Response to BBFC consultation on Age Verification

I have many concerns with the wording and intention both of the Digital Economies Act and the BBFC proposals for how they should be implemented. I have attempted to cover the major concerns here in brief.

Privacy
The privacy protections in the act and the consultation appear wholly inadequate. We are speaking here of creating a nation-scale database of people’s entirely legal, but also entirely private, viewing habits. Suicides in the aftermath of the Ashley Madison hack http://www.bbc.co.uk/news/technology-34044506 and the concerns about subversion of electoral processes by data collected by Facebook and Cambridge Analytica should surely serve as stark warnings that this aspect of the regulations must be looked at again. This is especially true given that the business model of some of the providers implementing large-scale age verification solutions is based on advertising, and therefore relies heavily on correlating and tracking visitors as they navigate online to target those adverts. I believe most people have a reasonable expectation of privacy when they visit a legal adult entertainment website. How is that expectation to be met if a secondary service provider (the age verifier) is correlating their porn viewing habits with their other online activity in order to cover their costs and make a profit?

Right To Appeal
Little mention is made in the proposals of rights of appeal. This procedure needs to be laid out in detail, with an independent appeals authority, and a light-weight system for quick response to prevent unwarranted censorship and the closure of businesses pending appeal.

Previous attempts at internet regulation in the UK included ATVOD deciding that a one-man-band operation was somehow operating a television on demand service in competition with Sky and the BBC. The appeals procedure was unfair in that the service was required to be taken down pending appeal, ensuring complete loss of customers so that even once a successful appeal was made a year later, the business in question had already collapsed. (The ATVOD procedure was so flawed that the organisation was wound up).

Given that the new regulations treat the digital equivalent of the local corner store on the same footing as Pornhub and Playboy, what will the appeals procedure be? What consideration will be given to allowing the continued existence of the disputed website pending appeal? What guarantees will be made on the independence of the appeals panel and the speed of the process?

The Scale of the Operation
There are 1.8 billion websites in the world (http://www.internetlivestats.com/total-number-of-websites/ ) of which 200 million are claimed to be currently active. In principle, each of these must be at least visited by BBFC inspectors to ensure that they are either non-adult in nature, non-commercial (presumably including any advertising), or if they do contain some commercial adult material, hold them behind a compliant age verification wall.

No serious consideration seems to have been given as to how a small organisation like the BBFC will be able to apply these regulations in anything like an even-handed manner given the scale of what is proposed.
Will automated or semi-automated searches be used to locate potentially infringing websites? This immediately falls foul of the Scunthorpe Problem (named after automated blocking by AOL’s profanity filter prevented people from sCUNThorpe from making accounts on AOL, https://en.wikipedia.org/wiki/Scunthorpe_problem).

The BBFC propose to start with sites which are “most frequently-visited, especially by children”, which seems at face value to be sensible. Unfortunately, on reflection, both halves of the sentence are problematic. It is hard to establish traffic levels robustly, and how on earth are the BBFC proposing to identify sites visited by children in an ethical manner? And all websites are available worldwide, unless blocked by national level firewalls.

All websites serve British customers and there is no reliable way of a small business in (say) Nevada choosing to disallow visitors from Britain. They can decline to admit customers into paid areas on the basis of credit card address details, but that’s never been any sort of problem anyway. At worst they may need to disallow the tiny fraction of payments made by debit card rather than credit card. This may be an issue to sites in Germany where credit cards are less used, but in the English-speaking world, credit card payment is almost universal and age verification to access the paywalled area is already the de facto standard (and has been for two decades).

The problem is trailers and the free area. There is no way for the Nevada producer to show legal-in-the-USA preview material to US customers but require UK customers to age verify first. Indeed, age verification systems required for UK compliance may be illegal in other jurisdictions given the lack of privacy protections. How can a small business obey mutually contradictory regulations coming from different countries?

Geotagging methods are haphazard and unreliable at best, and are also immediately defeated by any form of redirection ranging from simply telnetting to a machine in Spain and popping up a window back on your local machine, through virtual private networks (often used for legitimate purposes such as logging into commercially-sensitive corporate intranets while an employee is off site) to freely-available tools like TOR.

How is a small business operator in Nevada meant to comply with local and UK regulations if they cannot adjudicate the country of origin of an incoming HTML request? Doing so is beyond the capabilities of Netflix and the BBC, so what hope does a Swedish webmaster or a part-time performer in Amsterdam have of complying?

And why should one small business in Nevada have to endure the commercial burden of obeying UK regulations and paying to age-verify his potential customers so they can view his previews when his neighbour, whose site the BBFC have decided does not qualify as “frequently visited” and therefore do not propose to inspect, does not? Both will very likely be doing their best to comply with their local regulations already, but one is suddenly landed with a disproportionate foreign regulatory burden and the other is not.

They cannot even choose to age-verify only potential customers coming from the UK, since there is no robust method of geo-tagging by IP address that is not trivially defeated by redirection.

What in fact is likely to happen is what happened with ATVOD- site operators will keep their heads down in order to try to avoid notice, the regulator will pick on a small fraction of
operators essentially at random, and impose regulatory burdens on them which are not suffered by their competitors, putting the unlucky few at a serious competitive disadvantage, likely putting them out of business pending appeal.

The largest players who can afford to handle the requirements of verification on an industrial scale will rub their hands together in glee at the hope of putting their competitors-the small, diverse, boutique adult producers we’d presumably like to encourage-out of business.

The BBFC document simply fails to appreciate that the scale of the problem-200,000,000+ active websites in the world-is out of all proportion to anything the organisation has ever dealt with before.

For example, in 2016 the BBFC classified 1075 cinema films, 8201 videos and 74 music videos. That's of order of 30 classifications a day. Websites are currently being created at the rate of 1 per second- 86,400 a day.

To enforce the regulations in an even-handed manner, every single one of these really ought to be inspected. And revisited regularly to prevent change of use, since unlike cinema films which are static objects (a film is not re-edited on a daily basis) websites can and do change dynamically all the time. Otherwise unscrupulous operators can just register “www.MySewingWebsite.com” and use it to distribute porn- and if the regulators do chance upon it, will just switch domains to “www.OurHillwalkingWebsite.com”.

Estimates vary, but as many as 4% of websites might include adult entertainment, and therefore need more than a cursory inspection.

How do the BBFC proposed to organise the inspection of websites in a consistent and fair manner? At the very least, thresholds should be placed to exclude micro-businesses from unwarranted burden on the basis of hypothetical risk. It’s not clear what a good and robust set of metrics for those standards would be, but excluding businesses below a certain number of employees, a certain turnover threshold, or some metric based on unique visitors per day would be a start.

We need something more rigorous and even-handed than “most frequently-visited” as a criterion and the BBFC needs to set this out publicly and transparently.

**Metrics And Proportionality**

The act and the BBFC document appear to treat it as a given that viewing human nudity and human procreation when under the age of 18 is inherently harmful. Studies in this area are limited, with small sample sizes, questionable methodologies and contradictory results.

What steps are being taken to survey the extent of the problem in an impartial and rigorous way? We need data on the current extent of the problem, then we need metrics to quantify the reduction in harm as the regulations are rolled out, in order that we can evaluate their effectiveness. What metrics are proposed?

Since the UK’s proposed solution is the imposition of ISP-level censorship, financial censorship, and potentially large fines, hadn’t we better ensure that our approach is actually working, and that the harm caused to freedom of speech and the chilling effect of
self-censorship on already marginalised sexual minorities like the LGBT community and consensual BDSM practitioners sharing best practices online is actually accompanied by a positive effect on the problem the regulations are seeking to tackle?

Indeed, what steps are being taken to monitor the negative consequences of the regulations on freedom of expression and the provision of educational material by sexual minorities? Educational material is often made widely available on sites which also generate their income by sales of adult entertainment. “How to tie safely” videos on bondage websites, for example, and safe sex advice on gay sites. What attempt has been made to assess the chilling effect of regulation on these sources of information? Will they need to be placed behind age verification walls? A highly retrograde step if so, surely?

In short- what metrics are to be used to assess success, and to assess predicted negative consequences? How will it be determined whether these regulations are disproportionate or not?

**Accountability**

The BBFC annual report mentions that the organisation regularly conducts public consultations to ensure its guidelines stay up to date with public expectations. However, recent legal cases such as that of Michael Peacock ([https://en.wikipedia.org/wiki/R_v_Peacock](https://en.wikipedia.org/wiki/R_v_Peacock)) show that at least as far as obscenity goes, the public’s view is significantly different from that of the authorities.

Given that the BBFC is now to be given sweeping powers to block free speech in the UK on the basis of subjective determinations of what constitutes 18-rated material or 18-R material, there needs to be a much more wide-ranging, active, ongoing and transparent procedure to keep these regulations up to date. What is the BBFC proposing to do in this area?

Remember that the scale of the operation is MANY orders of magnitude greater than anything the BBFC has previous tackled. The potential impact on free speech is therefore also much more severe, and it seems doubtful that current consultation structures will be adequate for the scale of the new endeavor.

If the BBFC is going to become the arbiter of free speech in the UK, are they to come within the remit of laws such as those governing freedom of information requests?

**Specificity of Rules**

In the past, the BBFC has issued broad guidelines on what is likely to be considered at each level of classification, but the final classification of any work has always been made after viewing by human beings at the BBFC.

Detailed guidelines as to precisely what can and cannot be shown have never been issued.

Unless the BBFC is to recruit tens of thousands of new staff, they are going to be unable to inspect any meaningful fraction of adult websites. Given the typical scale of releases in the adult industry (many producers release a new product every day) it will not be possible for the BBFC to act in any advisory role in a meaningful way either.

Producers are left to guess what is and isn’t acceptable for publication on any given distribution channel. The most critical point where this matters is in knowing what material
is acceptable to distribute outside the age verification wall, and what must be restricted to within the wall.

For example, here are two still frames, drawn from trailers whose contents are rather similar.
Given a copy of the BBFC guidelines, can one determine if it is it acceptable for the producer of an adult entertainment product to show the above stills on their free area or for publicity on public platforms such as Twitter? Or for the trailers from whence they come?

One cannot.

I chose these two examples with care to illustrate a problem caused by the lack of specificity in guidelines. Both show an attractive actress being tied up, against the will of the character they are playing (but of course consensually and professionally in a safe working environment in reality).

The top still is from an American bondage producer, and would presumably be rated 18, or possibly 18R, or possibly characterised as extreme porn because the actress has all four limbs bound and is gagged... even though no actual sexual activity takes place, and as far as I know no nudity is featured either (I haven't purchased the full film, just watched the trailer).

The bottom still is from the movie RED, rated 12 by the BBFC.

Which rating would apply to the trailer for the American bondage film? Extreme porn (illegal and banned), 18, 18R or rated 12? Would publishing it be permissible for advertising, and for publication on a website in a free preview area outside the age verification area?

If not, why not, since the above clip for RED is freely available on YouTube, and in any case was drawn from a movie which was only rated 12?

More critically, how could any producer possibly follow the rules and only publish acceptable material on their free preview area and publicity, if the rules are not detailed enough that one cannot make this determination given the above two images and a copy of the rules?

Given that a producer must make this decision for EACH new release, on a daily basis, how can they possibly attempt to ensure that their adverts, trailers and free preview areas are compliant with the laws without extremely detailed, unambiguous guidelines?

It is not a solution to require that all advertising or previews or trailers be behind age verification walls. The cost of age-verifying a viewer will either be non-zero (for a reputable age verification company making its money from providing a service) or zero, but with a stiff cost to the end consumer in terms of loss of privacy and risk of exposure of intimate details.

The average ratio of customers to viewers in any industry is high. Typical sales of fetish videos are in the tens to hundreds of units; typical followings on Twitter are in the tens of thousands. If it costs £1 to verify the age of each of 10,000 viewers to sell to 100 customers at £10 a unit, all small producers will be put out of business- the cost of age verification will rapidly exceed their turnover, by a factor of 10. Or they must turn their potential customers over to the mercy of advertising-based age verification operators, a dubious and unappealing proposition at best.
Society acknowledges this in mainstream films- we allow 12-rated trailers for 18-rated films, and sell 18-rated films in supermarkets with suggestive but allowable photographs on the cover.

To take a second example, the photograph above would be considered pretty extreme on a lot of BDSM websites- especially the knife held in the girl’s hand, and what looks like a trail of blood on her shoulder.

The implication of violence, the blood, the (non-revealing, but clear) nudity... all would suggest an extreme porn image.

The producer of such an image might certainly consider keeping it behind an age verification wall, rather than putting it on the free area as a preview. And they might even self-censor, being unable to be sure whether or not it counts as extreme porn.
Actually, this image was on display at my local Tesco... at knee height.

It's the cover for a 15-rated movie, and was visible to passing toddlers.

As far as I know, there was no harm caused to anyone by its publication.

So if we are happy with this on the shelves at Tesco (which we should be), surely we should be happy with images like this on social media and as posters and previews for adult sites?

I defy anyone to classify the image according to BBFC guidelines and tell me whether or not it would be acceptable outside the age verification wall on an adult website, with reasoning that an impartial observer would be able to follow and verify.
Finally, I would just like to address the implicit idea that producers of adult entertainment are in any way targeting their products towards minors, as this seems to be an area of great misunderstanding.

Adult producers are also parents, carers, citizens, tax-payers and consumers. They have moral standards every bit as high - and occasionally of course as low- as everyone else’s. From a moral point of view, few want minors to be consuming their wares, any more than the producers of “Deadly Virtues” want toddlers to watch their horror film. But, like the producers of “Deadly Virtues”, they must showcase their wares in their shop windows in order to generate sales and make a living. “Deadly Virtues” did so in Tesco. Producers do so online on their websites in free areas and with trailers.

All reasonable producers would be willing to abide by sensible, consistent restrictions as to what they can display in their shop windows. They’d even do their best to do so country-by-country, despite the impossibility of verifying the geographical location of an incoming HTML request. (No such guidelines exist, certainly not for the UK). They keep the full versions of their products behind paywalls because that is how they make their money.

Payment for access to adult entertainment is overwhelmingly made by credit card, not debit card. Consumers are mostly savvy enough to know that all online purchases should be made via credit card, because of the greater consumer protection they provide. Existing paywalls are probably not perfect, but I would suggest that they already exclude almost all minors and could be tightened up if studies were to reveal that payment by minors using debit cards was actually a significant factor.

But note that minors would make extremely poor customers for adult producers. They have little disposable income, any payment methods they have are either illicit (stealing Dad’s credit card) or of limited use online (debit cards), and they likely don’t have the privacy at home to be able to consume adult entertainment. And since the vast majority of producers are reasonable human beings, the idea of kids watching their products is anathema.

The idea that producers are actually TRYING to sell to minors is far-fetched from both a moral and financial point of view. No producer has the slightest interest in minors viewing their material. They accept that some children may happen to view their preview material, as is the case for the extreme porn BDSM and blood image on the cover of Deadly Virtues and would be willing to work within a reasonable framework of restrictions on trailers, were any to be produced.

So how are kids going to view the full versions of these producers’ adult entertainment products? What exactly is the problem here? Where does all this free porn come from?

1) By stealing Dad’s credit card. Not likely to last long, and surely a parental issue not a governmental one. Age verification is of no help here, since if a card can be stolen, so can age verification credentials.

2) By getting access to material already legitimately purchased by an adult in the household. Again, a purely parental matter, and one which age verification online does not address.

3) By using their own debit card on the small number of sites which accept them. Possible, but are there any studies which indicate that this happens in significant numbers? Age verification would help here, but it is using a sledgehammer to crack a nut.
4) By viewing the material stolen and uploaded to a “Tube” site where it is made available for free to anyone.

This is the elephant in the room. Producers have been fighting an ongoing war against the tube sites for a decade or more, trying to stop copyright violation and piracy. Pirates post copies of a producer’s material to tube sites without authorisation, giving away free what was previously only available behind a paywall.

THAT is how children access porn. All other channels are insignificant.

Perhaps if existing laws regarding copyright violation were used to prosecute those who operate and distribute stolen material from legitimate producers, tube sites would not be able to continue to steal traffic from paywalled sites by giving away their copyrighted material for free.

These sites have grown large on the backs of pirated material, so large that some of them are now in fact also legitimate producers. But their business model still revolves around advertising, selling visitor’s eyeballs to advertisers.

It is they who have an incentive to display material to minors, because more visitors means more ad clicks which means more money. Unlike the original producer, their business model depends only on attracting more visits, not on convincing someone to pay for an adult entertainment product behind a paywall.

It is they who have an incentive to steal material, sucking in more visitors who previously would have had no option but to go behind the legitimate original producer’s pay wall to view the products. They put cosmetic “complain and we’ll take it down” measures in place so they can claim to be resisting piracy, but all adult entertainment producers know this is a sham. Videos get taken down on a complaint but are back up within hours. Many original producers are forced to hire specialist firms to try to combat the flood of piracy, and are losing the battle.

These sites are parasites on the legitimate industry of producing legal adult entertainment and it is they, not the original producers, who have created whatever problems might result from the free availability of adult entertainment online.

If one were to level the playing field by prosecuting the copyright infringement, removing all the stolen material from tube sites so it once again becomes available only behind existing pay walls, the problem of free porn would largely go away.

If one is serious about tackling minors viewing porn, prosecuting the pirates who make copyrighted material illegally available online would be a good start.

And being wary of allowing the most egregious example of a Tube site company built on piracy, MindGeek, to perform age verification and collect data on the private and intimate habits of a third of the UK population would probably be a wise second step.
CONCLUSION
If we are going to insist on these ill-considered and draconian censorship measures to combat a problem whose existence is questionable, the least we can do is to come up with some reasonable and consistent guidelines for producers of legal adult entertainment to follow in order to know that they are within the law.

Furthermore, we must put in place swift and fair appeals procedures (to avoid putting legitimate small businesses out of business whilst enduring bureaucratic delays). We must insist upon transparent and wide-ranging public consultations on the standards, and produce rigorous, unambiguous guidelines for what is acceptable outside age verification walls and what has to be placed inside.

We must ensure the privacy of the estimated 20 million UK citizens who are likely to avail themselves of age verification systems. We must institute proper scientific studies into the harm caused to children by viewing different sorts of adult entertainment, and studies to assess any possible negative impacts on free speech and the chilling effects of the regulations on minority communities.

None of these concerns are adequately addressed by the recent BBFC proposals.