with the appointed Liquidators.
44. Ofcom sent the Liquidators its Preliminary View on 12 October 2012 and invited the Liquidators to attend an oral hearing and to seek advice from the managing director of the Service Provider at the time of the breach. The Liquidators informed Ofcom that they did not wish to make any representations and did not intend, nor were obliged, to seek the views of the aforesaid director. As such, Ofcom proceeded to make the Decision without written or oral representations from the Service Provider.

Details of relevant cases on which Ofcom has already adjudicated

45. Ofcom does not consider it has adjudicated previous relevant cases.

Details of the Service Provider's recent compliance history

46. Given the relatively recent introduction of a regulatory regime for ODPS, there is little relevant history in relation to the Service Provider.

Factor's taken into account in determining the amount of penalty

47. Under section 368J(1) of the Act, the amount of the penalty must be such as Ofcom determines to be appropriate and proportionate to the contravention for which it is imposed. The maximum level of financial penalty that can be imposed on a Service Provider is an amount not exceeding 5 per cent of the provider's applicable qualifying revenue or £250,000, whichever is the greater.
48. Qualifying revenue is calculated by adding together revenue gained from advertising, sponsorship and subscription; and any charges made for the provision of programmes included in that service.
49. ATVOD does not currently collect qualifying revenue figures. In 4.17 of its "Consultation on regulatory fees for on-demand programme services for the period 1 April 2012 to 31 March 2013" it explains that, "... *at present, given the nascent state of the VOD industry, service revenues are often small or non-existent, and profits even more so. In addition, a number of ODPS are provided as part of a package which includes other services (e.g. linear TV services) and the particular portion of revenue or profit associated with the ODPS itself is not necessarily clearly defined or significant. At present there is no reliable or easily verifiable method of measuring the revenue or profit associated with a particular ODPS*". Consequently, the maximum level of penalty that can be imposed in this case is £250,000.
50. The Penalty Guidelines state that "*Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that we will act as an effective incentive to compliance, having regard to the seriousness of infringement.*" In reaching this decision, Ofcom has taken full account of the need to ensure that any penalty acts as a deterrent and has also taken account of the specific factors set out (non-exhaustively) in the Penalty Guidance, as well as any other factors we consider may be relevant.

The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants.

51. ATVOD set out in its Rules and Guidance that it would adopt the "precautionary approach" to ensure that children remain adequately protected under ATVOD Rules. Ofcom has made it clear that it supports ATVOD's approach. As set out in ATVOD's Guidance "material which might seriously impair the physical, mental, or moral development of minors" when provided as part of

Sanction 82(12) – Strictly Broadband

an on-demand programme service may include content that has been classified 'R18' by the British Board of Film Classification, or material equivalent to content classified in that category.

52. Government has confirmed that there is a good case that the existing Regulations require a precautionary approach and requested that Ofcom and ATVOD take any steps necessary 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.
53. For these reasons, and as set out earlier in this document, Ofcom is minded to view the material included as part of the Service as having the potential for harm.

The duration of the contravention.

54. Since the Service continued until 1 August 2012 to include material of the kinds described in ATVOD's Preliminary View and Final Determination, and continued to make use of inadequate measures to restrict access to it by those aged under 18 (as set out above), Ofcom considers the contravention to have continued from the date of ATVOD's Provisional View on 31 May 2012 until 1 August 2012.

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

55. Ofcom does not have evidence to quantify any financial gain the Service Provider may have made from the breaches of Rule 11. However, the letter of 29 March and referred to above indicates the Service Provider expected financial loss would result were it to comply with Rule 11, due to loss of customers.

Any steps taken for remedying the consequences of the contravention.

56. Ofcom is not aware of any steps having been taken to remedy the consequences of the contravention. The Service Provider's response to ATVOD's Determination that it was in breach of Rule 11 appears only to have been to indicate its intention to transfer editorial responsibility for the Service to a non-UK company rather than to take steps to comply with the substantive requirements of Rule 11 and/or to remedy the breach of that rule.

Whether the regulated body in breach has a history of contraventions.

57. This is the first recorded breach in relation to the Service Provider's provision ODPS.

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

58. We have detailed the process followed by ATVOD in reaching its Determination, and the opportunities given to the Service Provider to bring the Service into compliance with Rule 11. We do not consider appropriate steps were taken by the regulated body to prevent the contravention, and consider the breach to have continued until 1 August 2012.

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

59. We consider, given that it was systemic and in light of the discussions between ATVOD and the Service Provider and the opportunities given to the Service Provider to bring the Service into compliance, that the Service Provider was at best reckless as to the contravention and may have deliberately allowed the breaches to continue.

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

60. Ofcom considers that no steps were taken by the Service Provider to comply with the substantive requirements of Rule 11 at any stage. The Service Provider's response to ATVOD's Determination appears to have been to indicate its intention to transfer control of the Service to outside the UK, but it did not respond to a request from ATVOD to provide evidence as to whether and when this was done.

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

61. As noted above, ATVOD has not calculated the Service Provider's qualifying revenue. However, the Service Provider has provided turnover figures for the Service for the period January 1 2010 to 31 December 2010 of £616,566.
62. Ofcom considers that the financial penalty imposed in this case is proportionate, taking into account all of the factors outlined above, the turnover of the Service Provider and the need to ensure that any penalty imposed acts as a deterrent to future contraventions of the ATVOD Rules.

Co-operation

63. In accordance with the Penalty Guidelines, Ofcom may increase the penalty where a Service Provider has failed to cooperate with Ofcom's investigation.
64. The Service Provider failed to provide ATVOD with the relevant information regarding the jurisdiction of the Service within the set deadline; however they did provide that information and further information regarding the liquidation of the company. As such, Ofcom does not consider it appropriate to increase the penalty on account of a failure to cooperate in this case.

Conclusion

65. Ofcom concluded that the breaches of the ATVOD Rules by the Service Provider were serious, repeated and reckless and therefore merited the imposition of a financial penalty in accordance with section 368J of the Act.
66. Ofcom considers the financial penalty to be appropriate in relation to the seriousness of the breach and in relation to the deterrence it will represent to the VOD industry from committing similar breaches in the future. Ofcom considers that, to the extent it represents an interference with the Service Provider's rights to freedom of expression, its view is formed in accordance with the relevant provisions of the law (on the bases set out above). Likewise, that the penalty is proportionate for the reasons given and thereby is necessary (and no more than necessary) to pursue a legitimate aim, namely of protecting the physical, mental or moral development of persons aged under 18 in accordance with the statutory scheme set out above.
67. Ofcom considers that the Service Provider would still have been responsible from the date on which the breach began to the date it relinquished control, and a financial penalty would still appear to Ofcom in the circumstances to be appropriate and proportionate.
68. In view of the factors set out above, Ofcom deemed that the breaches were sufficiently serious to warrant the imposition of a statutory sanction of **£60,000** on Strictly Broadband Limited.

5 December 2012