

Ofcom Broadcast Bulletin

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Introduction

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives¹, Ofcom must include these standards in a code or codes. These are listed below.

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes, as well as licence conditions with which broadcasters regulated by Ofcom are required to comply. These include:

- a) Ofcom's Broadcasting Code ("the Code"), which, can be found at:
<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>.
- b) the Code on the Scheduling of Television Advertising ("COSTA") which contains rules on how much advertising and teleshopping may be scheduled in programmes, how many breaks are allowed and when they may be taken. COSTA can be found at:
<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/advert-code/>.
- c) certain sections of the BCAP Code: the UK Code of Broadcast Advertising, which relate to those areas of the BCAP Code for which Ofcom retains regulatory responsibility. These include:
 - the prohibition on 'political' advertising;
 - sponsorship and product placement on television (see Rules 9.13, 9.16 and 9.17 of the Code) and all commercial communications in radio programming (see Rules 10.6 to 10.8 of the Code);
 - 'participation TV' advertising. This includes long-form advertising predicated on premium rate telephone services – most notably chat (including 'adult' chat), 'psychic' readings and dedicated quiz TV (Call TV quiz services). Ofcom is also responsible for regulating gambling, dating and 'message board' material where these are broadcast as advertising².

The BCAP Code is at: www.bcap.org.uk/The-Codes/BCAP-Code.aspx

- d) other licence conditions which broadcasters must comply with, such as requirements to pay fees and submit information which enables Ofcom to carry out its statutory duties. Further information on television and radio licences can be found at: <http://licensing.ofcom.org.uk/tv-broadcast-licences/> and <http://licensing.ofcom.org.uk/radio-broadcast-licensing/>.

Other codes and requirements may also apply to broadcasters, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant licensees must provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code. Links to all these codes can be found at:
<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/>

It is Ofcom's policy to describe fully the content in television and radio programmes that is subject to broadcast investigations. Some of the language and descriptions used in Ofcom's Broadcast Bulletin may therefore cause offence.

¹ The relevant legislation is set out in detail in Annex 1 of the Code.

² BCAP and ASA continue to regulate conventional teleshopping content and spot advertising for these types of services where it is permitted. Ofcom remains responsible for statutory sanctions in all advertising cases

Standards cases

In Breach

Advertisements for Union Terrace Garden Referendum, Aberdeen

Northsound 1, 13-26 February 2012, various times

Northsound 2, 13-26 February 2012, various times

Original 106, 16-29 February 2012, various times

Introduction

Northsound 1 and Northsound 2 are local radio stations in Aberdeen. The licences for the stations are held by Northsound Radio Ltd (“Northsound”) which is owned by Bauer Media (“Bauer”).

Original 106 is also a local radio station serving Aberdeen. The licence for Original 106 is held by Original FM Aberdeen Ltd (“Original”). (Northsound and Original together: “the Licensees”).

Union Terrace Gardens is a park in the centre of Aberdeen. A plan to redevelop the Gardens was put to a local “referendum” – i.e. a local poll held under the terms of s.87 of the Local Government (Scotland) Act 1973. The poll sought responses from the public on the alternatives of retaining the Gardens or of adopting a particular development scheme, the City Garden Project.

The redevelopment scheme was a controversial matter in Aberdeen and therefore the subject of considerable local debate and discussion.

Ofcom received four complaints about radio advertising on the three stations, seeking to persuade listeners to vote in favour of the redevelopment.

In the course of our seeking comments from the Licensees it became apparent that three different advertisements supporting redevelopment had been placed by the Vote for City Garden Campaign. It also emerged that another advertisement – opposing the redevelopment and placed by Mr Mike Shepherd – had also been transmitted by Northsound 1 and Northsound 2.

Political advertising is prohibited on television and radio under the terms of section 321 of the Communications Act 2003 (“the Act”) and by Section 7 of the BCAP Code: the UK Code of Broadcast Advertising (“the BCAP Code”). The relevant extracts from the Act and the BCAP Code are given at the end of this Finding.

‘Political’ in this context has a wider meaning than ‘party political’ and embraces, for example, issue campaigning and seeking to influence public opinion on controversial matters. The terms of the prohibition are explained in greater detail in the Decision section of this Finding.

The BCAP Code, formerly Ofcom's Advertising Standards Code, is now for most matters enforced by the Advertising Standards Authority (Broadcast) Ltd (“ASA”). Ofcom, however, remains responsible under the terms of the Memorandum of Understanding between Ofcom and the ASA for enforcing the rules on ‘political’ advertising.

The BCAP Code also contains a requirement in Section 1 that advertising concerning certain types of material must be centrally cleared by a specialist industry body, the Radio Advertising Clearance Centre (RACC). One of the classes of material that must be so cleared is “matters of public controversy including matters of a political or industrial nature”.

The advertisements

The Vote for City Garden Campaign advertisements were as follows:

Vote for City Garden Campaign advertisement number 1:

- | | |
|-------------------|--|
| Female Voiceover: | <i>Why are you voting yes to the City Garden Project?</i> |
| Man 1: | <i>I'm voting yes because it's going to give us twice as much green space in the city's heart.</i> |
| Man 2: | <i>I'm voting yes because there'll be a great new arts centre and concert arena to attract big names, new events and festivals to the city.</i> |
| Woman 1: | <i>I'm voting yes because of the £182 million of investment to the city centre – and it's all coming from grants and private donations so it won't cost the taxpayer a penny.</i> |
| Woman 2: | <i>I'm voting yes because of the jobs it's going to create for Aberdeen.</i> |
| Female Voiceover: | <i>You deserve it. Aberdeen needs a city centre to be proud of. Voting packs will be dropping through letterboxes across the city around the 15th and 16th of February and you can vote until 5pm, Thursday the 1st of March. Give Aberdeen a new green heart and vote <u>for</u> the City Garden Project. Find out more at voteforcitygarden.co.uk.</i> |

Vote for City Garden Campaign advertisement number 2:

- | | |
|--------|--|
| Man: | <i>Oh, it's all very confusing...</i> |
| Woman: | <i>What is...?</i> |
| Man: | <i>Union Terrace Gardens and the City Garden Project!</i> |
| Woman: | <i>It seems very simple to me.</i> |
| Man: | <i>But, will it cost <u>us</u>, the taxpayer any money?</i> |
| Woman: | <i>Not at all, it's going to be funded from private donations and business rates from new businesses.</i> |
| | <i>And, when you think it's going to give us twice as much green space in the city centre, a world class</i> |

arts and cultural centre and a 5000 seat outdoor concert area, not to mention the wider regeneration of the city centre and the jobs it will create, it's going to be fantastic!

Man: *Sounds like you've already decided!*

Woman: *Absolutely, I'm voting for the City Garden Project!*

Female Voiceover: *You deserve it! Aberdeen needs a city centre to be proud of.*

Voting packs will be dropping through letterboxes across the city around the 15th and 16th February, and you can vote until 5pm Thursday 1st March.

Give Aberdeen a new vibrant green heart and vote for the City Garden Project.

Find out more at voteforcitygarden.co.uk.

Vote for City Garden Campaign advertisement number 3:

Female Voiceover: *Voting packs for the City Garden Project will be dropping through letterboxes across the city around the 15th and 16th February.*

Male Voiceover: *Before you vote, you need to know the facts.*

Female Voiceover: *The City Garden Project won't cost you a penny, it will be paid for through private donations and business rates.*

Male Voiceover: *It will create twice as much green space in the City Centre.*

Female Voiceover: *The City Garden Project will not only improve the gardens with a world class arts and cultural centre and a 5000 seat outdoor concert area, but the redevelopment it unlocks will also improve the St Nicholas House site, Aberdeen Art Gallery and the North Denburn.*

Male Voiceover: *It will also create thousands of jobs in Aberdeen.*

Female Voiceover: *Look out for your Voting pack that will include everything you need to know on how to vote. All votes must be submitted by 5pm Thursday 1st March.*

Male Voiceover: *Give Aberdeen a vibrant new green heart and vote for the City Garden Project.*

Find out more at voteforcitygarden.co.uk.

The advertisement placed by Mr Mike Shepherd, opposing the development, was as follows:

Man: *I'm so proud to live in Aberdeen with its lovely granite buildings, leafy green parks...but I hear Union Terrace Gardens – the green heart that provides the magnificent settings for Aberdeen's best buildings – could be destroyed. It would be a very sad day for us all if the big trees get chopped down and the bulldozers move in to our gardens. I've seen the proposed replacement and it looks totally out of place.*

Female voiceover: *Polling cards have now been sent out for the public referendum. If you care about Aberdeen you must vote, and please vote now. Vote "retain Union Terrace Gardens".*

The Vote for City Garden Campaign advertisements were transmitted a total of 238 times by Northsound 1 and Northsound 2 between 13 and 26 February 2012. Mr Shepherd's advertisement was transmitted a total of 26 times by Northsound 1 and Northsound 2 between 15 and 19 February 2012.

On Original 106, the Vote for City Garden Campaign advertisements were transmitted 100 times in total between 16 and 29 February 2012. Original 106 did not transmit Mr Shepherd's advertisement.

Ofcom considered that all four advertisements raised issues warranting investigation under the Act and under Sections 1 and 7 of the BCAP Code.

We therefore sought comments from the Licensees as to how the advertisements had complied with the relevant rules. We also sought comments via the Licensees from the advertisers themselves.

Response

Northsound 1 and Northsound 2

Generally, Northsound explained that it had at no stage deliberately flouted any rules. The Licensee believed the advertising to be a "local non-political privately funded issue" and explained its view that "the City Garden Project is not a political project. It is a civic project with economic development benefits on land owned by the council."

Due to the nature of the project, Northsound said, Aberdeen City Council decided to hold a referendum to establish the public's view before moving to a planning application. The outcome of the referendum was announced on 2 March 2012 as 52 per cent in support of the re-development scheme. Northsound explained its understanding that the "Elections and Referendums Act 2000 includes a UK-wide, national or regional referendum, but does not extend to a local referendum".

Vote for City Garden Campaign advertisements

Northsound told us that this organisation was set up by a group of private individuals who supported the re-development project. They were not a formally constituted organisation, the Licensee said, and had "no legal status". This advertiser had

appointed The BIG Partnership, a public relations consultancy, to run and manage its campaign.

The BIG Partnership made the following comments through the Licensee:

“This campaign was set up by a group of private individuals who wanted to see the project go ahead. They were not a formally constituted organisation. They have no legal status. They got together and appointed The BIG Partnership to run and manage the campaign and they provided funds for that campaign. The City Garden Project, as part of the wider city centre regeneration scheme, will be funded by private donations and a TIF scheme whereby Aberdeen City Council borrows money to pay for the regeneration and uses the new business rates generated by new business across the city as a result of the regeneration to pay back the loan. It will not be financed by Aberdeen City Council’s annual revenue budget and therefore not have an impact on local council tax payers or on the delivery of public services. The group behind the campaign is not political. The campaign aimed to influence the outcome of the referendum by communicating the facts and the benefits of the project to the public. The objectors to the project also ran similar advertisements.”

As to the advertisement’s content, Northsound told us that as the campaign was about a civic project and that the advertiser was set up by a group of private individuals who were not a “formally constituted organisation with no legal status”, it did not believe the campaign was of a political nature. In that respect, the Licensee said that it had derived guidance from a definition given in Section Six of the Broadcasting Code [the code that applies to programming, not advertising]:

Meaning of “referendum”:

For the purpose of this section a referendum (to which the Political Parties, Elections and Referendums Act 2000 applies) includes a UK-wide, national or regional referendum but does not extend to a local referendum.

Since Northsound had considered the advertiser and the subject of the advertising to be non-political, it had not submitted the advertising to the RACC for clearance in advance of its broadcast: it did not believe the advertisements fell into the special category within Section 1 of the BCAP Code of “matters of public controversy including matters of a political or industrial nature”.

Northsound added that it had modified its internal clearance procedure to ensure that this situation would not happen again. However, it maintained that the Vote for City Garden Campaign advertising – and the advertising by Mr Shepherd opposing the development – was not political. Further, Northsound said, it had carried advertising from both sides of the argument and “therefore gave a balanced view of the project”.

Advertisement by Mr Mike Shepherd

Northsound told us that this advertiser was a private individual and not part of a formally constituted organisation with any legal status.

As with the Vote for City Garden Campaign advertisements, Northsound said that in its view neither the nature of the advertiser nor the nature of the subject at issue was political. Therefore the advertising was not in its view subject to the prohibition contained in s.321 of the Act and Section 7 of the BCAP Code, or to the special category central clearance requirement in Section 1 of the BCAP Code.

Northsound had been unable to secure comments from the advertiser.

Generally, Northsound wished to state that it was never its intention to break any code or mislead its listeners. It said that its interpretation of the rules led it to believe that it was within its rights to accept the advertising as it believed “this was a local referendum paid for by private individuals and in no way political”.

Original 106

Original told us that it had considered the nature of the advertising before broadcast and had concluded that neither the advertiser nor the subject was political. To further satisfy itself, Original had checked the local political parties’ policies in respect of developing the Gardens and could find no position, for or against, in any official or public manifesto.

Further Original said, “[it] concluded that the entity making the booking was not a political or religious group and whilst the topic was locally controversial, it was not a political issue, a political aim or political in nature.”

As to the question of RACC clearance under Section 1 of the BCAP Code, Original said that the commercial copy had been made by a “fellow radio licence holder” [Northsound] and it had assumed that RACC clearance had been considered or obtained by them. However, “this turns out not to be the case and with hindsight if [it] had this dilemma over again [it] would undoubtedly have sought this [itself] regardless of where the copy was made or received from.”

Original supplied comments from the BIG Partnership, on behalf of the Vote for City Garden Campaign:

“The City Garden Project is not a political project. It is a civic regeneration project with economic development benefits on land owned by the council.

Due to the controversial nature of the project, Aberdeen City Council decided to hold a referendum to find out if it should proceed to a planning application. The referendum was run by the Council and the outcome was 52% in support.

The Vote for City Garden campaign, managed by us on behalf of a group of private individuals and businesses, aimed to inform the public about the project ahead of the referendum by communicating the facts and the benefits.

The objectors to the project also ran similar advertisements with their side of the story both on radio and in the press.”

In respect of the provisions of s.321 of the Act and Section 7 of the BCAP Code, Original said it was unable to see how these could apply “due to the advertiser in this instance not falling into the category of political advertising.”

Original commented on each section of ss.321(2) and 321(3) of the Act (and reproduced in Section 7 of the BCAP Code). In no case did it consider a section to have been breached. The texts of s.321 and Section 7 of the BCAP Code are given at the end of this Finding.

On s.321(2)(a) – the prohibition on advertising by or on behalf of a body whose objects are wholly or mainly of a political nature – Original told us it had satisfied itself that the advertiser was not wholly or mainly of a political nature.

Further, on s.321(2)(b) – the prohibition on advertising directed towards a political end – Original said that it did not believe that the advertiser “genuinely held any political ends”.

In respect of s.321(3)(a) – influencing the outcome of elections or referendums – we were told by Original that it was its belief “that this clause specifically related to elections or referendums of a political nature as set out in the definitions of what constitutes a breach of the Act under sections 321(2)(a) to (c).”

As to each of the criteria given in 321(3)(b) to (f), Original said variously that the advertisement: was not attempting to change the law, was not “targeting” local, regional or national government, and had not otherwise breached any of the sections’ terms.

Original did not comment directly on s.321(3)(g).

Original also commented on s.321(2)(c) – an advertisement which has a connection with an industrial dispute – saying that it believed, “there may have been multiple bookings by local authorities up and down the country concerning numerous industrial disputes including local refuse collection disruption due to industrial action, local public transport disruption due to industrial action and local GP service disruption due to industrial action. In all instances these campaigns had a connection with an industrial dispute. However, they were informational in their nature, the code as set out does not allow for this interpretation, or subjective application.”

It wished to make this point, Original said, because it believed the rules should be applied in the spirit of their intended purpose.

Original stressed that it was its genuine belief that it was not breaching any of the rules as it had understood these to apply specifically to political organisations, aims or objectives. Original did, however, recognise that the subject matter of the advertisements was a matter of controversy.

Decision

Under the Act, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services. (The full text of section 321 of the Act is given at the end of this Finding).

Section 321(2) explains that an advertisement contravenes the prohibition on political advertising if it is:

- a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;
- b) an advertisement which is directed towards a political end; or
- c) an advertisement which has a connection with an industrial dispute.

An advertisement may therefore fall foul of the prohibition on political advertising either because of the character of the advertiser or because of the content or nature of the advertisement. Section 321(3) sets out an inclusive, non-exhaustive list of examples of “objects of a political nature” and “political ends”. The example list of political objects is:

- a) influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;
- b) bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory;
- c) influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere;
- d) influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom or of a country or territory outside the United Kingdom;
- e) influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;
- f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;
- g) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends.

Section 321(7)(a) of the Act contains a general exception to the statutory scheme described above which operates by disapplying the previous subsections in relation to an advertisement of a public service nature placed by or on behalf of a government department.

These statutory provisions are reflected in Section 7 of the BCAP Code [the relevant rules are set out in full at the end of this Finding].

Ofcom therefore considered whether the advertisement complied with the relevant requirements of the Act and Section 7 of the BCAP Code.

We first considered whether the advertisement in this case fell within the general exception at section 321(7)(a) of the Act, namely whether the advertisement was of a public service nature and had been inserted by, or on behalf of, a government department.

Given the nature of The Vote for City Garden Campaign and Mr Mike Shepherd, who were a group of private individuals and a single private individual respectively, we concluded that neither was a government department. Section 321(7)(a) did not therefore apply.

The nature of the advertisers

We then considered whether either advertiser was a prohibited advertiser under the terms of s.321(2)(a), that is “...a body whose objects are wholly or mainly of a

political nature”. In this respect we noted the interpretative direction offered by s.405 of the Act:

“‘body’ (without more) means any body or association of persons, whether corporate or unincorporate, including a firm;”

Vote for City Garden Campaign appeared to have as its sole purpose the promotion of a vote in favour of the redevelopment scheme for Union Terrace Gardens. Further, the non-exhaustive list of examples of objects of a political nature and political ends includes at s.321(3)(a):

“influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;...”

Therefore we concluded that a body, whether incorporated or not, whose principal purpose is to influence the outcome of a referendum is a proscribed advertiser within the terms of s.321(2)(a). In that respect we consider a “local poll” enabled under local government legislation to be a referendum for the purposes of s.321(3)(a) of the Act. We note that Aberdeen City Council itself referred¹ to the poll as a referendum. Further, a previous Ofcom Finding² adopted the view that local polls are referendums for the purposes of s.321(3)(a).

On that basis we concluded that Vote for City Garden Campaign was a proscribed advertiser under the terms of s.321(2)(a) of the Act and that its advertising breached that section.

However, we did not consider Mr Mike Shepherd to be a proscribed advertiser. Although in Ofcom’s view a private individual could in certain circumstances constitute a political “body” (most obviously in the case of a professional politician seeking office as a single-person party), the facts available to Ofcom indicated that Mr Shepherd was better viewed as a private individual with a particular point of view on the subject of the referendum. In these circumstances, Mr Shepherd could not be regarded as an advertiser whose objects are wholly or mainly of a political nature.

The nature of the advertisements

We then considered whether the advertisements were prohibited under s.321(2)(b) as being directed towards a political end. In reaching views in that respect we considered the non-exhaustive list of “objects of a political nature” and “political ends” given in s.321(3).

As noted above, Ofcom considers local polls to constitute referendums for the purposes of s.321(3)(a). Therefore all of the advertisements under consideration plainly sought to influence opinion in respect of a referendum.

All of the advertisements were therefore in breach of s.321(3)(a).

¹ For example:

http://www.aberdeencity.gov.uk/council_government/consultations/current_consultations/utg.asp

² In Broadcast Bulletin issue 123:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb123/issue123.pdf>

Ofcom also considered ss.321(3)(c), (d) and (f) to be engaged. Where the policies and choices of local, regional or national government (in this case Aberdeen City Council) would be affected by the outcome of a referendum, the views and decisions of its executive would be influenced in turn. Therefore s.321(3)(c) (influencing the policies or decisions of local, regional or national governments) and s.321(3)(d) (influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom) both applied in this case.

In view of this Ofcom concluded that ss.321(3)(c) and (d) were both breached by the transmission of each of the advertisements.

Further, in Ofcom's opinion the subject of the redevelopment of Union Terrace Gardens was a matter of public controversy. News media reported the scheme as highly contested³, and documentation published by Aberdeen City Council itself referred to "...the strength of opinion which has arisen from all sides as a result of the proposed development."⁴ Quite apart from the controversy reported in this case, it is Ofcom's view that the holding of a referendum is in itself likely to be some indication of public controversy.

Therefore s.321(3)(f) – influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy – was also breached by all of the advertisements.

Therefore, the three Vote for City Garden Campaign advertisements were in breach of ss.321(2)(a), 321(2)(b), 321(3)(a), 321(3)(c), 321(3)(d) and 321(3)(f). Therefore the corresponding BCAP Code Rules 7.2, 7.2.1(a), 7.2.1(b), 7.2.2(a), 7.2.2(c), 7.2.2(d) and 7.2.2(f) were breached.

Mr Mike Shepherd's advertisement was in breach of ss. 321(3)(a), 321(3)(c), 321(3)(d) and 321(3)(f). Therefore the corresponding BCAP Code Rules 7.2, 7.2.1(b), 7.2.2(a), 7.2.2(c), 7.2.2(d) and 7.2.2(f) were breached.

Furthermore, neither Northsound nor Original had referred the advertisements to the RACC for central clearance. Therefore the Licensees were both in breach of BCAP Code Section 1.

We wish to make clear that the distinction that both Northsound and Original sought to draw between what is party political and what is more broadly political is not relevant to section 321 of the Act and Section 7 of the BCAP Code. As noted in the introduction to this Finding, 'political' in the context of the broadcast advertising prohibition is very much wider than those advertisers and those subjects that are directly party political. As the discussion above shows, the ban on political matter in broadcast advertising extends to campaigning, supporting a point of view in an election or referendum and seeking to influence public opinion on controversial matters.

Northsound 1 and 2:

Breaches of BCAP Code Section 1; and

³ See for example: <http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-17111347> and <http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-17065271>

⁴ See: <http://committees.aberdeencity.gov.uk/mgConvert2PDF.aspx?ID=17676>

Vote for City Garden Campaign advertisements: breaches of BCAP Code Rules 7.2, 7.2.1(a), 7.2.1(b), 7.2.2(a), 7.2.2(c), 7.2.2(d) and 7.2.2(f); and

Mr Mike Shepherd's advertisement: breaches of BCAP Code Rules 7.2, 7.2.1(b), 7.2.2(a), 7.2.2(c), 7.2.2(d) and 7.2.2(f).

Original 106:

Breaches of BCAP Code Section 1; and

Vote for City Garden Campaign advertisements: breaches of BCAP Code Rules 7.2, 7.2.1(a), 7.2.1(b), 7.2.2(a), 7.2.2(c), 7.2.2(d) and 7.2.2(f).

Extracts from the Communications Act 2003 and BCAP Code

Communications Act 2003

Section 319:

(1) It shall be the duty of OFCOM to set, and from time to time to review and revise, such standards for the content of programmes to be included in television and radio services as appear to them best calculated to secure the standards objectives.

(2) The standards objectives are—

...

(g) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services;

Section 321:

Objectives for advertisements and sponsorship

(1) Standards set by OFCOM to secure the objectives mentioned in section 319(2)(a) and (g) to (j)—

(a) must include general provision governing standards and practice in advertising and in the sponsoring of programmes; and

(b) may include provision prohibiting advertisements and forms and methods of advertising or sponsorship (whether generally or in particular circumstances).

(2) For the purposes of section 319(2)(g) an advertisement contravenes the prohibition on political advertising if it is—

(a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;

(b) an advertisement which is directed towards a political end; or

(c) an advertisement which has a connection with an industrial dispute.

(3) For the purposes of this section objects of a political nature and political ends include each of the following—

(a) influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;

(b) bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory;

(c) influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere;

(d) influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom or of a country or territory outside the United Kingdom;

(e) influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;

(f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;

(g) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends.

(4) OFCOM—

(a) shall, in relation to programme services, have a general responsibility with respect to advertisements and methods of advertising and sponsorship; and

(b) in the discharge of that responsibility may include conditions in any licence which is granted by them for any such service that enable OFCOM to impose requirements with respect to any of those matters that go beyond the provisions of OFCOM's standards code.

(5) OFCOM must, from time to time, consult the Secretary of State about—

(a) the descriptions of advertisements that should not be included in programme services; and

(b) the forms and methods of advertising and sponsorship that should not be employed in, or in connection with, the provision of such services.

(6) The Secretary of State may give OFCOM directions as to the matters mentioned in subsection (5); and it shall be the duty of OFCOM to comply with any such direction.

(7) Provision included by virtue of this section in standards set under section 319 is not to apply to, or to be construed as prohibiting the inclusion in a programme service of—

(a) an advertisement of a public service nature inserted by, or on behalf of, a government department; or

(b) a party political or referendum campaign broadcast the inclusion of which is required by a condition imposed under section 333 or by paragraph 18 of Schedule 12 to this Act.

(8) In this section “programme service” does not include a service provided by the BBC.

BCAP Code Section 1 (extract)

“Special category” radio advertisements, whether broadcast locally, regionally or nationally, must be centrally cleared by the RACC. The code includes rules throughout that makes clear those categories of radio advertisement that must be centrally cleared. Broadcasters or their sales houses must hold a record of centrally cleared advertisements. For more information, go to www.racc.co.uk or telephone 020 3206 7808. The special categories are:

- Consumer credit, investment and complex financial products and services
- Gambling products and services
- Alcohol products
- Medical and health and beauty products and treatments
- Food, nutrition and food supplements
- Slimming products, treatments and establishments
- Adult shops, stripograms, escort agencies and premium-rate sexual entertainment services
- Dating and introduction services
- Commercial services offering individual personal and consumer advice
- Environmental claims
- Matters of public controversy including matters of a political or industrial nature
- Religious organisations
- Charitable causes
- Films, DVDs, video, computer and console games that have an 18+ certificate or rating.

Advertisements that do not fall into the special category list and are broadcast only by one station or in one locality must be cleared for broadcast by the relevant staff at the station concerned. Advertisers should contact the relevant station for information or guidance. To provide consistent standards for the benefit of consumers and the radio industry, national radio advertisements should be centrally cleared by the RACC. National radio advertisements are those sold and broadcast nationally across the network.

BCAP Code Rule 7.2

7.2 Advertising that contravenes the prohibition on political advertising set out below must not be included in television or radio services;

7.2.1 An advertisement contravenes the prohibition on political advertising if it is:

- (a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;
- (b) an advertisement which is directed towards a political end; or

(c) an advertisement which has a connection with an industrial dispute.

7.2.2 For the purposes of this section objects of a political nature and political ends include each of the following:

(a) influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;

(b) bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory

(c) influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere

(d) influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom or of a country or territory outside the United Kingdom;

(e) influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;

(f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;

(g) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends.

7.2.3 Provision included by virtue of this section in standards set under section 319 [of the Act] is not to apply to, or to be construed as prohibiting the inclusion in a programme service of:

(a) an advertisement of a public service nature inserted by, or on behalf of, a government department; or

(b) a party political or referendum campaign broadcast the inclusion of which is required by a condition imposed under section 333 [of the Act] or by paragraph 18 of Schedule 12 to the Act.

In Breach

News

Russia Today, 21 August 2011, 13:01 and 14:06

The Diplomacy of Defence

Russia Today, 5 February 2012, 17:30

Introduction

Russia Today is a global news and current affairs channel produced in Russia, and funded by the Russia Government. In the UK, the channel broadcasts on the Sky satellite platform. The licence for Russia Today is held by Autonomous Non-profit Organisation TV Novosti ("TV Novosti" or "the Licensee").

News

A complainant alerted Ofcom to two separate news items, featuring the reporter Lizzie Phelan, which the complainant considered were not duly accurate or duly impartial. In summary, the complainant said that Lizzie Phelan made "claims that...the [Libyan] rebels obviously lack any popular support" and her report was not "a factual news report".

Ofcom reviewed the news items in question, which focused on the then on-going rebel insurgency, in Libya, against the government of Colonel Muammar Gaddafi. At the time of the broadcasts during the Summer of 2011, NATO was involved in an airborne military intervention against Colonel Gaddafi's forces.

In the news item broadcast on 21 August 2011 at 12:01, Lizzie Phelan said the following about the NATO air attacks:

"This is all part of the strategy to create mass panic and mass confusion here, because NATO has obviously failed in its military strategy to create a military solution here and so instead what we are seeing is a massive psychological operation going on to try and weaken the Libyan Government in that way".

"The question is how does NATO expect these rebels on the ground to maintain any so-called capture of an area if they are so dependent on NATO bombing and clearly lack any popular support to secure these towns and cities. It's clear that they are not able to do so and that the minute that NATO leaves this country then the two sides of the conflict can sit down and negotiate as the Libyan Government had been calling for. And the only obstacle to that diplomatic solution at the moment is the foreign intervention of the US, France and Britain and the other NATO States and the Persian Gulf states".

"There is a United Nations General Assembly meeting on September the 19th where it appears as though they are going to call for a resolution to suspend the bombing, but as we know in the past NATO has not respected the United Nations in Iraq, in Israel or anywhere else so there is no likelihood that they

will. Though NATO is in a real dilemma now because, as I said, they have failed to secure a military solution, but then obviously as we know, the United States, France and Britain - the arrogance of these countries – they can never just admit, that like in Afghanistan, like in Iraq and elsewhere, that they got it wrong. They expected to secure victory in a couple of weeks and they have been unable to so and that's because of the popular support of the Libyan Government here. So they are in a dilemma now where they can't just back down. They need to find a way - exit strategy essentially....It's a highly embarrassing situation for them".

"Of course in Libya, also, one of the reasons why they're so desperate to secure some kind of perception of victory through this psychological operation or campaign of confusion through the media is, of course, because they are pushing for intervention in Syria, and how can they justify to the Security Council and the international community, intervention in Syria when they have so abysmally failed in securing any of their aims in Libya. And let's remember their aim in Libya was supposedly to protect civilians and they are murdering civilians here in their thousands".

In the news item at 13:06, Lizzie Phelan said the following about the NATO operation:

"Of course we know that at the beginning of the crisis and continuously, the international media, the Western media – and Al Jazeera in particular – has been responsible for a number of really grave lies. Of course there was the lie that Gaddafi was attacking his own people, which thanks to the satellites of Russian intelligence proved that there were no such attacks from the air that took place; we had the lie that the Libyan Government was hiring mercenaries from African countries".

Ofcom considered the material raised issues warranting investigation under Rule 5.1 of the Code, which states:

Rule 5.1: "News, in whatever form, must be reported with due accuracy and presented with due impartiality".

We therefore sought the Licensee's comments as to how this material complied with this Rule.

The Diplomacy of Defence

A complainant alerted Ofcom to the programme broadcast on 5 February 2012, stating that the programme made "no attempt at impartiality". We assessed the programme, which was a documentary concerning the NATO and US policy of creating a 'missile defence shield' and deploying missiles in Eastern Europe, and its implications for Eastern Europe and the Middle East. During the programme, we noted that there were a number of statements that could be interpreted as being critical of NATO and US policy in respect of their policy on missile deployment, and supportive of Russian policy on the same issue:

"We need such [Russian] missiles to defend Russia. We would be crushed if we didn't have them. That's all there is to it."

Igor Korotchenko (Adviser to Russian Ministry of Defence): *"The forward-based American military presence, which means deployment of bases in post-Soviet republics, notably in Central Asia, is an element of US global domination..."*

Programme voiceover: *"Russia has taken adequate measures to counter such actions, but unlike NATO, it confines its activities to its own territory"*

Theodore Postol (Professor, MIT): *"I don't agree with the US Government's belief that this [the alleged threat of Iranian missiles hitting targets in the Middle East and Eastern Europe] is a serious problem. What Iran is doing is using very simple...rocket technology..."*

Programme voiceover: *"[Theodore Postol] maintains that the European missile defence system is ineffective...The Professor believes that the purpose of NATO's radar in Europe is to track the movements of Russian strategic weapons and monitor Russia's new military technologies"*

Brian Becker (National Coordinator of the Answer Coalition): *"The real target [for NATO] could be Russia but it certainly makes the people of Europe less safe. It draws them in, in fact, as a geo-strategic pawn by great powers, as they manoeuvre and use the missile defence shield, not as a way to defend Europe – not as a way to defend anybody in fact – but to provide a first strike potential capability against the adversary"*

Programme voiceover: *"NATO countries are in mood to restrict the deployment of their military installations to Europe. New American military bases might soon be set up in Kazakhstan, Kyrgystan, Turkmenistan and Tajikistan"*

Igor Korotchenko: *"Once Russia has been encircled by military bases, a new geo-political reality will emerge. We need to take this reality into account already today and take measures to control potential threats to our security"*

Programme voiceover: *"Meanwhile the view that missile defence shield is too expensive is gaining increasing currency inside the United States itself. It provides backing for the armed forces. Moreover, the project is making millions of dollars for NATO sub-contractors in various countries"*

Brian Becker: *"Between 2005 and 2009 the US has spent 50 billion dollars and the price tag for the entire programme that we are dealing with right now here in 2011 is another 150 billion dollars. That's larger than many countries' entire military budgets."*

Mariusz Chmiel (District Head of a Polish village): *"We're not overjoyed at the prospect of these weapons [US missiles] being deployed a few hundred*

metres from our homes. The missiles will pose a threat to the local population of over 1,000 people”.

Ezhbeta Domanska (schoolteacher): *“Most of the people living here are farmers. Of course they were very worried after hearing news of missile deployment...”.*

Mati Karmin (sculptor): *“The amount of effort spent on making such [i.e. NATO] weapons would be much better spent funding the arts”.*

Vadim Koshchuk (Division Head, Russian military radar station): *“Our system is being expanded in response to the expansion of the European missile defence shield. The aim is to match the measures being taken in Europe. New stations are being commissioned here to respond to NATO’s activities”.*

As discussed below, it was Ofcom’s view that this programme was dealing with a “matter of political or industrial controversy” or “a matter relating to current public policy” (i.e. the debate over NATO and US policy in respect of the issue of NATO missile deployment in Eastern Europe, and Russian policy on the same issue). We therefore considered this content raised issues warranting investigation under Rule 5.5 of the Code.

Rule 5.5 states that:

“Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole”.

Therefore, additionally, Ofcom asked TV Novosti to provide comments on how the programme complied with above rule.

Response

News

The Licensee said that Russia Today is “broadcast worldwide...intended for viewers of many different cultures and political views” but “above all...the channel reports and comments on world events from a Russian point of view”. TV Novosti stated its view that “viewers can and will understand that the views portrayed may not be aligned to those of their own country, culture or political belief...[and] they appreciate and benefit from ‘an alternative view’, as helping them understand why Russia’s stance is perhaps different from that of their own country. This, we argue, is a fundamental principal of freedom of speech”. In addition, the Licensee contended that “in having access to global news channels from multiple origins, Britain is perhaps unique in making available to citizens a spectrum of views of political and controversial situations. This is surely to be celebrated and not restricted”.

TV Novosti also said that Russia Today “always tries to cover events in a balanced and impartial manner, and therefore gives a voice on the air to independent journalists”. In this case, the news presented emphasised that Lizzie Phelan “an

experienced and independent journalist” was reporting “live” from Tripoli, which TV Novosti said was a “battle zone” where there was “little ability to pre-check everything she was going to say, nor time to seek alternative views”. The Licensee noted that the BBC Trust had published a report¹ concerning BBC coverage of the ‘Arab Spring’, which according to the Licensee “found that although the BBC’s coverage of the Israeli-Palestine conflict was deemed to be broadly positive, there were some serious flaws in the BBC’s coverage. These were in large measure deemed to have arisen because the reporters were ‘embedded’ in one particular faction of the conflict. The report highlights the difficulties in maintaining unbiased reporting in conflict situations”.

The Licensee said that: “Subsequent developments of the situation in Libya did however confirm, in the opinion of [Russia Today], that Lizzie Phelan was correct in her assertions”. In this regard, TV Novosti pointed to Lizzie Phelan stating in her reports that “much of the Western media had been reporting distorted information to viewers during the Libyan conflict”.

As evidence backing up the views expressed by Lizzie Phelan, the Licensee cited two reports by international non-governmental organisations that focused on Western media coverage of the Libyan conflict. For example, a report by Amnesty International said that:

“much Western media coverage has from the outset provided a very one-sided view of the logic of events, portraying the protest movement as entirely peaceful and repeatedly suggesting that the regime’s security forces were unaccountably massacring unarmed demonstrators who presented no security challenge”.

According to TV Novosti, the Amnesty International report also: documented instances of civilians being killed by NATO airstrikes; and reported an incident of NATO failing to provide evidence that a site it had targeted was being used for military purposes.

Further, the Licensee cited a report by the International Crisis Group, which said that:

“much Western media coverage has from the outset presented a very one-sided view of the logic of events, portraying the protest movement as entirely peaceful and repeatedly suggesting that the regime’s security forces were unaccountably massacring unarmed demonstrators who presented no real security challenge. This version of events would appear to ignore evidence that the protest movement exhibited a violent aspect from very early on”.

According to TV Novosti, given that “NATO was widely criticised [by organisations such as Amnesty International and the International Crisis Group] for its failure to respond” to criticism of NATO’s actions “[a]rguably, attempting to find commentators sympathetic to (but not necessarily fully informed of) NATO’s position could have led to accusations against RT [Russia Today] of misrepresenting NATO’s position”.

TV Novosti added that “Russia’s viewpoint is different from the UK’s. Yet RT is not peddling propaganda on behalf of the Russian government, which it frequently

¹ See “A BBC Trust report on the impartiality and accuracy of the BBC’s coverage of the events known as the ‘Arab Spring’”, 25 June 2012:

http://www.bbc.co.uk/bbctrust/our_work/editorial_standards/impartiality/arab_spring.html

criticises. The aim of the channel is to provide in-depth and broader coverage of world events than other news broadcasters offer". The Licensee said: "We feel that the very nature of conflict reporting makes it difficult, if not impossible, to guarantee unbiased coverage – but Ofcom's (rightful) demands for balance can be met by a plurality of broadcasters covering similar events".

In conclusion, TV Novosti said that "News coverage is enhanced by informed commentators, but they may on occasion overstep the mark in the context of providing rapid commentary on what are 'breaking' stories, or coverage of near-live happenings which are already being widely debated heatedly via internet mechanisms which are not subject to regulation". However, the Licensee said Lizzie Phelan's reports "delivered in the context of a live bulletin from the field, presented the facts with due accuracy, albeit with an element of counterpoise to what other parties [Amnesty International and The International Crisis Group] had suggested was distorted coverage of events by some Western media".

The Diplomacy of Defence

The Licensee said that: "This programme was a documentary of the situation regarding the development of the European missile defence shield post Cold War. It was not intended to be a totally balanced description in isolation, but very deliberately to alert viewers to, and stimulate debate on, the lack of public policy statements from European and US governments regarding the existence of multiple, potentially offensive, installations targeting Russia". In addition: "The documentary explained that Russia felt under threat and that it was prepared if necessary to respond to any threats...[and] that US policy, while not publicly explained, is based on utilisation of a Europe-based attack/retaliation defence shield for the benefit of the USA, but at the potential expense of Europe".

TV Novosti said that in preparing the programme, Russia Today staff had taken "reasonable steps" to obtain comments, contributions and/or participation in the programme by interview "of NATO and Pentagon officials", but no response was received. The Licensee added that it would welcome "any response from the USA or NATO as a sequel to the original documentary". However, TV Novosti stressed that: "We do feel, however, that the lack of recognition of the issues raised in the programme or the availability of alternative views should not have prevented [Russia Today] from broadcasting what was a documentary highlighting a major issue which will potentially impact many viewers and citizens of many countries". In addition, the Licensee said if persons representing potential alternative viewpoints are not prepared to participate in a programme "this can potentially result in the denial of information to viewers if only balanced reporting is allowed thus becoming an infringement of freedom of speech".

In its representations, TV Novosti provided Ofcom with details of a programme (*Czech Peace*), broadcast on 2 March 2012, "less than a month" after the broadcast of *The Diplomacy of Defence*. The Licensee regarded this programme to be evidence of another programme included in a "series of programmes taken as a whole", as defined in Rule 5.5 of the Code, which could provide the required due impartiality. TV Novosti said that *Czech Peace* was "very much a follow-up to Diplomacy of Defence. The Czech Republic is of course a member of NATO. The documentary present[ed] the views of Czech citizens – not the Russian government".

In conclusion, TV Novosti said that Russia Today is not "viewed as a hostile entity by NATO or the US Department of Defense" as indicated by the fact that Russia Today provides both NATO and US Department of Defense "with the authorization to

broadcast the channel in the US Air Force Academy Campus, in the military bases in Japan, Kyrgyzstan and elsewhere". Further, the Licensee pointed to that fact that the programme "resulted in a large number of viewer comments, the vast majority of which highlighted what was considered to be the stupidity of spending vast amounts of money to in effect perpetuate the Cold War".

General

TV Novosti also made a number of general points:

- the broadcaster said that "an informal discussion at an earlier stage could have led to a mutually satisfactory outcome, without the necessity for the large amount of effort expended by Ofcom and ourselves addressing the matter in a more formal manner";
- Ofcom should consider amending its complaints process, such that a complaining viewer should first be required to take up any issue with the broadcaster involved, and only if they are dissatisfied with the broadcaster response should they pursue the matter with Ofcom. In this regard the Licensee said that: "We are in an era where 'complaining' is becoming almost too easy, and is imposing a growing burden on Ofcom and broadcasters where the complaint is often quite trivial, and made without regard to the process which is triggered"; and
- the Licensee said that: "The issues raised by these particular complaints have been the subject of wide and detailed discussions within RT [Russia Today], and lessons have been learned, which will be applied in the future."

Decision

Under the standards objectives of the Communications Act 2003 ("the Act"), Ofcom has a statutory duty to set standards for the content of programmes as appear to it best calculated to secure the standards objectives, including that: news included in television and radio services is presented with due impartiality; and the special impartiality requirements set out in section 320 of the Act are complied with. These objectives are reflected in Section Five of the Code.

Broadcasters are required to comply with the rules in Section Five to ensure that due impartiality is preserved: in news programmes; and in non-news programmes, on matters of political or industrial controversy and matters relating to current public policy.

When applying the requirement to preserve due impartiality, Ofcom must take into account the broadcaster's and audience's right to freedom of expression. This is set out in Article 10 of the European Convention on Human Rights. Article 10 provides for the right of freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority. The broadcaster's right to freedom of expression is not absolute. In carrying out its duties, Ofcom must balance the right to freedom of expression on one hand, with the requirement in the Code to preserve "due impartiality" on matters relating to political or industrial controversy or matters relating to current public policy.

Ofcom recognises that Section Five of the Code, which sets out how due impartiality must be preserved, acts to limit, to some extent, freedom of expression. This is

because its application necessarily requires broadcasters to ensure that neither side of a debate relating to matters of political or industrial controversy and matters relating to current public policy is unduly favoured. Therefore, while any Ofcom licensee should have the freedom to discuss any controversial subject or include particular points of view in its programming, in doing so broadcasters must always comply with the Code.

In reaching decisions concerning due impartiality, Ofcom underlines that the broadcasting of highly critical comments concerning the policies and actions of any government or state is not, in itself, a breach of due impartiality. Any broadcaster may do this provided it complies with the Code. However, depending on the specific circumstances of any particular case, it may be necessary to reflect alternative viewpoints in an appropriate way in order to ensure that Section Five is complied with.

Further, in judging whether due impartiality has been preserved in any particular case, the Code makes clear that the term “due” means adequate or appropriate to the subject matter. Therefore “due impartiality” does not mean an equal division of time has to be given to every view, or that every argument and every facet of the argument has to be represented. Due impartiality may be preserved in a number of ways and it is an editorial decision for the broadcaster as to how it ensures due impartiality is maintained.

We considered each programme in turn under Section Five.

News

Rule 5.1 of the Code states that: “News, in whatever form, must be reported with due accuracy and presented with due impartiality”.

The obligation in Rule 5.1 to report news with due accuracy and present it with due impartiality applies potentially to any issue covered in a news programme, and not just matters of political or industrial controversy and matters relating to current public policy.

In reaching our decision, we took into account Ofcom’s guidance² to Section Five of the Code citing 2003 Ofcom research which found that there are greater expectations, in terms of due accuracy and due impartiality, for news channels that are perceived to be aimed at a UK audience than there are for channels with a global audience, such as Russia Today. In this regard we note the Licensee’s representation that Russia Today is not aimed specifically at a UK audience. Rather the channel “reports and comments on world events from a Russian point of view” and aims to “provide in-depth and broader coverage of world events than other news broadcasters offer”. There is nothing in the Code to prevent an editorial approach based on a view of world events from a particular country’s perspective, as long as the due impartiality requirements of the Code are complied with. In this regard, in this case, we took account of the specific editorial perspective taken by the Licensee, and the audience’s expectations to content. This reflects the Code’s definition of “due impartiality” which states that: “The approach to due impartiality may vary according to...the type of...channel [and] the likely expectation of the audience as to content.”

Any judgement as to the due accuracy and due impartiality of a particular news report is complicated. News reports will often include a wide range of interpretations

² See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section5.pdf>

of information or a given set of facts. Reporting an ongoing military conflict with due accuracy and impartiality can pose particular challenges for broadcasters because each side in a conflict often restricts the information and access it provides to journalists and understandably wishes to promote its viewpoint.

When considering whether or not a broadcaster has reported with “due accuracy”, it is important to recognise the importance attached to freedom of expression and the broadcaster’s right to be able to interpret news events as it sees fit. This must be particularly the case in political reporting which is often dependent on subjective interpretations of highly controversial matters. Intervention should only be necessary when that interpretation would be considered to breach the requirements of the Code. Ofcom considers that it would have been entirely appropriate, therefore, for Russia Today’s *News* reports to reflect that there was some debate internationally, as to whether certain parts of the international media were fully reporting all aspects of the Libyan conflict. Further, in assessing “due” accuracy, “due” means adequate or appropriate to the subject matter.

In this case, we first considered whether the news reports were reported with due accuracy i.e. we assessed those aspects of the news reports which could be principally described as articulating facts as opposed to opinions or viewpoints.

In the two news reports in question, Lizzie Phelan made a number of statements that expressed deep scepticism concerning: the relative success of the rebel advance into Tripoli; and the efficacy of the NATO airborne campaign in support of the rebels.

For example, in the news report at 13:01, Lizzie Phelan said:

“Last night there [were] some incidents in parts of Tripoli, which then seem to have been quite rapidly dealt with by the people here, and by the Libyan Government... There seems to have been a few snipers from the rebels shooting from buildings”.

In both news reports, Lizzie Phelan then went on to: criticise the strategy being followed by NATO and other Western Governments with regards to Libya; and counter accusations made about the then Libyan Government of Colonel Gaddafi.

In relation to the news report at 13:01, we considered that, whilst the tone of Lizzie Phelan’s reports could be seen to be critical of for example, NATO’s strategy in Libya, in most ways the factual content in both the two news reports, taken overall, mirrored the reports of other news outlets³ as to the current state of hostilities in the Libyan capital. For example, we noted that at the start of the news report at 13:01 the news presenter in the studio introduced a live ‘two-way’ interview with Lizzie Phelan, as follows:

“Libyan rebels say they are pushing on to Tripoli and claim they are now 30 kilometres away from the capital. There have also been reports of sporadic violence within Tripoli itself. But many people on the ground there say the situation is much calmer than suggested by reports. We can now cross to the

³ For example, see:

- <http://www.bbc.co.uk/news/world-africa-14606618>
- <http://www.bbc.co.uk/news/world-africa-14606081>
- <http://www.guardian.co.uk/global/middle-east-live/2011/aug/21/libya-syria-israel-middle-east-unrest?INTCMP=SRCH>

independent journalist, Lizzie Phelan, who is covering the civil war from Tripoli”.

When asked about incidents of alleged rebel activity that had occurred in Tripoli, as mentioned above, Lizzie Phelan stated there had been rebel activity in Tripoli the previous night. Soon after the news presenter posed the following question to Lizzie Phelan:

“The rebels say they are advancing towards Tripoli. Are people in the City worried that they might be caught in the bloodbath or do they think the rebels will be pushed back?”

In response, Lizzie Phelan said:

“Well, we’ve been hearing from the rebels and from NATO, that NATO’s allies - essentially the rebels - are a day, a week, or very close to Tripoli”

We considered that the news report at 13:01 therefore made reference to what was being reported more widely that: some rebel activity had occurred in Tripoli on 20 August and 21 August 2012; the main rebel forces was approximately 30 kilometres from Tripoli; but that there was still some support for Colonel Gaddafi in Tripoli. We therefore considered that this news report was duly accurate.

However, with regard to the news report at 14:06⁴, we noted that in her reports, Lizzie Phelan’s set out her rebuttal of the “lies” that Colonel Gaddafi “was attacking his own people” and “hiring mercenaries from African countries”. In relation to the latter accusation, that Colonel Gaddafi did hire African mercenaries, Ofcom noted that there is some dispute as to the extent to which this happened⁵. However, we noted that the United Nations⁶ had condemned the Government of Colonel Gaddafi for killing civilians several months before the news report in question.

In reaching our decision in relation to due accuracy, we are mindful that the news reports in question focused on the viewpoint of one “independent” journalist, giving her interpretation of events in what was a very fluid and developing combat situation. Further, Lizzie Phelan, according to the Licensee had “little ability to pre-check everything she was going to say”.

However, taking into account the widely acknowledged incidence of killings carried out by the forces of Colonel Gaddafi at that time, we considered that Lizzie Phelan’s statement that it was a “lie” that Colonel Gaddafi “was attacking his own people” was not duly accurate.

We then went on to consider whether the news reports were presented with due impartiality.

In assessing whether any particular news item has been reported with due impartiality, we take into account all relevant facts in the case, including: the

⁴ We noted that much of the content of the 13:01 news report was reprised in the 14:06 news report.

⁵ For example, see: <http://www.voanews.com/content/experts-disagree-on-african-mercenaries-in-libya-117156253/157553.html>

⁶ For example, see: <http://www.un.org/apps/news/story.asp?NewsID=38154&Cr=Libya&Cr1>

substance of the story in question; the nature of the coverage; and whether there are varying viewpoints on a news story, and if so how a particular viewpoint, or viewpoints, on a news item could be or are reflected within news programming.

In this case, Ofcom noted that the news item in question included various statements by Lizzie Phelan that that could be characterised as: critical of NATO's airborne military intervention against Colonel Gaddafi's forces in Libya during the summer of 2011; and supportive of the position of the then Libyan Government.

For example, we noted that Lizzie Phelan strongly criticised NATO's strategy in Libya, stating that: *"NATO has obviously failed in its military strategy"*. In addition, she stated her view that: *"the only obstacle to that diplomatic solution [in Libya] at the moment is the foreign intervention of the US, France and Britain and the other NATO States and the Persian Gulf states"*; and NATO *"expected to secure victory in a couple of weeks and they have been unable to so and that's because of the popular support of the Libyan Government here"*.

We considered that the news item did not reflect any alternative viewpoints to the view being put by Lizzie Phelan. For example, there was no reflection of the viewpoints of NATO in reaction to the criticisms being made about the on-going NATO military campaign in Libya. Nor was there any indication in the news items that alternative viewpoints were even sought by the broadcaster.

There is no requirement on broadcasters to provide an alternative viewpoint in all news stories or all issues in the news. All news stories must however be presented with due impartiality: that is with impartiality adequate or appropriate to the subject and nature of the programme. Presenting news stories with due impartiality in news programmes very much depends on editorial discretion being exercised appropriately in all the circumstances.

In this case, we noted that Lizzie Phelan did refer to the viewpoint of NATO, but, in Ofcom's view, this was only in the context of reporting NATO's statement of the geographical location of the Libyan rebels approaching Tripoli:

"Well, we've been hearing from the rebels and from NATO, that NATO's allies - essentially the rebels - are a day, a week, or very close to Tripoli."

Such comments, therefore did not serve to counter the criticisms of NATO's policy and military strategy made in the news reports. We also noted that the news presenter in the studio did not intervene at any point to challenge or question Lizzie Phelan so as to reflect the NATO viewpoint.

In reaching our decision, we took account of the Licensee's various representations in this case. Firstly, we noted that the Licensee cited two reports by non-governmental organisations⁷, Amnesty International and the International Crisis

⁷ See:

- Amnesty International Report, *"The Forgotten Victims of NATO Strikes"*, March 2011 (<http://www.amnesty.org/en/library/asset/MDE19/003/2012/en/8982a094-60ff-4783-8aa8-8c80a4fd0b14/mde190032012en.pdf>).
- International Crisis Report Group Report, *"Popular Protest in North Africa and the Middle East (V): Making Sense of Libya"*, June 2011 ([http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/North%20Africa/107%20-](http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/North%20Africa/107%20-)

Group⁸ which: criticised aspects of Western media coverage of the Libyan rebellion; and highlighted that the rebels had been responsible themselves for some examples of violent behaviour. In this way, according to TV Novosti, Lizzie Phelan was putting forward the viewpoint that “much of the Western media had been reporting distorted information to viewers during the Libyan conflict”. In line with freedom of expression, the Code does not prohibit a programme or reporter from reflecting particular perspectives on how different parts of the media cover different conflicts.

It is perfectly legitimate for a programme to be critical of Western nation-states and institutions and there is a long history of reporters presenting ‘personal view’ programmes which challenge orthodox thinking and present a particular viewpoint in a highly partial manner. This approach is not normally acceptable in a news programme (unless clearly signalled as a separate ‘authored’ item) and in any event a broadcaster is still required to preserve due impartiality, as appropriate, by reflecting alternative viewpoints in programming. In this case, we considered that Lizzie Phelan was criticising the Western media’s coverage of the Libyan conflict and also criticising NATO’s strategy and policy with regards to Libya. Given the strength and one-sided nature of these criticisms of NATO policy in her contribution to this news programme, in our view, it was incumbent on the broadcaster to ensure that alternative viewpoints were reflected in the news reports to counter the criticisms being made by Lizzie Phelan. This was not done by Russia Today in this news programme, and TV Novosti did not and could not point to any other linked news programming where this happened.

We did not accept the Licensee’s argument that due to the criticism of NATO by various international organisations for its failure to respond to criticism of its actions, “attempting to find commentators sympathetic to (but not necessarily fully informed of) NATO’s position could have led to accusations against RT [Russia Today] of misrepresenting NATO’s position”. The Code requires that in order for due impartiality to be preserved, alternative viewpoints have to be reflected in news programmes, as appropriate. A broadcaster cannot opt out of complying with, for example Rule 5.1 of the Code, because it fears being criticised for seeking to do so in an inadequate way.

Second, we noted TV Novosti’s representations that: Lizzie Phelan did not have time “to seek alternative views”; and a recent BBC Trust report on BBC coverage of the ‘Arab Spring’ highlighted “the difficulties in maintaining unbiased reporting in conflict situations”. Ofcom acknowledges the practical difficulties in seeking alternative viewpoints when reporters are working in challenging environments such as one of military conflict. We are also aware of the fact that reporters were working under certain reporting restrictions imposed by the then Libyan Government. However, TV Novosti, as the responsible Licensee, was in a position to include in their news programming, viewpoints to counter the criticisms of NATO policy being made by Lizzie Phelan. For example, the broadcaster could have included an interviewee in the studio, or the news presenter could have himself summarised the viewpoint of NATO in terms of its policy and strategy towards Libya. Ultimately it is an editorial decision for the broadcaster as to how to it complies with the due impartiality requirements of the Code.

[%20Popular%20Protest%20in%20North%20Africa%20and%20the%20Middle%20East%20OV%20-%20Making%20Sense%20of%20Libya.pdf](#)).

⁸ The International Crisis Group describes itself as “an independent, non-profit, non-governmental organisation committed to preventing and resolving deadly conflict”.

Third, we noted the Licensee's argument that "the very nature of conflict reporting makes it difficult, if not impossible, to guarantee unbiased coverage – but Ofcom's (rightful) demands for balance can be met by a plurality of broadcasters covering similar events". Similarly, the Licensee pointed to the various global news channels from "multiple origins", which in the Licensee's view suggests that "Britain is perhaps unique in making available to citizens a spectrum of views of political and controversial situations". We took note of these comments but point to the fact (irrespective of the, editorial range, origin or editorial approach of different news channels licensed by Ofcom) that each of these channels is individually required to comply with the Code. A service is not able to preserve due impartiality on its own channel through pointing to content on other services.

Given the above, we concluded that on the specific facts of this case these news items were not presented with due accuracy and due impartiality. We have therefore recorded a breach of Rule 5.1 of the Code in respects of the two *News* reports in question.

The Diplomacy of Defence

We assessed this programme under Rule 5.5 of the Code, which states that:

"Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service.... This may be achieved within a programme or over a series of programmes taken as a whole."

We considered first whether the requirements of Section Five of the Code should be applied: that is, whether the programme concerned matters of political or industrial controversy or a matter relating to current public policy. We then went on to assess whether the programme preserved due impartiality, by for example reflecting sufficiently alternative viewpoints.

We considered this programme included a large number of statements, as laid out in the Introduction, relating to: the policies and actions of NATO and the US Government relating to the issue of the NATO and US policy on missile deployment in Eastern Europe; and the Russian State's policies on such matters. In summary, the programme included a number of statements that Ofcom considered to be: highly critical of NATO and the US Government and their policies in respect of missile deployment in Eastern Europe; and supportive of the Russian State's policies on such matters. We therefore considered it dealt with a matter of political controversy and matter relating to relating to current public policy, and Rule 5.5 was applicable.

We then went on to assess whether the programme preserved due impartiality by, for example, containing sufficient alternative viewpoints. We considered that, taken overall, this programme did not include any views that could reasonably be said to reflect the viewpoint of NATO or the US Government, with regard to their policies and actions in respect of their policy on missile deployment in Eastern Europe. Further, this programme when considered alone gave a one-sided view on this matter of political controversy and matter relating to current public policy.

We noted the Licensee provided details of a separate programme (*Czech Peace*) as evidence of the views of NATO and the US Government on this issue being included in a "series of programmes taken as a whole", in relation to Rule 5.5 and as defined

by the Code⁹, and broadcast on Russia Today. *Czech Peace* was a documentary which highlighted a range of reactions, including those of the local Czech population, to the siting of a US radar base in Brdy, in the Czech Republic. In general, the vast majority of the views expressed within this programme were against the siting of the radar station (and against US policy more generally) with regard to its military deployment in Eastern Europe. TV Novosti did not provide specific evidence of alternative viewpoints included within *Czech Peace*. We therefore undertook a careful analysis of the programme's content. Although the programme was not about exactly the same subject as *The Diplomacy of Defence* (i.e. NATO and US policy of creating a 'missile defence shield' and deploying missiles in Eastern Europe, and its implications for Eastern Europe and the Middle East, and with particular reference to Poland), the subject-matter of *Czech Peace* (i.e. the debate concerning the siting of a US radar station in the Czech Republic) was in a similar area, and touched on similar themes.

We identified a few statements from Czech citizens or officials, as well as a short statement from President Obama, included in this programme which could be described as articulating a viewpoint that was supportive of US Government military deployment in Eastern Europe. For example, in *Czech Peace*, the following statements were made:

Jiří Krytinář (Czech actor): *"...I got to know the mentality of the American people. I think they're wonderful. That's why I stand behind building the radar base. Because above all it concerns us, and if we want to live without war and without stress then we should have the radar base"*.

Tomáš Töpfer (Czech senator): *"In the Middle Ages, if some Tartars had yelled: 'You knaves, why are you fortifying your town? We won't hurt you. You bastards, you're building walls no one wants to climb over'. That's how I see the radar. It's just a wall against anyone who would threaten the area with ballistic missiles"*.

President Obama: *"As long as the threat from Iran persists, we will go forward with a missile defence system that is cost effective and proven. If...the Iranian threat is eliminated, we will have a stronger basis for security and a driving force for missile defence construction in Europe will be removed"*.

We considered that the above statements in the programme *Czech Peace* would have served to provide a degree of balance with regard to the discussion concerning US military deployment within Eastern Europe. However, we noted that the overwhelming majority of views expressed within *Czech Peace* could be characterised as being critical of US military deployment within Eastern Europe. Therefore, we noted that, taken together, both the *The Diplomacy of Defence* and *Czech Peace* almost exclusively consisted of statements that could be described as critical of NATO or the US Government, with regard to their policies and actions in respect of their policy on missile and military deployment in Eastern Europe.

Further, we noted that the programme *Czech Peace* was broadcast three and a half weeks after *The Diplomacy of Defence*. We noted that the Licensee described *Czech*

⁹ The Code defines the meaning of "series of programmes taken as a whole" as: "more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience. A series can include, for example, a strand, or two programmes (such as a drama and a debate about the drama) or a 'cluster' or 'season' of programmes on the same subject"

Peace as “very much a follow-up to” *The Diplomacy of Defence*. However, Ofcom was not aware of any evidence that would suggest that the two programmes were part of a “series of programmes taken as a whole” in relation to Rule 5.5 of the Code. For example, we noted that the forthcoming broadcast of *Czech Peace* was not signalled to the audience during or around the broadcast of *The Diplomacy of Defence*. In this regard, we remind broadcasters of Rule 5.6 of the Code, which states that:

“The broadcast of editorially linked programmes dealing with the same subject matter (as part of a series in which the broadcaster aims to achieve due impartiality) should normally be made clear to the audience on air”.

In reaching our decision, we noted that there were some alternative viewpoints included in the programme *Czech Peace*, as laid out above. However, we considered that, on balance, and taking all relevant factors into consideration, these alternative viewpoints were not sufficiently reflected on the issue of NATO and US Government policy in respect of their policy on missile deployment in Eastern Europe to ensure due impartiality was preserved.

In reaching our decision, we also took account of the Licensee’s representations regarding this programme under Rule 5.5. Firstly, we noted the Licensee’s representation that the purpose of the programme was to “stimulate debate on, the lack of public policy statements from European and US governments regarding the existence of multiple, potentially offensive, installations targeting Russia”. Given the nature of this channel, a global news channel produced from a Russian perspective, it is unsurprising that the channel should wish to explore global strategic issues from a Russian perspective. However, as appropriate, when dealing with matters of political or industrial controversy and matters relating to current public policy, the broadcaster must reflect alternative viewpoints on such matters in the same programme or in a series of programmes taken as a whole. Similarly, the fact that, according to TV Novosti, both NATO and US Department of Defense allow Russia Today to be broadcast in their military establishments, and the programme resulted in various supportive comments from viewers, did not affect the requirement on the Licensee to ensure that Section Five of the Code was complied with.

Second, we noted TV Novosti’s representation that production staff had attempted to seek alternative viewpoints from, for example, “NATO and Pentagon officials” but had not been successful in these attempts. By attempting to obtain the participation within the programme of an organisation to provide an alternative viewpoint, the broadcaster did not discharge its obligations under Section Five of the Code. In such circumstances, if a broadcaster cannot obtain for example an interview or statement laying out a particular viewpoint on a matter of political or industrial controversy and matter of current public policy, then the broadcaster must find other methods of ensuring that due impartiality is maintained. These might include: summarising, within the programme, what that alternative point of view is; or including contributions from participants to express alternative views. However, ultimately, how due impartiality is maintained is an editorial matter for the broadcaster.

Third, we noted the Licensee’s representation that if persons representing potential alternative viewpoints are not prepared to participate in a programme “this can potentially result in the denial of information to viewers if only balanced reporting is allowed thus becoming an infringement of freedom of speech”. In reaching its decision, Ofcom has taken account of the fact that the right to freedom of expression is at its highest when discussing political matters. However Rule 5.5 reflects explicit statutory requirements in the Act (sections 320(1)(b) and 320(2) and has a clear

purpose in the public interest i.e. to ensure that broadcasters ensure that their radio and services television preserve due impartiality when dealing with matters of political or industrial controversy and matters relating to current public policy. As mentioned above, Ofcom recognises that Section Five of the Code, which sets out how due impartiality must be preserved, acts to limit, to some extent, freedom of expression. However, the fact that no one agreed to appear in this programme to present the NATO viewpoint did not prevent this broadcast being shown: the programme could still have complied with Section Five of the Code if the broadcaster had also used editorial methods, such as those as outlined above, to sufficiently reflect alternative viewpoints. Due impartiality does not require “balanced” reporting – it only requires that an alternative viewpoint or viewpoints are sufficiently reflected according to the context.

As we have already made clear, the broadcasting of highly critical comments concerning the policies and actions of any government, multi-national institution or nation state is not, in itself, a breach of due impartiality. Importantly, the Code does not prohibit broadcasters from criticising Western nation-states and institutions or more generally challenging the orthodox view of the West, as long as due impartiality is preserved. It is essential that news and current affairs programmes are able to explore and examine controversial issues and contributors are able to take a robust and highly critical position. However, depending on the specific circumstances of any particular case, it may be necessary to reflect alternative viewpoints in an appropriate way in order to ensure due impartiality is preserved.

In this case, it is clear that viewers were presented only with viewpoints supportive of the Russian Government’s policy on this particular matter of political controversy and matter relating to current public policy (NATO missile deployment in Eastern Europe), thus denying viewers some knowledge of crucial alternative viewpoints on this issue. Therefore, in our view, to record a breach of Rule 5.5 would not be a disproportionate infringement of the Licensee’s right to freedom of expression. Ofcom therefore considered *The Diplomacy of Defence* breached Rule 5.5 of the Code.

Conclusion

In reaching our decision, we also took account of the Licensee’s general representations about Ofcom’s investigation procedures.

Firstly, the Licensee said that “an informal discussion at an earlier stage could have led to a mutually satisfactory outcome, without the necessity for the large amount of effort expended by Ofcom and ourselves addressing the matter in a more formal manner”. We note this point, but we are of the view that if a licensee broadcasts content that presents potential issues under the Code, Ofcom is under a statutory duty to investigate those issues, and we must do in accordance with our published procedures.

Second, we note the suggestion made by TV Novosti that Ofcom should consider amending its complaints process, such that a complaining viewer should first be required to take up any issue with the broadcaster involved, and only if they are dissatisfied with the broadcaster response should they pursue the matter with Ofcom. In this regard, we would point to paragraph 1.9 of Ofcom’s existing Procedures for investigating breaches of content standards for television and radio¹⁰, which states that: “In the interests of timely resolution, Ofcom considers that complainants should

¹⁰ See <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/june2011/breaches-content-standards.pdf>

follow the broadcaster's own complaints procedure before making a complaint to Ofcom... If a complainant is not satisfied with the broadcaster's response to their complaint, the complaint can then be submitted to Ofcom". Ofcom in other words already actively encourages viewers to complain first to the relevant broadcaster. We consider it would disproportionate to *oblige* viewers to complain to the broadcaster first. This is a position Ofcom has arrived at following extensive public consultation in the past.

Ofcom underlines that broadcasters are free to criticise, for example, any perceived 'Western consensus' on any controversial policy or issue provided the Licensee complies with the need for due impartiality set out in the Code. Broadcasters are not required to give equal coverage to each perspective but must ensure that alternative viewpoints are reflected as appropriate in programming to some extent. Broadcasters should note however that when items in their news programmes criticise the policies and actions of individuals, organisations, governments or states, they must not only be presented with due impartiality but also reported with due accuracy. If news is reported in an unduly partisan fashion it risks breaching both the requirement for due accuracy and due impartiality in news.

News: Breach of Rule 5.1

The Diplomacy of Defence: Breach of Rule 5.5

In Breach

Uncle Saddam

Praise TV, 14 April 2012, 07:00

Introduction

Praise TV is a Christian network broadcasting on cable and satellite platforms. *Uncle Saddam* was a documentary about the former Iraqi leader, Saddam Hussein.

Ofcom was alerted to this broadcast shown early on a Sunday morning which included one use of the word “fuck”, as well as scenes that showed the injuries of people who had been tortured and people who had been executed.

Ofcom considered the material raised issues warranting investigation under Rules 1.3 and 1.14 of the Code, which state:

Rule 1.3: “Children must also be protected by appropriate scheduling from material that is unsuitable for them.”; and

Rule 1.14: “The most offensive language must not be broadcast before the watershed (in the case of television)...”.

Ofcom therefore asked the holder of the licence for Praise TV at the time of the broadcast, Destiny Broadcasting Network Europe Ltd (“Destiny” or “the Licensee”), how this broadcast complied with these Code rules.

In the course of Ofcom’s investigation of this case, this licence was revoked by Ofcom on 15 August 2012 because Destiny was unable to satisfy Ofcom that it had general control over its programmes.¹

Response

Destiny said *Uncle Saddam* was a documentary which was “educative to the public”. The Licensee said Saddam Hussein’s cruelty “cost him his life which is a history and is a lesson that can teach people not to involve themselves in such crimes that can make them to be executed.”

The Licensee said the word “fuck” was used because the contributor “was swearing with a religious book”. Destiny did not provide any further explanation for the broadcast of this language.

Destiny said that the sequence which showed people tied to poles and “seemingly shot at” showed “no evidence in the picture to suggest that bullets shot the supposed victims as the shot changes almost immediately.” The still images which depicted various methods of torture, including victims’ faces were, the Licensee said, “quickly flashed” on screen to portray the character of Saddam Hussein to viewers.

Destiny said that *Uncle Saddam* is available to view on the internet, and that other Christian broadcasters have shown programmes about the Passion of Christ, the

¹ See Notice of Revocation at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb212/>

Holocaust and the slave labour trade which contained much stronger imagery than within *Uncle Saddam*. The Licensee added that images of torture carried out by American and British forces in Iraq have been broadcast on television channels worldwide and questioned why such images in this documentary should be treated any differently.

However, Destiny said it would not show this programme again while Ofcom investigated this issue.

Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that “persons under the age of eighteen are protected”. This duty is reflected in Section One of the Code.

Rule 1.3

Rule 1.3 requires children to be protected by appropriate scheduling from material that is unsuitable for them. This rule states that “children” means “people under the age of fifteen years.”

Uncle Saddam was a documentary with a serious intent: to show how Saddam Hussein influenced the lives of the people of Iraq through intimidation and how his family gained positions of power in his regime. This is clearly a legitimate subject for a documentary but the content and scheduling of any documentary shown before the watershed must be appropriate.

Ofcom assessed first whether *Uncle Saddam* contained material unsuitable for children. We noted that the documentary included:

- Video footage of around eight seconds showing a man who resembled Saddam Hussein pointing a gun and appearing to shoot two men who were slumped over and tied to poles; and video footage of around five seconds depicting men in military uniform with rifles shooting at a group of men who were blindfolded and tied to poles.

Ofcom noted the poor quality of these images broadcast – little detail was shown and no bullet wounds or reactions from the victims were discernible. Nevertheless, although of a very brief duration, Ofcom considered this execution footage was capable of causing distress.

- Detailed drawings of torture techniques followed by photographs of men’s disfigured and bloodied heads after they had been tortured. This sequence lasted about 20 seconds.

These drawings showed images of: a man whose head was placed in a vice; a man whose hand was being drilled into; someone whose toe was being squeezed with pliers; a man whose back was heavily scarred by an instrument; and a man who was wired to the mains supply for electrocution. Each drawing was followed by a close up still photograph of the head of a dead person who had been tortured. All the heads shown were bloodied, one had part of the face missing and one appeared to have been badly burned. In Ofcom’s view this was also a shocking and disturbing sequence.

- Images of a “massacre” in northern Iraq resulting from the use of chemical weapons showing the bodies of a family including young children.

These images were shown in the context in a discussion of the role of Ali Hassan al-Majid (known as ‘Chemical Ali’) in organising attacks against Iraqi Kurds, and showed footage said to be of dead Iraqi Kurds, including young children, in northern Iraq who had apparently been killed by chemical weapons. The sequence showed a family group, including two young children, dead on the ground.

In Ofcom’s opinion this content depicting executions and the after-effects of torture and military action was graphic and distressing and unsuitable for children.

We therefore went on to consider whether it was appropriately scheduled so as to protect any children in the audience. Appropriate scheduling is judged according to various factors such the nature of the content, the likely number of children in the audience, the nature of the channel and audience expectations.

We noted that the programme was broadcast on Praise TV at 07:00 on a Sunday when it is likely that a number of children – some unaccompanied – would be among the audience. Praise TV is a Christian network broadcasting on cable and satellite services. In Ofcom’s opinion the audience (and in particular parents) for a Christian religious channel would not have expected a documentary on such a subject with such potentially disturbing content to be shown on Praise TV at this time, especially on a Sunday. While some of the images shown were indistinct, the cumulative effect of the different sequences, especially the torture images, meant that the nature of the content would have been potentially distressing even to an adult audience. Children were therefore not protected by appropriate scheduling, and this amounted to a breach of Rule 1.3.

Rule 1.14

Rule 1.14 states that the most offensive language must not be broadcast before the watershed. Ofcom research on offensive language² clearly notes that the word “fuck” and variations of this word are considered by audiences to be amongst the most offensive. Such language is unacceptable before the watershed.

Ofcom noted that the word ‘fuck’ was not used by a contributor, as the Licensee suggested, but by the narrator. In any event, there was no editorial justification for including the most offensive language within this daytime broadcast. Therefore we are also recording a breach of Rule 1.14.

In Ofcom’s view this was clearly a documentary intended for an adult audience. The fact that violent and other material is available to view on the internet, or may be shown on Ofcom licensed channels in accordance with the Code after the watershed, is irrelevant. Ofcom is concerned that Praise TV did not recognise that this film was appropriate to be broadcast only after the watershed, did not have compliance arrangements in place to ensure this happened, and sought to defend the scheduling of this documentary at 07:00 on a Sunday.

Breaches of Rules 1.3 and 1.14

² Audience attitudes towards offensive language on television and radio, August 2010 (<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>)

In Breach

Bollywood Box Office

B4U Music, 27 May 2012, 12:55

Introduction

Bollywood Box Office is a programme which reviews the latest Bollywood movies. The programme is broadcast worldwide on various B4U Music channels in India, Europe and the USA, and features a presenter who introduces and reviews clips from upcoming films. The licence for B4U Music is held by B4U Network (Europe) Ltd ("B4U Network" or "the Licensee").

A viewer alerted Ofcom to a lunchtime broadcast which they were watching with young children and which included in their view a scene too violent and bloody to be shown during the day.

Ofcom noted that during *Bollywood Box Office* the presenter introduced the first film, "*Department*" and described it as "*The latest cop, gangster, action thriller to hit the box office*". The first scene of the promotional trailer for "*Department*" that followed showed a close up shot of a man putting a gun in another man's mouth and pulling the trigger; blood then splattered on the wall behind the man's head. This scene consisted of two shots which lasted around two seconds in total, and further brief shots from the film appeared in a montage.

Ofcom considered the material raised issues warranting investigation under Rule 1.11 of the Code, which states:

"Violence, its after-effects and descriptions of violence, whether verbal or physical, must be appropriately limited in programmes broadcast before the watershed... and must also be justified by the context".

Ofcom therefore asked B4U Network how this content complied with Rule 1.11.

Response

B4U Network said that the programme was produced in India by B4U Television Network (India) and that the footage from the film "*Department*" had been provided as a promotional trailer by the film's producers. B4U Network said that its general practice is that all programmes to be broadcast in the UK are edited in India, under strict instructions and guidance provided by the B4U Network UK Legal and Compliance department.

B4U Network said that its UK legal and compliance department had vetted the promotional trailer for "*Department*" and asked for various scenes which contained "strong content", including the scene in which the man was shot in the head, to be removed.

B4U Network explained that although sequences from the film "*Department*" had been broadcast over 300 times in the UK by the Licensee without this scene, an individual editor for this edition of *Bollywood Box Office* in its office in India had included it by mistake. B4U Network said it would provide training for its editing department in India to ensure such a mistake would be prevented in future.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that “persons under the age of eighteen are protected”. This objective is reflected in Section One of the Code.

Rule 1.11 requires that violence in programmes shown in television programmes before the watershed must be appropriately limited and must be justified by the context.

In this case a male character was shown being shot dead in close up, causing blood to splatter against the wall behind his head. Although the sequence lasted around two seconds the violence shown was graphic and the shot of the blood splattered wall compounded the potentially distressing effect of this brief scene. It was, therefore, in Ofcom’s opinion not appropriately limited.

Ofcom next considered whether the violence was justified by the context.

Bollywood Box Office is a programme that reviews movies, some of which may contain adult issues and themes. Ofcom considered the likely expectation of the audience would be that films which include some violence might be reviewed on such a show; however the audience, and parents in particular, would expect any scenes unsuitable for children to be removed from a movie review show broadcast at this time of day.

Ofcom noted that B4U Music is a channel that features music videos and movie reviews, and that its content is likely to appeal to children and young adults. Ofcom’s assessment was that the Sunday lunchtime scheduling of the programme meant it was likely that children, some unaccompanied by an adult, would have been watching at this time. Ofcom noted that no warning was given before the broadcast of this sequence about the violent nature of the scene.

For these reasons Ofcom concluded that this scene of violence was not appropriately limited and justified by the context, in breach of Rule 1.11.

Breach of Rule 1.11

In Breach

Storm Night

Storm (Channel 966), 18 June 2012, 21:00 to 21:30

Introduction

Storm Night is a segment of interactive ‘adult chat’ advertising content broadcast on the licensed service known as Storm (Sky Channel 966). The service is freely available without mandatory restricted access and is situated in the ‘adult’ section of the Sky electronic programme guide (“Sky EPG”). Viewers are invited to contact onscreen presenters via premium rate telephony services (“PRS”). The female presenters dress and behave in a sexually provocative way while encouraging viewers to contact the PRS numbers.

The licence for Storm is owned and operated by Live Television Limited (“Live Television” or “the Licensee”).

Ofcom received a complaint that content on this service, broadcast shortly after the watershed, contained sexual images that were too strong to be shown at this time.

Ofcom noted a female presenter on screen wearing a translucent leopard skin print one piece outfit, which clearly showed the presenter’s breasts. The outfit was cut away at the sides and back and featured a thong style back. In addition, she wore a black thong, under the one piece outfit, and fishnet stockings. From around 21:15, and until at least 21:30, the presenter adopted various sexual positions: she lay on her side with her legs apart (albeit away from camera) while thrusting her body up and down, stroking her breasts and inner thighs and pulling down her top to reveal her cleavage; she moved onto all fours and thrust her bare buttocks (albeit at an angle slightly away from camera) to mime sexual intercourse; and, she knelt upright on her legs and moved her body up and down to mime sexual intercourse. While adopting these positions her outer genital area was briefly visible.

Ofcom considered this material raised issues warranting investigation under BCAP Code Rule 32.3, which states:

“Relevant timing restrictions must be applied to advertisements that, through their content, might harm or distress children of particular ages or that are otherwise unsuitable for them.”

We therefore sought the Licensee’s comments as to how this material complied with this Rule.

Response

The Licensee said that “the translucency [of the leopard skin print] visible on-screen was not visible in the studio”. Live Television explained that it has since advised all production staff to ensure that the clothing worn by presenters is monitored as broadcast, so that their bodies are adequately covered. The Licensee added that producers of the show have also been reminded of the need to ensure that material broadcast immediately after the watershed is suitable for children.

Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that: “the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented”. This objective is reflected in the rules set out in the BCAP Code.

The BCAP Code contains rules which permit ‘adult chat’ services to be advertised (and so broadcast) within prescribed times and on free-to-air channels that are specifically licensed by Ofcom for that purpose. When setting and applying standards in the BCAP Code to provide adequate protection to members of the public from serious or widespread offence, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention of Human Rights, as incorporated in the Human Rights Act 1998. However, the advertising content of ‘adult chat’ services has much less latitude than is typically available to editorial material in respect of context and narrative. A primary intent of advertising is to sell products and services, and consideration of acceptable standards will take that context into account.

Rule 32.3 of the BCAP Code states: “Relevant timing restrictions must be applied to advertisements that, through their content, might harm or distress children of particular ages or that are otherwise unsuitable for them.”

Appropriate timing restrictions are judged according to factors such as: the nature of the content; the likely number of children in the audience; the likely age of those children; the time of the broadcast; the position of the channel in the relevant electronic programme guide (e.g. the “adult” section); any warnings; and mandatory restricted access.

On 27 July 2011 Ofcom published revised guidance on the advertising of telecommunications-based sexual entertainment services and PRS daytime chat services (the “Chat Service Guidance”)¹. This clearly sets out what Ofcom considers to be acceptable to broadcast on these services post-watershed. In particular, the Chat Service Guidance states that with regard to material broadcast after 21:00 ‘adult chat’ broadcasters should ensure that:

- “After 9pm any move towards stronger – but still very restrained – material containing sexual imagery should be gradual and progressive. There should not for example be any miming of sexual acts between 9 and 10pm”.

Ofcom has also made clear in numerous previous published findings that stronger material should appear later in the schedule and that the transition to more adult material should not be unduly abrupt at the 21:00 watershed².

¹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/bcap-guidance.pdf>

² For example:

- *Red Light 2*, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb196/obb196.pdf>
- *ChatGirl TV*, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb2001/obb201.pdf>
- *Get Lucky*, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb204/obb204.pdf>

In applying BCAP Code Rule 32.3, Ofcom had first to decide if the broadcast material was unsuitable for children.

Ofcom noted that between 21:00 and 21:30, the female presenter wore a cut away one piece outfit that, at times and depending on her position, revealed her outer genital area. In addition, from approximately 21:15 she adopted various sexual positions such as lying on her side with her legs open thrusting up and down with her hips while pulling down her top and stroking her body; moving onto all fours and thrusting her bare buttocks up and down; kneeling upright and moving up and down. In these positions she repeatedly mimed sexual intercourse. In Ofcom's view, the translucent clothing which revealed her breasts, the sexual positions and the miming of sexual intercourse were intended to be sexually provocative in nature. In light of this behaviour and imagery, Ofcom concluded that this material was clearly unsuitable for children.

Ofcom then considered whether relevant timing or scheduling restrictions had been applied by the Licensee to this broadcast. Ofcom took account of the fact that the channel is in the 'adult' section of the Sky EPG. However, this material was broadcast on a channel without mandatory restricted access in the period very soon after the 21:00 watershed, when some children may have been available to view, some unaccompanied by an adult.

Ofcom also had regard to the likely expectations of the audience for programmes broadcast at this time of day on a channel without mandatory restricted access directly after the 21:00 watershed. In Ofcom's opinion, viewers (and in particular parents) would not expect such material to be broadcast and available to view so soon after 21:00, particularly given that material broadcast on such services prior to 21:00 should be non-sexual in tone and apparent intent. The broadcast of such sexualised content was inappropriate to advertise 'adult sex' chat so soon after the 21:00 watershed. This broadcast was therefore in breach of BCAP Code Rule 32.3.

Breach of BCAP Code Rule 32.3

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- *Party*, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb207/obb207.pdf>

In Breach

Andy & Craig's Big Drive Home

Northsound 1, 23 to 27 April 2012, 15:00

Introduction

Northsound 1 is a local commercial radio station that broadcasts to the Aberdeen area. The licence for the service is held by Bauer Media Group ("Bauer Media" or "the Licensee"). From 23 to 27 April 2012, the station ran a listener competition about the Eurovision Song Contest which took place in Azerbaijan the following month.

Each day, listeners were invited to call the station's landline telephone number (charged at standard rate) and, if put to air, they had to correctly identify a past Eurovision Song Contest entry from a short section of its lyrics. The first correct entrant was awarded £150 and entered into a main prize draw. On the last day of the competition, one of the five winners was selected at random to receive the main prize. The main prize draw was described on air as:

"The chance to go to this year's Eurovision Song Contest, flights, accommodation, show tickets – it's all there for you."

Ofcom received a complaint from the winner of the main prize who discovered that the tickets he had won were not for the Eurovision Song Contest itself, but for the dress rehearsal (scheduled for the previous day).

Ofcom considered the material raised issues warranting investigation under Rule 2.16 of the Code.

Rule 2.16 "Broadcast competition prizes must be described accurately"

Therefore, Ofcom asked the Licensee how the description of the main prize complied with this rule.

Response

The Licensee explained that the promotion was booked by an airline company using an advertising agency and there was no formal written contract for this competition between itself and either the airline company or the agency. It said that at no point in the advertising agency's correspondence with the airline was it mentioned that the tickets on offer were for the dress rehearsal and it was therefore unaware that the prize did not include tickets for the main event until the competition had ended. It added that, had this been brought to its attention, it would have immediately adjusted the way in which the prize was described on air.

The Licensee said that, having been made aware of the issue, it applied pressure on the airline to provide main event tickets but, as none were available, set about arranging a suitable compensation package. The winner accepted £1,000 in compensation, in addition to the prize on offer.

Bauer Media explained that owing to timing constraints with this kind of programming, it relies on third party agencies. Further, it said that it is often not practical to have a written agreement beyond an email confirmation due to short lead

times. Nonetheless, it apologised for the confusion and said that it would never intentionally mislead its listeners or offer prizes that it did not think it could deliver.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that “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”.

These objectives are reflected in, among other rules, Rule 2.16, which serves to ensure broadcast competition prizes are described accurately. The purpose of this rule is to prevent viewers and listeners from being misled into entering a competition on the basis that they could win a particular prize which is not in fact available to them.

In this case, although not specifically stated on air, Ofcom considered that listeners would have reasonably assumed that the main prize included tickets for the final of the Eurovision Song Contest. Furthermore, the knowledge that only dress rehearsal tickets were on offer may have deterred listeners from seeking to enter.

However, Ofcom noted that the only entry route for the competition was via a local landline number which did not generate any revenue for the station and would have involved a limited cost to those listeners seeking to enter. We also noted the swift action taken by the station and the substantial compensation package offered to the winner in addition to the original prize.

Ofcom accepted that Licensee did not deliberately seek to mislead entrants. However, we were nevertheless concerned that the Licensee promoted the competition and described the prize on air without any guarantee from the prize provider (for example through any form of written agreement) about the details of the prize or that it could even be fulfilled.

The competition prize was not described accurately and the broadcast was therefore in breach of Rule 2.16.

Breach of Rule 2.16

In Breach

Mornings with Toby Anstis

Heart FM Network, 25 and 28 May 2012, 10:00

Introduction

Heart FM Network is a group of contemporary chart music and information radio stations serving adult audiences across central England, southern England and north Wales. It is owned by Global Radio ("Global"), which is responsible for its compliance.

Mornings with Toby Anstis is a three-hour weekday morning show broadcast across the Heart FM Network. *'Who's on Heart'* is a broadcast competition that is promoted and conducted regularly throughout the programme. Listeners are invited to call the programme and identify three celebrities to win a potential jackpot of £60,000. On each occasion the competition is conducted, only the listener who successfully connects to the studio is charged for their call (at their network operator's standard rate). All other potential entrants find the competition line is engaged and should not therefore be charged.

A Heart Devon listener contacted Ofcom, as she was concerned that, on three occasions, the presenter did not inform listeners the competition was being conducted across the entire Heart FM Network. She considered that Heart Devon listeners could have entered the competition unaware of the large number of people they were competing against.

Ofcom noted that, at approximately 10:55 and 11:55 on 25 May 2012, and 12:55 on 28 May 2012, the presenter solicited entries into *'Who's on Heart'* without giving any indication of how widely the competition was spread (beyond the area of a listener's local Heart service).

We also noted our consideration of a previous complaint, when, on 3 April 2012, a local presenter on Heart Devon had similarly solicited entries into *'Who's on Heart'* during her handover from the station's local breakfast show to Heart FM Network's *Mornings with Toby Anstis*. On that occasion, Global had told Ofcom that the regular presenter had been replaced by a cover presenter, who had "failed to read her script in full", adding that it had "addressed the issue with the presenter" and assuring Ofcom that it "[understood] the need to include a message about the nature of a network-wide competition, and [had] reinforced with all presenters that they are to read all competition and commercial scripts as they are provided, for this reason." In light of these circumstances, and the fact that appropriate messages had been included later in the programme, Ofcom decided not to pursue the matter. However, we made clear to Global that we would pursue any recurrences.

We considered the broadcasts on 25 and 28 May 2012 raised issues warranting investigation under Rule 2.15 of the Code, which states:

"Broadcasters must draw up rules for a broadcast competition or vote. These rules must be clear and appropriately made known. In particular, significant conditions that may affect a viewer's or listener's decision to participate must be stated at the time an invitation to participate is broadcast."

Ofcom's Guidance to this rule makes clear that where a competition is run simultaneously across a number of stations, e.g. a radio network, and the main prize is not awarded by each local/regional service, we would normally expect that it has to be made clear that other services are participating. The guidance also advises that this should be done both on air and in any written rules, whenever the competition or its results are run.

We therefore asked Global for its comments on how the broadcasts had complied with Rule 2.15.

Response

Global expressed its disappointment that its presenters had not adhered to its internal policy, as they had been "stringently reminded of their responsibilities regarding the communication of the competition's rules following the original incident, and the critical points were included and emphasised in every script presenters were required to read out when setting up and executing the competition."

It added that it had therefore reiterated to its staff that "it is essential ... all presenters, both locally and on the network, state that the competition runs across the Heart network when giving out the phone number."

Global said it had now conducted an urgent review, to assess the risk to listeners, and had noted that on all occasions where entry was encouraged, including the incidents in this instance, listeners were directed to read the competition terms and conditions – which included reference to the competition running across the Heart network – on the Heart website.

It noted that, by 10:55 on 25 May 2012, 635 rounds of the competition had been conducted and that, based on its "RAJAR¹ figures for time spent listening ... by the end of the week commencing 25th June each Heart listener would have heard the correct network disclaimer and terms and conditions message approximately 34 times", adding that, "for the local Heart Devon station this [increased] to 40."

Global also noted that it had received no other complaints about the matter.

It therefore considered there was "little chance overall of listeners being unaware of the significant rules and conditions associated with this long-running network competition", but added that it took its responsibilities to Ofcom and its listeners extremely seriously and, as part of its review, had consulted senior management to examine solutions for ensuring compliance going forward.

Global said that, having further reminded all its presenters of their obligation to include "the network disclaimer when encouraging entry directly", it had, "as an additional safeguard ... also implemented a pre-recorded 'tag on' of the disclaimer, which will play out automatically with the phone number." It therefore considered it had "taken every step possible to prevent a recurrence of the incidents ... as it would require both human and technical error..."

While Global said it "appreciated the complainant's concerns", it concluded that, "given the long-running nature of the competition and the vast number of times the

¹ Radio Joint Audience Research, which is jointly owned by the BBC and the RadioCentre (on behalf of the commercial radio sector), is the official body responsible for measuring radio audiences in the UK.

information was given overall, [it had] made clear the 'significant conditions that may affect ... a listener's decision to participate' and [had] stated them 'at the time an invitation to participate is broadcast', as per [Rule] 2.15."

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure standards objectives, including "that generally accepted standards are applied to the contents of ... radio services so as to provide adequate protection for members of the public from the inclusion in such services of ... harmful material."

This is reflected in part by Rule 2.15 of the Code, which requires, among other things, that broadcasters "draw up rules for a broadcast competition", "make them...clear and appropriately made known" and, in particular, state "significant conditions that may affect a...listener's decision to participate...at the time an invitation to participate is broadcast."

For competitions to be run fairly, listeners should be given sufficient information to enable them to decide whether or not to participate. When run simultaneously on various local/regional services, competitions can result in participation being spread wider (i.e. beyond the local area) than might be obvious to listeners in any one location.

In this instance, Ofcom noted that *'Who's on Heart'* appeared to have become an established broadcast competition in *Mornings with Toby Anstis*, particularly given its prominence in the programme. We therefore accepted that most regular listeners to this morning show were likely to have heard and understood that the competition was conducted across the Heart FM Network.

We also took into account that the risk of any potential financial harm to a listener who entered the competition but was unaware of the large number of people they were competing against was very limited, as calls should have been charged only to entrants who were brought to air and at their network operators' standard rates.

However, it is Ofcom's view that *no* listener – regular or casual – should be given the impression that a competition is run over a smaller geographical area than is actually the case. We therefore view the potential size of a broadcast competition as a significant condition that may affect a listener's decision to participate (to which Code Rule 2.15 refers). In this instance, on three occasions, such a condition was not broadcast at the time listeners were invited to participate in the broadcast competition, *'Who's on Heart'*, in breach of Rule 2.15 of the Code.

We therefore welcome the action taken by Global.

Breaches of Rule 2.15

In Breach

BMW: A Driving Obsession

CNBC, 26 November 2011, 18:00

Introduction

CNBC is a business news channel broadcast on cable and satellite platforms. It is aimed at business professionals. In addition to news, CNBC also broadcasts documentaries. The licence for the channel is held by Business News (Europe) Partnership (“Business News” or “the Licensee”).

BMW: A Driving Obsession – a documentary about the car manufacturer, BMW – was produced by CNBC’s sister company in the United States and was broadcast on CNBC in the UK.

A viewer was concerned that the trailer for the programme presented the BMW brand in a way which endorsed the brand and was akin to advertising. Ofcom therefore viewed both the trailer and the programme.

The approximately 42 minutes programme (excluding advertising breaks) consisted of five parts. Part one covered an American couple who had travelled to Munich, Germany to have a tour of BMW’s plant before collecting their new BMW. It also featured the presenter Carl Quintanilla interviewing Csaba Csere (the former editor of ‘Car and Driver’ magazine), David Champion (Director of Automobile Testing for non-profit Consumer Reports) and Uwe Ellinghaus, BMW’s Director of Brand Management. It also contained coverage of the Detroit Auto Show where Mr Quintanilla interviewed Ian Robertson, BMW’s Head of Sales and Marketing about its competitors in the premium car market.

The following are examples of references to BMW products and the brand which were included in part one of the programme:

Carl Quintanilla (in vision):	<i>“The Autobahn is one reason Germany has produced many of the world’s fastest – and most remarkable – cars including the one I’m driving now. It wears the blue and white logo of one of the most successful, envied and copied companies in history – BMW. And it’s a company we’ll take you inside.”</i>
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Narration:	<i>“On the north end of town is the headquarters of Bavarian Motor Works, BMW. And right next door is the BMW Welt – or World – the ultimate showcase for the car the company calls ‘the ultimate driving machine’. For fans, it’s a high octane stew. Whether they’re curious about the company’s early products, into car culture, or like [customers’ name]s, they’ve travelled over six thousand miles to pick up their new Bimmer.”</i>
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Narration:	<i>“BMW makes it a day-long affair – a kaleidoscopic immersion in BMW production, engineering and innovation. For those who</i>
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can't wait to see their new set of wheels – and like a little anticipation – it fits the bill.”

Customer: *“It is just friendly and open. And gosh, now you're one of the team here. And that kind of feeling that makes you go ‘Yay, I'm part of the team.’”*

Narration: *“Nothing about the [customer surname]'s experience is an accident. Their entire day here has been carefully engineered into a kind of theatre, like everything BMW does, with an attention to detail and design. You can see it in its architecture, in its cars and in the way it's chosen to grow. At BMW it's all about engineering tightly meshed with design. That results in cars loved by people for whom driving itself is a pastime, according to Csaba Csere – he's the former editor of ‘Car and Driver’ magazine.”*

Csaba Csere: *“The best driving machine means – means that it's – sport. That it's fast. That it has steering that as you're going around a corner and you hit a bump, it actually kicks back. And you feel what's happening. Most cars aren't that way.”*

Narration: *“Csere believes that's the key to BMW's popularity”*

Csaba Csere: *“For twenty to thirty years they've largely delivered on the ultimate driving machine as a brand statement.”*

Director of Brand Management:

“I think this is something that sets BMW still apart. Never disappoint.”

The second part of the programme covered what happens at BMW's research and development centre in Munich. Mr Quintanilla interviewed two of BMW's sound designers who demonstrated how warning sounds are chosen for BMWs and Minis. Mr Quintanilla then interviewed a seat comfort engineer for BMW, before showing one of BMW's wind tunnels where it tests cars in cold weather. Mr Quintanilla also interviewed the Chairman and CEO of the BMW Group about BMW's new electric and hybrid cars.

The following are some examples of references to BMW products and the brand which were included in the second part of the programme:

Narration: *“Although BMW's principal competitors – Audi and Mercedes – do their own exhaustive testing and design, BMW claims its efforts go a bit further. They're nothing if not scientific about it.”*

Sound designer: *“These things you couldn’t even name are the most important in the end that makes it different between dislike, like or love a product. But why they really love it, I think it’s because the designers gave all their love to all these tiny things.”*

In the third part of the programme, Mr Quintanilla interviewed the Chief Designer for the BMW Group and discussed which design elements of BMWs help to define the brand. The process of design through to manufacture was covered with input from two of BMWs designers.

The fourth part of the programme covered what happens at BMW’s Rolls Royce plant in Goodwood, UK, with input from the Chairman and CEO of the BMW Group and some of the craftsmen who make and test the cars. This part of the programme also covered Volkswagen’s takeover of the Rolls Royce and Bentley factories, the Bentley brand and all the employees in 1998 and how BMW won the right to use the Rolls Royce name, logo and hood ornament and had to rebuild the business from scratch.

The following are some examples of references to BMW products and the brand which were included in the fourth part of the programme

Narration: *“Getting it right is mandatory at Rolls Royce, no matter the request.”*

Rolls Royce employee: *“... it’s all about finding the problem – or stopping the problem from ever getting to the customer. We’re going way, way beyond what a customer would ever see.”*

Carl Quintanilla (in vision): *“Why bother then?”*

Rolls Royce employee: *“Well it’s the best car in the world. So you know, we have to – we have to exceed expectations.”*

The fifth and final part of the programme covered the culture of BMW and included input from BMW’s Head of Cultural Engagement discussing BMW art cars which have been painted by famous artists and the use of a BMW in the James Bond films. Mr Quintanilla also talked to BMW’s spokesman for BMW Classic which restores vintage BMWs.

The following is an example of a reference to BMW products and the brand which was included in the final part of the programme

Narration: *“Some critics have dismissed BMWs as over-engineered, over-hyped and over-priced. Try telling that to their legions of imitators and buyers, drawn to a brand built on high-tech performance and that most elusive quality – status.”*

Business News confirmed to Ofcom that neither it, the programme producer nor any person connected¹ with either received any payment or other valuable consideration for the inclusion of references to BMW in the programme, and that therefore the references had not been subject to any product placement arrangement.

¹ “Connected person” is defined in Part 1 of Schedule 2 of the Broadcasting Act 1990.

Ofcom therefore considered the programme material raised issues warranting investigation under the following Code rules:

Rule 9.1: “Broadcasters must maintain independent editorial control over programming.”

Rule 9.4: “Products, services and trade marks must not be promoted in programming.”

With regards to Rule 9.1, we requested that Business News provide any contracts, arrangements and/or any other correspondence between CNBC US (the producer) and BMW (and/or any agents or associates of either), for access to: the BMW locations; BMW employees; BMW customers; and BMW archive and/or graphics material which were featured in the programme.

We also requested Business News’ comments on how the programme complied with Rule 9.4.

Response

Rule 9.1

Business News provided evidence to demonstrate that CNBC had maintained independent editorial control. It stated that “considerable efforts were made to ensure that BMW understood and accepted the independence of the production team.... the process of identifying a customer to film for part of the Programme was undertaken in consultation with BMW, but under the direction and discretion of the production team.... a number of discussions took place both with BMW and internally before CNBC alone resolved upon the concept for the programme.”

Business News continued that “in liaising with BMW over the programme’s numerous potential locations and subjects for discussion, many of the ideas proposed by BMW were properly considered but not pursued as they were not necessary for, or in keeping with, the areas that CNBC US wished the programme to cover. It is clear that an appropriate degree of separation and independence was maintained by CNBC at all times.”

Business News stated that “BMW assisted the producers by granting access to relevant plants, employees and customers as evidenced throughout the programme. However, ultimately it was the programme producers who decided what was to be included and who held control over the production.”

Rule 9.4

Business News explained that CNBC in the US has previously produced and broadcast a number of documentaries focusing on specific companies and business individuals². It said that “these programmes typically relate to multinationals and often have a particular emphasis on the characteristics of the business, the challenges it has faced and the overall market context.... The documentaries have aimed to

² The Licensee confirmed that 15 of these programmes were also broadcast on CNBC. Ofcom therefore extended its assessment to these other 15 programmes. Ofcom did not find these programmes to have breached the Code.

provide an investigative focus on each business, showing a fair portrayal of what the producers found.”

Business News stated that the programme was originally produced by an in-house CNBC US production team which has to comply with the ‘CNBC News Policy and Guidelines September 2006’ and the ‘Comcast Corporation Code of Conduct: Facing ethical and compliance issues with integrity’.³ It continued that CNBC US “has a regular dialogue with its sister company offices and seeks to ensure that programming that might be broadcast by affiliate companies is suitable for broadcast internationally”. Business News confirmed that one of its own compliance officers undertook a programme review before broadcasting the programme in the UK.

Context and intended audience

In considering the application of Rule 9.4 of the Code, Business News explained that it noted from the section of the Code ‘How to use the Code’, “the importance of ensuring that ‘programme content can always be justified by the context and the editorial needs of the programme’”. The Licensee also referred to Ofcom’s published guidance to Rule 9.4 which states, “Where a reference to a product or service features in a programme for purely editorial reasons, the extent to which a reference will be considered promotional will be judged by the context in which it appears.” Business News said that CNBC is a business news channel aimed at business-people. It aims to provide business leaders, investors and those in the financial services industry with the information and analysis they need.

It Business News said that the “premise of the programme was to look carefully at the BMW business by examining how BMW has become so successful and profitable in the American luxury car market and by considering the continuing competitive pressures upon the company as it strives to maintain its market position. To this end, the programme examined the inner workings of the company – its culture, mind-set and history – with a focus on engineering and brand management.” The Licensee stated that BMW “is a company that a business viewer would be interested to look into and to understand and learn from” and that at the outset of the programme, the narrator stated that the aim of the programme was to take viewers “inside” BMW. Business News said that this aim was clear from the ‘behind-the-scenes’ nature of the programme and reinforced by the factual content of the programme in relation to BMW’s workforce, its processes and procedures and its market performance, production and position in the market. Business News submitted that the aim of the programme “was informed by balanced comment where the views of independent third parties and objective facts will necessarily carry significant weight.”

Business News stated that the programme’s intended audience was aware of the “fierce competition in the automotive industry and Audi’s growth in recent years as well as of similar environments of fierce competition between leading brands generally” and that it would view the comments made in the programme in the context of this knowledge. It added that a business viewer would be informed by the views of BMW employees but would “not necessarily be swayed by such views in the overall context of the programme”.

Business News also submitted that the narration identified positive perceptions of the BMW brand that were attributed to BMW itself, for example: “...*the car the company calls ‘the ultimate driving machine’...*”; “...*the products they make, they say, will be*

³ Comcast is the majority owner of CNBC.

'premium' vehicles..."; and *"...BMW claims its efforts go a bit further..."*. The Licensee argued that this was consistent with one of the aims of the programme which was to consider how the company perceived itself.

Business News stated that "a factual statement that may be deemed 'positive' should not consequently be deemed promotional". It referred to Ofcom's published guidance on Rule 9.4 which states that "there may be circumstances that justify a greater degree of information about products or services within programmes". The Licensee said that "in order to accurately portray BMW's business it was necessary and justifiable to present a significant degree of factual information" regarding BMW's success. It added that the average business viewer would have a legitimate interest in the size and scope of the company's operation, its position in the market and its efforts to maintain that position.

Negative and critical references

Business News submitted that the programme contained "many negative statements" and that "the vast proportion of the programme is either neutral or factually descriptive". It provided examples including:

Narration: *"In England, the company owns two other brands. They make mini, the sporty car that began life as a British economy model. And Rolls Royce a car at the high end of luxury with a price tag to match."*

Narration: *"In the face of tough European pollution standards and consumer demand for fuel-efficiency, BMW is creating a new sub-brand."*

Narration: *"In 1993 the company bought the troubled British Rover group. It was a disaster. Rover's operations were a mess and by the time BMW got itself out of the deal in 2001, it had lost billions of dollars."*

Business News stated that factual information of this nature would be of significant interest to the business viewer, who would be looking to gain an understanding of the inner-workings of the company.

It also gave further examples of comment in the programme that were critical of BMW, including those set out below:

i) BMW's history

Narration: *"By the mid-'30s, the Nazi regime was rearming Germany and BMW played a role."*

BMW historian: *"BMW was the aircraft engine company in the Third Reich. It was one part of the whole plan in the Third Reich, even for starting the Second World War."*

Narration: *"By 1944 almost half BMW's factory workers were forced labour from occupied countries, POWs or concentration camp prisoners."*

Narration: *"BMW was also making big cars, and poor sales of those brought the company to the brink. In a fateful 1959 meeting shareholders considered a takeover by rival Mercedes-Benz."*

Carl Quintanilla (in vision): *"Fair to say BMW came within days of being a unit of Mercedes?"*

Manfred Grunert: *"I would say if that day had gone a little bit different, then we would have been sold to Mercedes. It was really at the edge."*

ii) BMW's obsessive approach leads to over-engineering

Narration: *"Uwe Ellinhaus, the Director for Brand Management at BMW admits they can go overboard in their attention to detail."*

Carl Quintanilla (in vision): *"Is there something about German car makers, and specifically BMW, that is a little mad?"*

Director of Brand Management: *"Boy, this is an – difficult question to answer. I wouldn't wanna say mad. But clearly there is a certain level of over-engineering that we have where we pay so much attention to detail that we might even get – lost sometimes and – overdo things. We once found out that – for example – some of our pedals are painted four or five times. That's a couple of years ago. And we asked what's the difference by doing it only two times or three times. And nobody could really tell."*

Narration: *"Some critics have dismissed BMWs as over-engineered, over-hyped and over-priced".*

iii) The complexity of BMW cars can be annoying

David Champion: *"In many ways I think they are over-engineered.... Those simple things like just tuning the radio... is sort of like a five-step process to try and get through. And that sort of complexity – I think is very annoying."*

Carl Quintanilla (in vision): *"Can you play that again? [Beeping] Right, that is annoying."*

Sound designer: *"Yes, and after [laughs] a few more times, it's even more annoying"*

iv) BMW cars have significant reliability issues while competitors' cars do not

Narration: *"Champion admits BMWs can be great cars to drive but he says the company's technical prowess hasn't cured the cars of some significant reliability issues...."*

David Champion: *"...Lexus, Infinity, Acura, all competing in that same marketplace."*

And they all have better reliability.”

v) Threat to BMW caused by its ubiquitous presence and its competitors

Business News submitted that BMW's perspective as a company operating in a competitive market was properly counterbalanced by appropriate reference to its competitors and their stated aims and the on-going struggle to remain ahead of the competition. The Licensee stated that the programme noted that Lexus, Infiniti and Acura are *“all competing in that same marketplace”* and that all three *“have better reliability”*. It observed that along with BMW, Mercedes and Audi make up the three top automotive brands and these competitors *“aren't standing still”*. Business News submitted that viewers were left with *“the clear understanding that BMW is having to work hard to maintain market position and to maintain a position as an exclusive brand.”* The Licensee provided the following further examples of negative comments in relation to this specific issue:

Narration: *“In 2010, the BMW Group dominated the premium car market, selling more than 1.2 million luxury cars worldwide. But its competitors aren't standing still. Audi, the number three brand behind Mercedes has brashly declared that by mid-decade it will take over BMW's number one spot.”*

Narration: *“Audi does seem to be treading common ground in the way it markets its models. BMW's 3, 5 and 7 series, matched by Audi's A4, A6 and A8.”*

Narration: *“Looking ahead, BMW may have the most to fear from its own success. If you're an exclusive, luxury brand and drivers begin to see your cars everywhere how exclusive are you really?”*

vi) The design of the BMW 7-series

Narration: *“The design process is as exciting as it is stressful, Adrian van Hooydonk knows the pressure well. Ten years after beginning his career at BMW, he penned the lines for a controversial 7-series under then-design chief Chris Bangle. Although, the car was blasted by reviewers, who dubbed the large back end the Bangle Butt...”*

Business News stated that comments of this nature were highly critical of BMW's reputation and gave due balance to BMW's positive perception of its own brand.

Business News also pointed to comments made by independent third parties during the programme, and said that a business viewer would attribute far greater weight to the highly critical views of an independent expert (e.g. David Champion, Director of Automobile Testing for non-profit Consumer Reports), than to praise of BMW's brand and products submitted by BMW employees.

Further, Business News argued that the juxtaposition of a positive comment with a negative comment did not negate the negative comment. It stated for example, that

the fact that Audi's claim that it would take over BMW's number one spot was refuted by a BMW employee in no way negated Audi's claim. The Licensee said that the programme presented the differing views of two competing companies and neither view was accorded greater weight than the other. Business News said that the expression of differing viewpoints was central to "the process of providing balanced broadcasting" and was in keeping with the principles that underpin the Code, pointing in particular to the requirement of Rule 5.9 that alternative viewpoints are adequately represented.

Business News said that it considered that "each of the references to BMW is editorially justifiable given the premise of the programme and its likely audience". It therefore considered that the programme was not in breach of Rule 9.4 of the Code.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure specific standards objectives, one of which is "that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with."

Article 19 of the EU Audiovisual Media Services (AVMS) Directive requires, among other things, that television advertising is kept visually and/or audibly distinct from programming.

The purpose of this is to prevent programmes becoming vehicles for advertising and to protect viewers from surreptitious advertising. Further, Article 23 of the Directive requires that television advertising is limited to a maximum of 12 minutes in any clock hour.

The above requirements are therefore reflected in, among other rules, Rule 9.1 of the Code which requires that broadcasters maintain independent editorial control over programming in order to prevent third party influence (including commercial influence), and Rule 9.4 which prohibits the promotion of products, services or trade marks in programming.

Rule 9.1

Having considered the information provided by the Licensee, Ofcom was satisfied that there was no evidence to suggest that BMW had influenced, or tried to influence the content of the programme in such a way as to impair CNBC's responsibility and editorial independence. Ofcom therefore did not find a breach of Rule 9.1 of the Code.

Rule 9.4

Context and intended audience

Ofcom accepted that there was editorial justification for a programme about BMW's business on CNBC which is a business news channel, primarily aimed at business-people.

As noted by Business News, Ofcom's published guidance to Rule 9.4 states, "Where a reference to a product or service features in a programme for purely editorial reasons, the extent to which a reference will be considered promotional will be

judged by the context in which it appears.” Ofcom took account of the fact that the intention of this programme was to explore the inner workings of BMW, and the reasons underpinning its market position and brand success. As such, Ofcom accepted that a programme of this type would, in principle, fall into the category envisaged by the guidance to Rule 9.4 which states: “there may be circumstances that justify a greater degree of information about products or services within programmes”.

Nevertheless, it should be noted that this greater latitude for information about products and services in certain types of editorial contexts does not give broadcasters freedom to include unlimited references that amount to the promotion of products or services. Ofcom therefore turned to consider the nature of the references to BMW’s brand and products in the programme, and the extent to which these had been promotional, in the context of a programme about an international business aimed at business viewers.

Ofcom agreed with the Licensee that the factual information provided in the programme would be of significant interest to the business viewer. However, overall, in Ofcom’s view, while the programme did contain some negative comments about BMW, as detailed below, in almost every case, these were either framed in positive statements or immediately followed by positive statements about the brand or its cars, as set out in the Introduction.

The relative lack of critical statements in this approximately 42 minute programme (excluding advertising breaks), resulted in the overwhelming focus of the programme being the positive qualities of BMW and Rolls Royce cars, the success of the BMW brand and positive comments from the majority of the programme’s contributors which clearly endorsed the brand and its cars.

Ofcom then went on to consider the arguments put forward by Business News about the negative and critical references to BMW contained in the programme and in particular the role they played in the overall impression given of BMW by the programme as a whole.

Negative and critical references

Ofcom noted Business News’ arguments that the negative statements included in the programme should be assessed qualitatively not quantitatively and that the juxtaposition of a positive comment with a negative comment does not negate the negative comment. When considering the programme, Ofcom did not take the approach of simply counting the number of positive and negative statements to judge whether or not the programme was promotional. Nor did we consider each negative comment juxtaposed with a positive comment to be positive. Rather, we considered the programme as a whole and considered its overall tone and the effect of the various different elements that made it up.

For example, Ofcom took into account Business News’ view that a business viewer would attribute far greater weight to the highly critical views of an independent expert (e.g. David Champion (Director of Automobile Testing for non-profit Consumer Reports), than to praise of BMW’s brand and products submitted by BMW employees. The views of two independent third parties were included in the programme, Csaba Csere and David Champion. However Ofcom noted that these interviews were extremely brief and limited in weight within the programme compared to the coverage given to BMW contributors. For instance, the interview between the presenter and Csaba Csere, who spoke in favourable terms about BMW, comprised

60 seconds of the programme, while the interview between the presenter and David Champion, who provided the only negative independent voice, comprised 55 seconds of a programme which was approximately 42 minutes in duration (excluding advertising breaks).

In its response, Business News identified a number of critical comments made about BMW during the programme. Ofcom's assessment of a selection of the comments is set out below.

i) BMW's history

Ofcom acknowledged that the comments in the programme about the history of BMW, for example its links with the Third Reich and the near take-over by Mercedes in 1959, were critical of those aspects of BMW's past.

ii) BMW's obsessive approach leads to over-engineering

Narration: *"Uwe Ellinhaus, the Director for Brand Management at BMW admits they can go overboard in their attention to detail."*

Carl Quintanilla
(in vision): *"Is there something about German car makers, and specifically BMW, that is a little mad?"*

Director of Brand Management: *"Boy, this is an – difficult question to answer. I wouldn't wanna say mad. But clearly there is a certain level of over-engineering that we have where we pay so much attention to detail that we might even get – lost sometimes and – overdo things. We once found out that – for example – some of our pedals are painted four or five times. That's a couple of years ago. And we asked what's the difference by doing it only two times or three times. And nobody could really tell."*

Ofcom did not consider this to be a particularly critical comment about BMW. Having attention to detail is usually considered to be a positive attribute. Further, Ofcom considered that the example of "over-doing it" given by BMW's Director of Brand Management (i.e. painting pedals four or five times instead of two or three times), was unlikely to be seen by viewers as being detrimental to the car or the consumer.

Business News also identified that near the conclusion of the programme it was stated that *"Some critics have dismissed BMWs as over-engineered, over-hyped and over-priced"*. However, Ofcom noted that this was somewhat negated by the statement that immediately followed: *"Try telling that to their legions of imitators and buyers drawn to a brand built on high-tech performance and that most elusive quality – status."*

iii) The complexity of BMW cars can be annoying

David Champion: *"In many ways I think they are over-engineered.... Those simple things like just tuning the radio... is sort of like a five-step process to try and get through. And that sort of complexity – I think is very annoying."*

Carl Quintanilla: *"Can you play that again? [Beeping] Right, that is annoying."*

Sound designer: *"Yes, and after [laughs] a few more times, it's even more annoying"*

Ofcom noted that David Champion's criticism of BMWs being over-engineered was one of only a few criticisms from an independent third party which were included the programme.

However, Ofcom considered this in the context of the whole segment of the programme about creating the sounds for BMWs (e.g. alerting drivers to unbuckled seatbelts, open doors and engine failures). The segment demonstrated how much time BMW sound engineers spend in creating the variety of sounds for a BMW, a Mini and a Rolls Royce. The sound that the presenter, Carl Quintanilla, said was *"annoying"* was one that was played to him by a sound engineer. It was not presented as a sound which is actually used in BMWs cars. Later in this part of the programme the presenter spoke to two sound engineers about the amount of time they spend on perfecting the sounds. One of the engineers stated, *"these things you couldn't even name are the most important in the end, that makes it different [sic.] between dislike, like or love a product. But why they really love it, I think it's because designers gave all their love to all these tiny little things."* Therefore, the comment that Business News had identified as being critical was on a topic that was, overall, presented in a very positive way within the programme.

iv) BMW cars have significant reliability issues while competitors' cars do not

Ofcom acknowledged that David Champion referred to *"significant reliability issues"* with BMWs and that its competitors have *"better reliability"*, both critical statements about BMW.

vii) Threat to BMW caused by its ubiquitous presence and its competitors

Ofcom acknowledged that the references in the programme made it clear to viewers that BMW is "having to work hard to maintain market position and to maintain a position as an exclusive brand."

Ofcom also considered the following comments, which Business News put forward as being critical of BMW:

Narration: *"In 2010, the BMW Group dominated the premium car market, selling more than 1.2 million luxury cars worldwide. But its competitors aren't standing still. Audi, the number three brand behind Mercedes has brashly declared that by mid-decade it will take over BMW's number one spot."*

Narration: *"Audi does seem to be treading common ground in the way it markets its models. BMW's 3, 5 and 7 series, matched by Audi's A4, A6 and A8."*

Narration: *"Looking ahead, BMW may have the most to fear from its own success. If you're an exclusive, luxury brand and drivers begin to*

see your cars everywhere how exclusive are you really?"

While Ofcom accepted that these comments could be seen as being critical of BMW. However, Ofcom noted that the latter was nevertheless framed in a very positive statement about the brand's success and ubiquity. Further we noted that the statement was immediately followed by Uwe Ellinghaus, BMW's Director of Brand Management, stating why he was not concerned about this:

Narration: *"Ellinghaus says he's not worried."*

Uwe Ellinghaus: *"More and more customers say as long as this brand appeals to me, as long as this product is right, I don't care how many people in my neighbourhood are able to afford this car."*

This comment was then followed by scenes of a couple who had travelled from America to collect their new BMW from the BMW headquarters in Munich, accompanied by the narrator stating:

"As for the [customers' surname]s, they have no concern about the brand's appeal. They're just eager to see their car."

Business News also pointed to the following reference to BMW's competitors including Audi:

Narration: *"In 2010, the BMW Group dominated the premium car market, selling more than 1.2 million luxury cars worldwide. But its competitors aren't standing still. Audi, the number three brand behind Mercedes has brashly declared that by mid-decade it will take over BMW's number one spot."*

However, Ofcom noted that this was immediately followed by BMW's Head of Sales and Marketing's view which negated the claim as follows:

Narration: *"BMW's Head of Sales and Marketing, Ian Robertson, said he didn't feel threatened."*

Carl Quintanilla
(in vision): *"Talk to me about Audi's bluster."*

Ian Robertson: *"As far as I'm aware, if you look at the numbers, they speak for themselves."*

Narration: *"Audi does seem to be treading common ground in the way it markets its models, BMWs three, five and seven series matched by Audis A4, A6 and A8. Is it imitation? Robertson has a stronger word for it."*

Ian Robertson: *"Well, they say that you know, plagiarism is the sincerest form of flattery."*

Ofcom also noted the following reference to BMW's competitors which claimed that the quality of BMW cars is higher than its competitors:

Narration: *"Although BMW's principle competitors – Audi and Mercedes – do their own exhaustive testing and design, BMW claims its efforts"*

go a bit further. They're nothing if not scientific about it."

Therefore, Ofcom concluded that, while the three comments identified by Business News on their own could be perceived as negative, when seen in the context of that particular segment of the programme overall, they were not.

v) The design of the BMW 7-series

Narration: *"The design process is as exciting as it is stressful, Adrian van Hooydonk knows the pressure well. Ten years after beginning his career at BMW, he penned the lines for a controversial 7-series under then-design chief Chris Bangle. Although, the car was blasted by reviewers, who dubbed the large back end the Bangle Butt..."*

However, Ofcom noted that the remainder of this sentence quoted by Business News stated *"...it broke sales records and profoundly influenced car design for years"* which was clearly a positive statement about the design of the BMW 7-series and its popularity amongst car buyers.

Conclusion

It should be noted that in a programme of this type, when a brand is featured or focused upon, Section Nine of the Code does not require there to be a rigid or balanced division of time to positive and negative comments about a brand and/or its products.

In this case, Ofcom accepted that there were a small number of critical or negative comments in this programme. However, Business News had argued that a much larger number of references were critical of BMW and its products. In Ofcom's view, the impact of a negative or critical reference on the audience cannot be considered in isolation but must be taken in the wider context in which it is viewed by the audience. That impact is likely to be significantly lessened if it is immediately followed by a rebuttal or a positive response. This is even more likely to be the case where the positive rebuttal is delivered by the presenter or in narration, as the editorial voice of the programme – as illustrated, for instance, by the example immediately above this conclusion.

Overall, the approximately 42 minute programme (excluding advertising breaks) contained almost entirely positive comments by almost all of the contributors and the presenter/narrator. With the exception a small number of criticisms of BMW, the vast majority of negative comments were framed within or followed by positive rebuttals. Ofcom considered that the cumulative effect of this positive focus on the individual products, the brand and people's perception of, and aspiration for, the products and the brand, led to the programme promoting BMW and its products.

Breach of Rule 9.4

In Breach

Checktrade.com sponsorship of Cowboy Builders

Channel 5, 12 June 2012, 19:00

Introduction

Cowboy Builders is sponsored by Checktrade.com, a website that provides a directory of trades and services.

A complainant alerted Ofcom to a sponsorship credit that consisted of the following:

- stylised letters that spelt out the name of the sponsor, accompanied by the text “*sponsored by*” and “*where reputation matters*”; and
- a voiceover stating “*recommended trades and services that are vetted and monitored*”.

Ofcom considered the voiceover raised issues warranting investigation under Rule 9.22(a) of the Code, which states:

“Sponsorship credits broadcast around sponsored programmes must not contain advertising messages or calls to action. Credits must not encourage the purchase or rental of the products or services of the sponsor or a third party. The focus of the credit must be the sponsorship arrangement itself. Such credits may include explicit reference to the sponsor's products, services or trade marks for the sole purpose of helping to identify the sponsor and/or the sponsorship arrangement.”

We therefore asked Channel 5 (or “the Licensee”) for its comments on how the credit complied with this rule.

Response

Channel 5 stated that the sponsor is a website that provides a listings service of professional trades and services that goes beyond being simply a directory. It said that the backbone of the sponsor's service is users' recommendations combined with information provided by Checktrade.com about the listed services, which details accreditations, insurance cover and legal information.

Channel 5 said that the aim of the credits was to engage the audience, linking the programme with the sponsor's service using various images of construction and utilities, which are used to build each letter of the sponsor's web address. The Licensee explained that the sponsorship campaign consisted of six credits in total, two of which contained the line in question. Channel 5's view was that, as a whole, the branding and association between the sponsor and the programme was clear and the description did not impinge on the primary focus of sponsorship, being the association between the sponsor and the programme.

Channel 5 continued that the sponsor is relatively unknown. The company has no countrywide television presence and there is a lack of awareness of the company amongst the target audience. On this basis, the Licensee considered that a brief

description of the sponsor's service as a statement helped identify this relatively unknown sponsor.

In accepting these credits, the Licensee said it took into account the standing practice that broadcasters can make clear in sponsorship credits the nature of the sponsor's service by using a brief description, provided the description does not include special promotional references. Channel 5 submitted that the inclusion of the web address alone would not have been enough to identify the nature of the sponsor's service. It stated that the sponsor operates a trades' directory service that "distinguishes itself in the relevant market by only listing trades that are recommended, vetted and monitored". Channel 5 considered this to be an accurate and succinct description of what the sponsor does.

Channel 5 commented that the fact that a description of a business model is necessarily positive should not prevent it from being used in sponsorship credits. In Channel 5's view, a sponsor should be entitled to have its business appropriately and accurately described. It said that, in this instance, finding words that did not carry positive connotations but that would just as accurately describe the sponsor's business would have been very difficult.

It continued that the production of the credit was carefully monitored to ensure the focus remained on the association between the sponsor and the programme. The channel worked closely with the client to ensure the statement was aimed at identifying the sponsor's service and was not unduly prominent. Channel 5 said it took measures to ensure the words were not spoken promotionally and there was no direct encouragement to use the service. Channel 5 said the description of the business was entirely secondary, and that it did not go beyond "doing what it was supposed to do". The words were presented in neutral language and would have been understood by viewers to be a description of a service, rather than an advertising message. Channel 5 believed that, when viewed as a whole, the focus of the credit was clearly the sponsorship arrangement.

While Channel 5 accepted that the words were capable of objective substantiation, it equally argued that they were being used to describe the sponsor's service. Channel 5 contended that it found it difficult to see how a business could be described accurately without using words that were capable of being substantiated. Channel 5 was of the view that the area of concern was the use of superlative language, in a promotional way, to describe a business. It did not consider that the language used in the credit fell into this category. Channel 5 said that the fact that the words could be objectively substantiated did not weigh one way or another towards whether they can be considered to be an advertising message.

Channel 5 reiterated that the statement identifying the service appeared briefly at the end of the main credits and was not the focus of the credit. Channel 5 argued that if the words were not included, the sponsor's service would not have been described in a way that is, in Channel 5's view, consistent with the letter and spirit of the AVMS Directive and the Ofcom rules.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that "the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with".

The EU Audiovisual Media Services (AVMS) Directive requires sponsored programmes to be “clearly identified as such by the name, logo and/or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in an appropriate way for programmes at the beginning, during and/or end of the programmes”. Such identification is usually achieved by way of sponsorship credits broadcast around sponsored programmes.

The AVMS Directive also limits the amount of advertising a broadcaster can transmit and requires that advertising is kept distinct from other parts of the programme service. Sponsorship credits are treated as part of the sponsored content and do not count towards the amount of airtime a broadcaster is allowed to use for advertising. To prevent credits effectively becoming advertisements, and therefore increasing the amount of advertising transmitted, Rule 9.22(a) of the Code requires that sponsorship credits¹ contain no advertising messages or calls to action.

As stated above, the purpose of a sponsorship credit is to identify the sponsor of a programme. To achieve this identification, as mentioned by Channel 5 in its response, sponsorship credits may include a brief description of the sponsor’s business. However, sponsorship credits should not be used to highlight the benefits of the sponsor’s products or services: that is the purpose of advertising. Broadcasters therefore need to take care to ensure that the manner in which a sponsor’s business is described is not promotional and as a result amounts to an advertising message, in breach of Rule 9.22(a).

Ofcom has published extensive guidance on the application of Rule 9.22(a). This guidance recognises that when judging whether the various components of a sponsorship credit amount to the credit being sufficiently distinct from advertising, fine editorial judgements are often required. The guidance refers to a number of factors that Ofcom is likely to take into account when assessing a credit against the requirements of Rule 9.22(a). These include the focus of the credit, ‘calls to action’ and claims about the sponsor’s products and services. In particular, the guidance states that “claims about the sponsor’s products/services (in particular those that are capable of objective substantiation), are likely to be considered as advertising messages and therefore should not be included in sponsorship credits.

Channel 5’s response addressed two key points: the focus of the credit and the purpose of the words used in the voiceover.

Focus of the credit

Ofcom notes that the sponsorship credit consisted of two elements:

1. the letters spelling out the sponsor’s name, which were sometimes accompanied by the words, in smaller text, “sponsored by” and “where reputation matters”; and
2. the voiceover stating “*recommended trades and services that are vetted and monitored*”.

There was no verbal reference to the sponsorship arrangement.

¹ Rule 9.22(a) relates to sponsorship credits broadcast around programmes. There are more restrictive rules for sponsorship credits transmitted during programmes.

Given that the sponsorship arrangement was referred to in text only and in a font that was less prominent than that used for the sponsor's name, Ofcom did not agree with Channel 5's statement that the description of the sponsor's business was "entirely secondary".

Description of the sponsor's service

Channel 5 maintained that "a sponsor is entitled to have its business or service briefly described, provided the description does not include special promotional references" and that if "the words were not included, the sponsor's service would not have been described in a way that is, in [Channel 5's] view, consistent with the letter and spirit of the AVMS Directive and the Ofcom rules.

As set out above, the AVMS Directive requires sponsored programme to be "clearly identified as such by the name, logo and/or any other symbol of the sponsor". This requirement is enforced through Rule 9.19 of the Code, which states:

"Sponsorship must be clearly identified by means of sponsorship credits.

These must make clear:

- a) the identity of the sponsor by reference to its name or trade mark; and
- b) the association between the sponsor and the sponsored content."

There is no requirement in either the AVMS Directive or the Code for sponsorship credits to include a description of a sponsor's service. However, Ofcom accepts that it may be appropriate to include a description for the purpose of helping to identify the sponsor. Nevertheless, Rule 9.22(a) makes clear that explicit references to the sponsor's product, service or trade mark must be for the sole purpose of helping to identify the sponsor and/or the sponsorship arrangement.

In this case, the description of the sponsor's business included reference to specific positive attributes of the business (i.e. that the trades included in the sponsor's directory were "recommended", "vetted" and "monitored"). Ofcom does not agree that it was necessary to list these attributes for viewers to be able to understand that the sponsor operates a trades directory business.

Furthermore, Ofcom considers the references to these attributes of the sponsor's services (namely that it recommends, vets and monitors tradespeople) are claims that are capable of being substantiated. Ofcom accepts that simply because a description can be substantiated does not necessarily mean it amounts to an advertising message and therefore cannot be included in a sponsorship message. What is key is the purpose for which information is included in a credit: it must be for identification and not promotional purposes. Ofcom considers that the listing of the specific attributes in the credit went beyond a brief description of the sponsor's service for the purpose of identifying the sponsor.

Ofcom considers that the combination of the list of specific attributes and the focus on these attributes (compared to the focus on the sponsorship association text) amounted to an advertising message in the sponsorship credit. The credit was therefore in breach of Rule 9.22(a).

Breach of Rule 9.22(a)

In Breach

News

CFM (Carlisle), 14 March 2012, hourly, 11:00 to 18:00, and 15 March 2012, 07:00, 08:00, 11:00 and 13:00

Introduction

CFM (Carlisle) is a local commercial radio station broadcasting a music and information service for listeners in and around Carlisle. The licence for CFM (Carlisle) is held by Carlisle Radio Ltd ("Carlisle Radio" or "the Licensee"), which is owned by the radio group, Bauer Radio Ltd ("Bauer").

A listener contacted Ofcom, as he was concerned that the news bulletin broadcast at 12:00 on 14 March 2012 featured the promotion of a local upcoming concert by JLS ("the concert"). The news item comprised the following:

Newsreader: *"And JLS are coming to Carlisle this summer. 20,000 fans will pack into Bitts Park this August to see the lads. Dion Clements is one of the promoters and says fans are in for quite a show."*

Promoter: *"A brand new show, for starters. It is an all new show that people will be coming to see and they can expect. But obviously, you know, back flipping and all this sort of, you know – they're JLS; they do what they do and people can expect, you know, can expect to see them at their best."*

Newsreader: *"And the boys will be joining CFM's Robbie Dee on the show tomorrow morning. Tickets go on sale at eight AM at our website – all the details can be found at our Facebook page as well."*

The newsreader then ended the bulletin with a brief weather summary, after which the following pre-recorded promotional trail for CFM's breakfast show was broadcast:

Voiceover: *"Robbie Dee in the Morning on CFM!"*

Robbie Dee: *"JLS are coming to Bitts Park Carlisle on the August Bank Holiday weekend, brought to you by CFM. Tickets go on sale tomorrow morning at CFM.com after eight o'clock and I'll be speaking to Marvin from JLS on the show tomorrow morning, here, eight o'clock."*

Voiceover: *"Robbie Dee in the Morning – weekdays from six and Saturdays from ten – only on CFM!"*

Carlisle Radio confirmed to Ofcom that:

- references to the concert were made in the *News*, hourly from 11:00 to 18:00 on 14 March 2012 and in 14 bulletins between 06:00 and 18:00 on 15 March 2012;
- references to the concert in neither these news bulletins, nor any broadcast on 14 March 2012 of the pre-recorded promotional trail for CFM's breakfast show, were subject to a commercial arrangement with a third party;

- other references to the concert were made in CFM's programming on both 14 and 15 March 2012; and
- some of these references were subject to a commercial arrangement between CFM and Beat Up Music Ltd ("Beat Up"), the promoter and producer of the concert.

Having assessed all the broadcast references to the concert that were made in programming on 14 and 15 March 2012, Ofcom found 11 additional news bulletins that:

- promoted the concert in the same or a similar way to the *News* broadcast at 11:00 on 14 March 2012; and
- were followed closely in programming by the same or similar promotion of the concert in the pre-recorded promotional trail for CFM's breakfast show that was broadcast after the *News* at 11:00 on 14 March 2012.

Ofcom therefore found 12 *News* broadcasts warranting investigation under Rule 10.3 of the Code, which states:

"No commercial reference, or material that implies a commercial arrangement, is permitted in or around news bulletins..."

We sought the Licensee's comments as to how these *News* broadcasts complied with this rule.

Response

Carlisle Radio said that CFM had made references to the concert in *News* on 14 and 15 March 2012 only. The Licensee added that broadcast references to the concert were not planned for future news bulletins but were planned as part of other programming on CFM and would continue until nearer the event (25 August 2012). It said that some of these references would be subject to a commercial arrangement and provided a copy of a Media Partnership Agreement between CFM and Beat Up, which, among other things, broadly outlined their scheduling.

The Licensee also said that CFM's news team had no knowledge of the commercial arrangement. It added that the decision to run news items about the concert was made independently by the news team, as pop acts the size of JLS rarely reached Carlisle and there was great interest around the concert, with regular queries about it from listeners. The Licensee said that CFM's news team considered the concert to be a major story for the station's target audience and it had therefore aimed to provide as much information as it could, including how to get tickets, which was not obvious due to the venue being a park.

However, Carlisle Radio added that, on reflection, it "accept[ed] that this overstepped the mark", adding that Bauer had "used this as an opportunity to refresh [its] training with journalists to highlight [Rule 10.3] in the Broadcasting Code ... and ensure that it doesn't happen again" on any of its radio stations.

Decision

Under the Communications Act 2003 (“the Act”), Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure standards objectives, including “that the unsuitable sponsorship of programmes included in ... radio services is prevented.” Further, Ofcom is obliged under the Act to “have regard” for “the desirability of maintaining the independence of editorial control over programme content.”

There is no outright prohibition on the promotion of events in news bulletins. The inclusion of such material, which may include interviews with performers and/or promoters, and the provision of ticket information (including availability and prices), is an editorial decision for radio licensees.

However, Rule 10.3 of the Code makes clear that, among other things, “no ... material that implies a commercial arrangement, is permitted in or around news bulletins...”. This prevents any general promotion or unjustified prominence of products and services in news¹.

Ofcom accepts that news bulletins are generally presented in a different style to other programming. To this extent, promotional material contained in news bulletins may not necessarily imply that it is subject to a commercial arrangement with a third party, if it is clearly distinct from other programming. However, where such material is scheduled close to similar promotional material and the promotion of the relevant product or service is prevalent on the station at the time, Ofcom considers that the promotional material in news is likely to appear to listeners to be a commercial reference (i.e. to be broadcast subject to a commercial arrangement).

Ofcom noted that, during daytime (06:00 to 19:00), Carlisle Radio made 28 references to the concert in programming (including eight in news broadcasts) on 14 March 2012. Further, it made 34 such references (including 14 in news broadcasts) in programming, together with 14 advertisements for the event, on the 15 March 2012. Most of these 76 broadcast references to the concert on CFM were promotional (including references to ticket availability, price and/or CFM’s “exclusive” association with the event), 34 of which were subject to the Media Partnership Agreement between CFM and Beat Up, although these excluded the references made in both *News* and the pre-recorded promotional trail for CFM’s breakfast show.

Given the extent to which Carlisle Radio gave the concert, around its ticket launch, broadcast exposure on 14 and 15 March 2012, Ofcom is of the view that listeners would have considered that promotional references to the event in non-news programming were commercial references. There were 12 instances on 14 or 15 March 2012 when programming material promoting the concert closely followed promotion of the event in news bulletins. In these circumstances, Ofcom took the view that listeners were also likely to have considered that the promotions of the concert in *News* were commercial references.

Ofcom recognised that the editorial decision by Carlisle Radio to include the promotion of the concert in CFM’s news bulletins on 14 and 15 March 2012 reflected its belief in the material’s appeal and apparent importance to its target audience. However, we noted that the decision was made independently of other CFM departments, without considering the full context in which the promotion was included

¹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section10.pdf>

in *News* in relation to additional contemporary references to the concert elsewhere in its service.

Ofcom therefore considered that the promotion of the concert in these 12 news bulletins implied that the broadcast of these specific promotional news items were subject to a commercial arrangement, in breach of Rule 10.3 of the Code.

Breaches of Rule 10.3

Advertising Scheduling cases

In Breach

Advertising minutage

Sony Entertainment Television (UK), 16 May 2012, 11:00

Introduction

Rule 4 of the Code on the Scheduling of Television Advertising (“COSTA”) states: “time devoted to television advertising and teleshopping spots on any channel in any one hour must not exceed 12 minutes.”

During monitoring of licensees’ compliance with COSTA, Ofcom noted that on 16 May 2012 Sony Entertainment Television (UK) transmitted one minute and four seconds more advertising than the amount permitted in a single clock hour.

Ofcom therefore sought comments from Entertainment Networks (UK) Limited (“Sony” or “the Licensee”), the licence holder for Sony Entertainment Television (UK) under Rule 4 of COSTA.

Response

The Licensee explained that it has well established compliance procedures in place at all stages of the scheduling production process; at the sales house, internally at Sony, and at playout.

Sony said that on this occasion a late change to the schedule resulted in a minutage violation which was missed due to human error internally and at playout.

Further, Sony said that to mitigate the risk of further errors it had introduced extra checks to late schedule changes. Additionally, the playout company “are reviewing their workflow to ensure all parts of the schedule are checked twice, and reconfirmed the administration and checking procedure to all staff to ensure accuracy and accountability”.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content which it considers are best calculated to secure a number of standards objectives. One of these objectives is that “the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with”.

Articles 20 and 23 of the EU Audiovisual Media Services (AVMS) Directive set out strict limits on the amount and scheduling of television advertising. Ofcom has transposed these requirements by means of key rules in COSTA. Ofcom undertakes routine monitoring of its licensees’ compliance with COSTA.

In this case, Ofcom found that the amount of advertising broadcast by Sony was in breach of Rule 4 of COSTA.

This compliance failure follows previous instances of minutage overruns on Sony Entertainment Television (UK), as follows:

- in issue 186 of the Broadcast Bulletin¹, we resolved two breaches of Rule 4 of COSTA; and
- in issue 194 of the Broadcast Bulletin², we recorded two breaches of Rule 4.

In those cases, Sony provided assurances to Ofcom that, following compliance failures at the time, it had since implemented improved procedures to minimise the risk of a recurrence.

We note the Licensee's assurances on the steps taken to prevent further errors. We also note that the circumstances leading to this incident differed to the previous cases. However, Ofcom is concerned that, despite previous assurances by Sony, its revised procedures have not proved sufficiently robust to prevent a further breach of Rule 4 of COSTA. Ofcom expects Sony to avoid any recurrence of this issue.

Breach of Rule 4 of COSTA

¹ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb186/obb186.pdf>

² <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb194/obb194.pdf>

Broadcast Licence Condition cases

In Breach

Breach of Licence Condition

Dune FM (Southport), 9 July 2012 to present

Introduction

Dune FM Limited (in liquidation) (the “Licensee”) is the holder of a local FM commercial radio licence AL203 for the Southport area (broadcasting on 107.9 MHz) (the “Licence”).

On 9 July 2012, Liverpool County Court ordered that Dune FM Limited be wound up under the provisions of the Insolvency Act 1986. Following the subsequent appointment of the Official Receiver as liquidator of Dune FM Limited, Dune FM Limited ceased to trade, and therefore was no longer able to continue broadcasting.

Given that the Licensee was no longer broadcasting, on 2 August 2012 Ofcom wrote to the representative of the Official Receiver to inform it of Ofcom’s preliminary view that the Licensee was in breach of licence Condition 2(1) contained in Part 2 of the Schedule to the Licence, which states that:

“The Licensee shall provide the Licensed Service specified in the Annex for the licence period and shall secure that the Licensed Service serves so much of the licensed area as is for the time being reasonably practicable.” (Section 106(2) of the Broadcasting Act 1990).

Ofcom invited the Licensee to make representations on these matters.

Response

In a letter to Ofcom dated 8 August 2012, the representative of the Official Receiver, acting as the liquidator of Dune FM Limited, responded that: “I am not in possession of any evidence that contradicts your assertion that Dune FM is in breach of the licence as detailed in your letter.”

Decision

By ceasing to provide its licensed service following the winding-up of the Licensee, the Licensee was in breach of licence Condition 2(1) in Part 2 of the Schedule to the Licence. Ofcom has therefore formally recorded this breach by the Licensee.

As the Licensee has not resumed broadcasting, and is unable to do so as a result of the Licensee’s liquidation, this breach by the Licensee is a continuing one. Provision by a licensee of its licensed service is the fundamental purpose for which a commercial radio licence is granted. Ofcom has a range of duties in relation to radio broadcasting, including securing a range and diversity of local radio services which are calculated to appeal to a variety of tastes and interests, and the optimal use of the radio spectrum. These matters find expression in, or are linked to, the licence condition requiring the provision of the specified licensed service. Where a licensed service is not being provided in accordance with the licence, none of the required programming output is provided. In addition, choice for listeners is reduced.

Further, it is a duty placed upon Ofcom to ensure optimal use is made of the electromagnetic spectrum. This non-provision of a licensed radio service by the Licensee is not optimal use of that radio spectrum.

The Licensee is put on notice that we are considering this licence contravention for the imposition of a statutory sanction in light of its seriousness and ongoing nature.

Breach of Licence Condition 2(1) in Part 2 of the Schedule to the commercial radio licence for the Southport area held by Dune FM Limited (in liquidation) (licence number AL203).

Fairness and Privacy cases

Upheld

Complaint by Miss F

Central News, ITV1, 12 February 2012

Summary: Ofcom has upheld this complaint by Miss F of unwarranted infringement of privacy in the programme as broadcast.

On 12 February 2012, Central News broadcast an item concerning the medical consequences for women who had had Poly Implant Prosthèse (PIP) breast implants¹. A contributor to the programme, Miss Brown, was interviewed and she spoke about the Facebook group she had set up in light of the anxiety that many of the women who had PIP implants were feeling. Miss Brown was filmed while viewing a Facebook page in the programme. While she did so, the Facebook page briefly showed posts² made by Miss F. Following the broadcast of the programme, Miss F complained to Ofcom that her privacy was unwarrantably infringed in the broadcast of the programme.

Ofcom found that Miss F did have a legitimate expectation that her posts, which indicated that she had had breast implants, would not be broadcast in the programme. While Ofcom took into account the broadcaster's right to freedom of expression and the fact that the infringement was limited, Ofcom considered that on balance in these particular circumstances, the broadcaster's right to freedom of expression did not outweigh Miss F's expectation of privacy.

Introduction

On 12 February 2012 at 17:30, ITV1 broadcast an edition of *Central News*, its regional news programme for the Midlands area of the UK. This edition included a report about the possible danger to women caused by PIP breast implants and whether the private clinics that inserted them should bear the cost of replacing them.

The report included an interview with Miss Jane Brown who, the report stated, had learned that her breast implants had been filled with industrial grade silicon that should have been used for mattresses. Miss Brown had set up a Facebook Group to support other women who had PIP implants and who felt anxious about the uncertainty of their medical situation. This part of the report included two shots totalling about five seconds focussing on the screen of the laptop computer that Miss Brown was using and a close up image of the Facebook page of the support group was shown. In particular, in one shot on the left of the Facebook page, a photograph of two women could be seen along with Miss F's full name in bold letters. Immediately beneath this name, messages (or posts) apparently typed by Miss F were clearly visible and capable of being read in part. The complainant, Miss F, was one of the women shown in the photograph. Ofcom noted that in this first shot the text of the first post would not have been legible to the normal viewer, but if the image was paused it was legible. The image of the Facebook page in this part of the report was visible on screen for approximately two seconds before the page was scrolled through so that nothing was legible.

¹ Poly Implant Prosthèse (PIP) breast implants were made by a French company of the same name.

² i.e. messages or comments made on a Facebook page.

At the end of the report there was another shot lasting about two seconds in total of the Facebook page being shown being scrolled up and then with the photograph of the two women and Miss F's full name. A different post was also visible. This image was visible on screen for approximately one second. Ofcom noted that in this shot also the text of the first post would not have been legible to the normal viewer, but if the image was paused some of it was legible.

Following the broadcast of the programme, Miss F complained to Ofcom that her privacy was unwarrantably infringed in the programme as broadcast.

Summary of the complaint and the broadcaster's response

Miss F complained that her privacy was unwarrantably infringed in the programme as broadcast in that she was shocked and upset to find that images from pages of the "closed" Facebook group she had joined were shown in which her photograph and her name were clearly visible, alongside three posts that she had intended to be private.

Miss F said that her breast implant surgery had been something that she had intended to be a private matter, but was now public knowledge. She said that as a result of the broadcast of the programme, she immediately received a text message from a close friend and discovered that a number of her work colleagues had also seen the report. Miss F said that she was very annoyed and angry that this information was shown without her prior permission.

In response, ITV said that during the course of the interview with Miss Brown, she had given no indication that the page, unlike most other Facebook pages, had any access restrictions in relation to the content. Miss Brown had allowed the programme makers to film the Facebook website and ITV believed that the page and its content had been put in the public domain by those who had posted to it. ITV added that had it been aware that there was any restriction on the ability to view postings, then it was likely to have taken the view that, as the nature of the information was medical, it was not something that should be broadcast.

ITV said that while the Facebook group itself is described as "closed", it is not, in fact, private and has no published privacy policy. ITV said that the website is an invitation only site but has more than 150 members, all of whom can view all postings and can also recommend as well as accept new members. The webpage's host, Miss Brown, informed ITV that she has never refused to accept anyone wishing to join the group. Therefore, anyone could access the Facebook webpage concerned and could view Miss F and others postings on it. Furthermore, even without accessing its full content, names and Facebook profiles of its members are identified to anyone clicking on the word "members" on its front page.

ITV added that Miss F had put the information contained in the posts into the public domain on other entirely unrestricted forums both prior to and after the press report complained of. Copies of these postings were provided by ITV to Ofcom. In addition, Miss F has not applied privacy settings to her own Facebook page and information she has posted there would no doubt lead those who looked at it to reasonably conclude that she had undergone surgery. ITV therefore submitted that details of Miss F's surgery and her subsequent concerns had been put into the public domain by Miss F and consequently this undermined her position that she had intended to keep this information private. ITV said that Miss F responded openly to media requests and made other public website posts which are readily available via a

Google search. In summary, ITV stated that there was no infringement of Miss F's privacy and, if there was, it was warranted by the public interest in the report.

ITV added that the item was focused on Miss Brown and her problem with PIP implants and the web support group she had set up for others in the same position. The Facebook posts made by the complainant which were seen in the programme were incidental and fleeting and could only be discerned if a viewer paused the programme to view the relevant frame.

Notwithstanding its position as summarised above, ITV regretted any distress that was caused to Miss F as a result of the programme and gave an undertaking that it would not broadcast the footage complained of again.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording and a transcript of the programme as broadcast, and both parties' written submissions.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcasters to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

In considering the complaint Ofcom had regard to Practice 8.6 of the Code which states that if the broadcast of the programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

In relation to whether Miss F's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered whether Miss F had a legitimate expectation of privacy in that her Facebook posts would not be broadcast in the programme without her consent.

Ofcom noted the following in the programme:

Reporter: *"Jane Brown had her breasts enlarged with PIP implants in 2004; implants it's now known were filled with industrial silicon intended for*

mattresses. She now fears they've ruptured, but says she and thousands of other women are still facing an anxious wait to find out what will happen next.

Miss Brown: *We feel that we're not getting the answers we need and we're just being messed around and being battered from pillar to post and we need those answers and we need this moving forward. Every day there are stories of cancelled appointments, problems getting scans and surgeons being extremely rude and rushed through their appointments, care co-ordinators giving them false or misleading information, it's just all sorts. At every step people are trying to take, they seem to be hitting brick walls in different issues.*

Reporter: *Jane who lives in Melton Mowbray has now set up a Facebook support group for other women in the same position. Her surgery was carried out by the cosmetic group Transform. It says removing PIP implants will be free, but replacements will cost two and a half thousand pounds".*

Ofcom noted that as the reporter explained that Miss Brown had set up a Facebook group for other women, a shot was shown on screen for approximately five seconds of the post made by Miss F which included a small photograph of her with two other women. In this first shot the text of the first post would not have been legible to the normal viewer, but if the image was paused it was legible. If paused the text did identify that Miss F had undergone implant surgery. It was not clear from the footage shown exactly what the post had said, although Ofcom observed that Miss F's full name and words "*transform*" and "*PIP*" were visible. The footage showed the webpage being scrolled to the top of the page which had the title "*PIP implants through Transform Support Group*" and "*Closed group*". Ofcom also noted that the footage of Miss F's posts was shown in the programme without her having given her consent.

Ofcom took into account that the group was "closed" - which means that only members of a particular group are able to view posts and material that appear on the page in question. Therefore Miss F would not have expected people outside that group to be able to view her posts, by them being broadcast to a wider audience without her consent. It was a reasonable assumption for viewers watching this material to make from the material shown in the context of the report that Miss F had undergone implant surgery. Ofcom considers that information confirming that an individual has undergone cosmetic surgery is normally medical information which is sensitive and personal in nature. Therefore, this type of information would usually attract a significant legitimate expectation of privacy.

Ofcom noted that Miss F had placed material confirming that she had PIP implants on other forums. For example, on 14 January 2012, Miss F posted on the PIP Implant Forum and on 16 January 2012 she posted a comment in relation to a request from a broadcaster who was doing some research on PIP implants. However, Ofcom noted that these posts were not readily available on the internet without entering particular search terms and conducting further research. Further, the posts were confined to members of groups who had a common interest in the issue of PIP implants and were limited to the Facebook community. Ofcom therefore did not agree with ITV that this meant that the information was in the public domain and that therefore Miss F did not have a legitimate expectation of privacy. Rather, when taking all these factors into consideration, Ofcom took the view that Miss F would not have expected information pertaining to medical surgery she had had to be disclosed

to a group outside of this community and then broadcast to a wider audience. Consequently, Ofcom's view was that Miss F did have a legitimate expectation of privacy which was only marginally limited by the posts that she made on other forums and on Facebook.

Ofcom further observed that: in the first shots Miss F's post appeared on screen for no more than five seconds in duration in total, and that her name was only clearly legible for around two seconds. In the shot at the end of the report her name was clearly legible for around one second. Ofcom also took into account that Miss F was not the subject of the report and that showing her posts was incidental. It also took into account that, although the text of posts shown on screen containing sensitive personal information would not have been legible to the normal viewer, if the image were paused some text was legible. In these circumstances, Ofcom's view was that the infringement of her privacy was limited to some extent.

Ofcom therefore found that: Miss F had a legitimate expectation of privacy, albeit slightly limited, that images of the posts she had put on a closed group on Facebook would not be broadcast in a programme; the infringement of her privacy was limited to some extent; and, ITV did not obtain her consent to show those images.

Ofcom went on next to consider the broadcaster's competing right to freedom of expression in considering whether the infringement was warranted.

Ofcom considered the particular justification put forward by ITV for including the posts made by Miss F in its news programme. Ofcom noted that the news report voiced concerns, principally raised by Miss Brown, that not enough was *"being done to help patients worried for their health"*. Ofcom took into account that there was considerable interest in these events because of the medical implications for the thousands of women who had PIP implants and therefore considered that there was a public interest in general terms in the subject of the report. Although incidental, Miss F's posts were relevant to the report in that they illustrated that Miss Brown had set up a Facebook group to help women who had PIP implants and Miss F was one of the many people who had joined this group. Ofcom considered that the brief footage of Miss F's Facebook post was used as a visual device to illustrate the fact that Miss Brown had *"now set up a Facebook support group for other women in the same position"*.

While Ofcom noted the public interest in the subject matter of the news item and ITV's submission that the footage complained of was fleeting and incidental, it did not consider on balance that there was any public interest which warranted infringing Miss F's privacy, by disclosing that she had undergone a breast implant procedure.

Taking all the above factors into account, Ofcom's view is that, on balance and in the particular circumstances of this case, the broadcaster's right to freedom of expression and to impart information and ideas and the audience's right to receive this information without interference did not outweigh the intrusion into Miss F's privacy.

Ofcom therefore found that the inclusion of footage of a computer screen revealing medical information relating to Miss F without her consent, was an unwarranted infringement of her privacy.

Accordingly, Ofcom has upheld Miss F's complaint of unwarranted infringement of privacy in the broadcast of the programme.

Not Upheld

Complaint by Mr Julian Assange

True Stories: WikiLeaks: Secrets and Lies, More 4, 29 November 2011

Summary: Ofcom's decision is that this complaint made by Mr Julian Assange of unjust or unfair treatment and unwarranted infringement of privacy in the broadcast of the programme should not be upheld.

The programme charted the history of WikiLeaks¹ and featured contributions from Mr Assange, a number of employees from The Guardian and other newspapers. Other contributors, such as a former employee of WikiLeaks and others who came into contact with Mr Assange or who were affected by the impact of the material that was published by WikiLeaks, also featured and gave their opinions on WikiLeaks, Mr Assange and related matters.

Mr Assange complained to Ofcom that he was treated unjustly or unfairly in the programme as broadcast and that his privacy was unwarrantably infringed in the programme.

Ofcom found as follows:

- Mr Assange did provide his informed consent to appear in the programme;
- Material facts were presented in a way that was not unfair to Mr Assange and omitting certain facts or points raised by Mr Assange did not create unfairness in the programme as broadcast;
- Mr Assange was provided with a timely and appropriate opportunity to respond to the points in the programme; and
- Mr Assange did not have a legitimate expectation of privacy in relation to the footage of him dancing in a nightclub in Iceland, which was included in the programme.

Introduction

On 29 November 2011, Channel 4 broadcast on its channel More 4 an episode from its *True Stories* strand of documentaries, entitled "*WikiLeaks: Secrets and Lies*". The programme chronicled the history of WikiLeaks, which was described in the programme as "*the biggest leak of secrets in history. In its wake, dictators fall, wrongdoing is uncovered and a superpower [the USA] is humbled*". The programme featured extracts of interview footage of Mr Assange and other contributors who were involved with WikiLeaks and Mr Assange.

After a brief introduction, the programme featured footage from an interview with Mr Assange, in which he was shown responding to the question of why he started WikiLeaks. The programme then cut to the programme's narrator who gave a brief biography of Mr Assange and stated that Mr Assange had "*attended 37 schools as a child*" and that, while studying at Melbourne University in Australia, he had:

¹ WikiLeaks is described on its website as: "a not-for-profit media organisation" whose "goal is to bring important news and information to the public."

“established himself as Australia’s foremost hacker. His tag: mendax – translation: given to lying. In 1996 he was prosecuted for a hack into telecoms giant Nortel; his conviction [was] one of the world’s earliest”.

The narrator stated that Mr Assange set up WikiLeaks as a “*website openly committed to whistle-blowing*” in 2006, and that as “*the secrets poured in*” he had hired a “*Berlin-based computer programmer*” called Mr Daniel Domscheit-Berg. Excerpts from Mr Domscheit-Berg’s interview were broadcast throughout the programme. He was described in text shown on screen as a “*WikiLeaks spokesperson*” and the programme explained how and why Mr Domscheit-Berg became involved with WikiLeaks.

The programme included interview footage from Mr David Leigh, the investigations editor at The Guardian newspaper, who described his first meeting with Mr Assange at a conference of journalists in Norway in March 2010 and his impressions of him. Mr Leigh said that during this meeting Mr Assange had shown him footage of US soldiers shooting civilians in Iraq. This footage, known as the “*Collateral Murder footage*”, was broadcast in the programme. Mr Leigh remarked that in releasing this footage, Mr Assange was “*providing a great journalistic service*”.

A contribution from Mr Adrian Lamo, who was introduced as “*one of Assange’s few rivals for most famous hacker in the world*”, also featured in the programme. The programme explained that Mr Lamo had been in contact with Mr Bradley Manning, a US serviceman who was arrested and charged with supplying classified information to WikiLeaks after Mr Lamo informed the US authorities that Mr Manning had allegedly confessed to leaking information to WikiLeaks. The narrator said that Mr Manning’s arrest had prompted an internal split at WikiLeaks, with Mr Assange wanting to continue publishing material and Mr Domscheit-Berg wanting to stop.

The programme moved on to discuss the meeting which took place at The Guardian newspaper headquarters in London attended by representatives from The New York Times, Der Spiegel (a news magazine in Germany) and Mr Assange. This meeting was the culmination of an agreement between Mr Nick Davies (a special correspondent at The Guardian) and Mr Assange, to disclose the next batch of “*secrets*” (the “*Afghan War Logs*”) through a “*media alliance*”. During this part of the programme, Mr Leigh stated that Mr Assange had carried himself as “*a cult leader*” and “*made you feel you were dealing with someone who wasn’t quite from the same planet as the rest of us*”.

Mr Davies stated in the programme that for moral and political reasons the newspapers and magazines involved were always aware that they could not publish anything “*which might get someone hurt on the ground*”. Therefore, it was important that the material “*did not identify any sensitive locations or sensitive methods of operations*”. Mr Leigh added that at this point it became apparent that Mr Assange and WikiLeaks had a “*very different mindset*” because they (i.e. WikiLeaks) just wanted to “*dump out all the data*”. Mr Leigh explained that they had tried to warn Mr Assange of the possible reprisals that informants might suffer if he published the material, but Mr Assange had replied “*they’re American informants, they deserve to die*”. The programme then cut to footage taken from Mr Assange’s interview in which he said “*there was no row at all...only hints of a discussion*”.

The programme included archive footage from 25 July 2010 when the various media partners published, in conjunction with WikiLeaks, the “*Afghan War Logs*”. Mr Davies said that after the material had been published, The Times newspaper had gone to the WikiLeaks website and had discovered information which “*clearly put in jeopardy*

the safety of identifiable Afghan civilians". Mr Domscheit-Berg stated that, in his view, the WikiLeaks story had now changed to *"publishing for the sake of publishing"* and that it was *"becoming the kind of organisation that does things because no one can stop you"*.

Mr Assange stated in the programme that he was in *"a precarious position"* and that in late July 2010 he had to go into hiding. Consequently, he had given a copy of a password which would allow access to 250,000 confidential diplomatic 'cables' (*"the Diplomatic Cables"*) to Mr Leigh for *"safe-keeping"*. Mr Leigh said that while he was reading this material he received a telephone call from Mr Davies who told him that Mr Assange had been arrested on suspicion of rape². Mr Davies expressed his disbelief at the allegations and said that he had called the WikiLeaks co-ordinator, Mr Donald Bostrom, who told him: *"I am sorry to tell you it's true"*. Footage of Mr Assange dancing in a nightclub in Iceland was shown accompanied by Mr Leigh stating that Mr Assange had:

"upset these two women [in Sweden] by his incontinent sexual behaviour which had involved, it would appear, jumping on them and not using a condom even though they had very much wanted him to."

Mr Davies remarked that he found it *"distressing"* that Mr Assange was suggesting that the rape allegations were *"some kind of American dirty trick"* because *"the guy [Mr Assange] is supposed to stand for truth and that wasn't true"*.

The programme then referred to the publication of the *"Iraq War Logs"* and stated that at this point, although Mr Davies had wanted to continue publishing, he was not prepared to *"be the main point of contact with Mr Assange."* This was because Mr Assange had approached a number of television stations to cover the Afghan War Logs despite WikiLeaks' contract with The Guardian newspaper, and because it was necessary for the material to be kept secret because otherwise the Pentagon might prevent the media outlets involved from publishing it. The programme then cut to interview footage of Mr Assange who said that Mr Davies was a part of the UK media industry which he viewed as a *"credit-stealing, credit-whoring and back-stabbing industry"*. Mr Davies further stated that he had never *"met a human being as dishonest as Julian [Assange]"*.

When the *"Iraq War Logs"* were published, the programme stated that The New York Times had run a personal profile of Mr Assange which he described as a *"sleazy hit piece full of factual inaccuracies"*. The programme's narrator said that Mr Assange was furious and consequently decided that The New York Times would have *"no part in the release of the last and most significant batch of documents..."*. However, the programme went on to state that a *"pact"* was subsequently formed between the existing media partners (i.e. The Guardian, Der Spiegel and The New York Times), Mr Assange and two new media partners (Le Monde and El Pais³) for the release of the Diplomatic Cables.

Archive footage of Mr Assange arriving at the High Court in England and news items detailing Mr Assange's refused bail application was then shown in the programme. Mr Davies commented that:

² On 7 December 2010, Mr Assange was arrested in the UK, pursuant to a European Arrest Warrant. This had been issued in response to a request made by Swedish police to question Mr Assange on allegations of sexual assault.

³ 'Le Monde' and 'El Pais' are daily newspapers in France and Spain respectively.

“WikiLeaks’ moral and political authority flows from the fact of truth-telling and you cannot do that and then also tell lies to the world, it doesn’t work”.

The programme then went on to detail Mr Assange’s decision to publish *“all the cables with nothing blacked out”* despite facing worldwide condemnation, including from his *“former media partners”*. Mr Domscheit-Berg described the decision as *“anti-secrecy”* rather than *“pro-whistle blowing”* and Mr Davies said that it was *“a Greek tragedy...but ultimately it had become a disaster because of one man’s personality flaws”*. Immediately following Mr Davies’ comments, Mr Assange was shown stating that:

“There is a view that one should never be permitted to be criticised for being even possibly engaged in a contributory act that might be immoral. And that that type of arse-covering is more important than actually saving people’s lives. That it is better to let 1000 people die than risk going to save them and possibly run over someone on the way. That is something that I find to be philosophically repugnant.”

The programme concluded with on-screen text stating:

“November 2nd 2011 High Court rejects Julian’s appeal. Julian is appealing - again”.⁴

This was followed by:

“WikiLeaks suspends all publishing”.

Following the broadcast of the programme, Mr Assange complained to Ofcom that he was treated unjustly or unfairly in the programme as broadcast and that his privacy was unwarrantably infringed in the programme as broadcast.

Summary of the complaint and the broadcaster’s response

Unjust or unfair treatment

In summary, Mr Assange complained that he was treated unjustly or unfairly in the programme as broadcast in that:

- a) The programme did not obtain Mr Assange’s informed consent to appear in the programme. In particular, Mr Assange complained that:
 - i) The programme makers misrepresented to him what the programme would focus on.

In summary and in response, Channel 4 said that it was clear from a number of emails (provided to Ofcom) prior to the interview being filmed, the interview itself and the release form, signed by Mr Assange, that Mr Assange was in fact given a detailed and accurate description of the programme as it evolved including who would be likely to be featuring in it. Channel 4 also stated that during the course of the filming the bitter enmities between the key protagonists and their criticisms of each other became increasingly apparent

⁴ This relates to Mr Assange’s appeal in the Supreme Court in the UK against being extradited to Sweden in relation to allegations of “sexual molestation” and rape.

but this was reflected in subsequent emails between the programme makers and Mr Assange.

- ii) Mr Assange was not made aware of other key contributors who would be appearing in the programme.

In summary and in response, Channel 4 said that the email exchanges and his interview reflect that Mr Assange was well aware of who the key players were in the story.

- iii) Opportunities to preview the programme were not offered to him but were offered to other contributors such as The Guardian newspaper.

In summary and in response, Channel 4 said that the producers entered into a perfectly legitimate access agreement with The Guardian. This had to be carefully negotiated because The Guardian had concluded an agreement with a production company concerning the film rights to the book "WikiLeaks: Inside Julian Assange's War on Secrecy" and therefore rights for the documentary needed to be carefully discussed and agreed. Mr David Leigh of The Guardian acted as an ad hoc consultant and provided access to many useful contacts and assisted in the process of checking on certain factual matters. A reasonable fee was agreed with him to cover these consultancy services. Channel 4 said that Mr Leigh was not an advisor to the programme and was not credited as such. The Guardian requested, and was granted, a right to preview the programme solely for the purpose of raising concerns about factual accuracy. Mr Assange did not at any stage when the interview with him was negotiated request a preview of the programme and the issue was not raised when he signed the amended release form.

- b) The programme presented, disregarded and omitted material facts in a way that was unfair to Mr Assange. In particular, Mr Assange complained that the programme:

- i) Broadcast material which was highly prejudicial to his extradition hearing in England (which was held a few days after the programme was broadcast), and other potential legal hearings related to the allegations of rape or WikiLeaks. Mr Assange said that the programme included comments from interviewees, who had no first-hand knowledge of the allegations he faced. In addition, the programme did not interview any of Mr Assange's legal team who had the authority to provide information on the allegations.

In summary and in response, Channel 4 said that it was "fanciful" to suggest that a documentary programme could in any way influence the decision making of the Supreme Court in this country. Channel 4 added that Mr Assange's application to continue his legal fight was ultimately successful and therefore Channel 4 said that there had not been any prejudice to his case. Channel 4 argued that the attempt to extradite Mr Assange from the UK, his legal battle to oppose extradition, the allegations made about him in Sweden, and his immediate public response to them were crucial aspects of the story and so it would have been bizarre not to have referred to them in the programme. Channel 4 said that Mr Assange spoke about the case in his interview and a brief extract was included in the programme. At no time did Mr Assange suggest that the programme makers should speak to his legal team.

Channel 4 also stated that the legal case was not the focus of the programme which fairly reported that Mr Assange denied the allegations and was continuing the appeal process. Channel 4 argued that the programme simply stating the fact that the allegations had been made against Mr Assange and adding that there was no unfairness to Mr Assange in the way that the allegations of sexual assault in Sweden and subsequent legal proceedings were reported either by commission or omission. Furthermore, Channel 4 contended that Mr Assange had initially claimed publicly that the allegations were part of an American intelligence dirty tricks conspiracy against him, and therefore it was reasonable to hear from those who were critical of these claims made without an apparent evidential basis to support them.

ii) Omitted crucial facts, such as:

- That Mr Leigh had broken a written agreement and had revealed a secret decryption key which led to the publishing of the “unredacted cables” [i.e. the Diplomatic Cables]. Instead, the programme said that this was an incomprehensible and reprehensible decision made by WikiLeaks.

In response, Channel 4 said that both the programme makers and Channel 4 made a legitimate editorial decision that this complicated dispute between Mr Assange and The Guardian was not relevant to the programme and that the interests of fairness did not demand that it be included. According to Channel 4, the programme makers took the reasonable decision not to include the views of either side of this dispute on the basis that the decryption key issue was ultimately not relevant to the publication by Mr Assange of the unredacted cables.

Channel 4 said that Mr Assange gave Mr Leigh the unredacted master file of the Diplomatic Cables and that he also gave him an encryption key. Mr Leigh understood that the “password” would not work after a short time. Mr Leigh claimed that Mr Assange told him that “this file would then expire, be deleted within a matter of hours” and says that Mr Assange described it as a temporary website. Channel 4 said that Mr Assange was, and still is, very critical of Mr Leigh’s decision to publish the key in his book. Channel 4 also added that some months prior to this publication, WikiLeaks, unbeknownst to Mr Leigh, replicated the files on the web. Mr Assange alleges that Mr Daniel Domscheit-Berg allowed a German publication to make the connection between the files and the published encryption key and that it is only for this reason that he (Mr Assange) was forced to publish the unredacted files in their entirety. However, according to Channel 4, this account is disputed in a number of respects. Channel 4 said that it does not appear to be disputed that Mr Assange always intended to publish the cables in their unredacted form and Mr Assange even states this in the programme. Channel 4 argued that, on this basis, a reasonable editorial decision was made that the detail of this dispute was not relevant to the programme and that there was no unfairness to Mr Assange in not including it in the programme.

- Attributing the statement “*they’re American informants, they deserve to die*” to Mr Assange but failing to mention that two individuals, Mr Goetz and Mr Stark (who were also present at the time this statement was supposed to have been made) have no recollection of Mr Assange making such a statement.

In response, Channel 4 said that the dinner at a restaurant in London was attended by Mr Assange, Mr Declan Walsh and Mr David Leigh of The Guardian, and Mr John Goetz and Mr Marcel Rosenbach of Der Spiegel. Mr Holger Stark of Der Spiegel told the programme makers (on camera in his interview) that he was not there and was away at the time. Mr Declan Walsh, The Guardian's Afghan correspondent, entirely supports Mr Leigh's account. In fact in The Guardian book "WikiLeaks: Inside Julian Assange's War on Secrecy" co-authored by Mr David Leigh, it is reported that Mr Declan Walsh, who is quoted, was particularly concerned by this comment, which he calls "callous", on the basis of his knowledge of the country, and the virulence of its feuds. Marcel el Rosenbach declined to be interviewed for the programme and John Goetz would not discuss the dinner on camera. However, Mr Goetz did not at any time tell the programme makers that Mr Assange did not make this statement.

Channel 4 said that the programme left viewers with the clear and unequivocal impression that Mr Assange denied having made this remark because he denies there was a "row". Not to include an explicit denial from him caused no unfairness and Channel 4 added that it is not tenable to suggest that it was also incumbent upon the programme makers to interview people who Mr Assange suggests would agree he did not say the remark alleged by Mr Leigh and Mr Walsh – not least because that is at odds with the producer's research.

- Failing to mention that Mr Domscheit-Berg (whose status was misrepresented by being described in the programme as a "*WikiLeaks spokesperson*") had: stolen funds and sabotaged WikiLeaks; deleted thousands of submissions revealing war crimes and corruption in financial institutions; and, profited from and unleashed the chain of events that led to the publishing of the unredacted Diplomatic Cables. After February 2011, Mr Domscheit-Berg had little to no involvement with WikiLeaks operations after being sacked on 14 September 2010. Mr Assange added that all this information was available in two public statements issued by WikiLeaks.

In response, Channel 4 said that it was clear from the programme maker's research conversations with Mr Holger Stark and Mr John Goetz of Der Spiegel, and from their recorded interviews, that Mr Domscheit-Berg was instrumental in the crucial deal being made between Der Spiegel and WikiLeaks and that he was the key middle man in relation to their dealings. By their own account, Mr Domscheit-Berg advised that Der Spiegel should work with WikiLeaks and he alerted the newspaper to a big story coming up that he suggested they should work on together. Mr Domscheit-Berg also set up Mr Stark's trip to London to meet Mr Assange which led to Der Spiegel becoming a major media partner with WikiLeaks in the key publication events discussed in the programme.

Channel 4 said that Mr Domscheit-Berg published a book entitled "Inside WikiLeaks: My Time with Julian Assange at the World's Most Dangerous Website" and was described on the front cover as "former spokesman of WikiLeaks" and the book describes him as "the effective No. 2 at WikiLeaks and the organization's most public face, after Julian Assange".

In Channel 4's view, it was not the role of the programme to rehearse the public or private disputes between Mr Assange and Mr Domscheit-Berg,

including Mr Assange's various allegations against him and contention that his role as spokesperson was limited to Germany. Channel 4 argued that the programme reported that Mr Domscheit-Berg had been "suspended for disloyalty insubordination and de-stabilization in a time of crisis" and it would not have been appropriate for, and was not incumbent upon, the programme makers to report what Channel 4 described as detailed, defamatory and unsubstantiated claims made against Mr Domscheit-Berg by Mr Assange.

Channel 4 submitted that the crucial issue was that Mr Domscheit-Berg was involved in the key events at WikiLeaks at the material time and was therefore able to give a view on what happened at the time and events subsequently. According to Channel 4, this was not unfair to Mr Assange because his own account about Mr Domscheit-Berg's time at WikiLeaks appears contradictory, as Mr Assange claims in his complaint that Mr Domscheit-Berg had "little to no involvement in WikiLeaks post February 2010 and none at all after 25 August 2010".

- Disregarding the fact that the reason that Mr Assange did not want The New York Times to be involved in the publishing of the US Diplomatic Cables was because The New York Times had told the White House about earlier releases.

In response, Channel 4 said that this fact was reported in the programme and was not "disregarded". Channel 4 added that in his interview Mr Assange made it clear – as the other interviewees involved contended – that a key reason, if not the key reason, behind Mr Assange's decision to exclude The New York Times from the arrangement was his dissatisfaction with their coverage of him and WikiLeaks. In any event Channel 4 said the programme addressed Mr Assange's objections to The New York Times decision to tell the White House in advance of publication – a view which was also shared by Mr David Leigh in the programme.

- Disregarding the banking blockade against WikiLeaks and the ongoing harassment of WikiLeaks volunteers. Mr Assange said that the programme gave the impression that WikiLeaks suspended publication because of his impending court hearing when, in fact, WikiLeaks suspended publication on 27 October 2011 due to financial blockades that were imposed on WikiLeaks, before the High Court made its decision on 2 November 2011.

In response, Channel 4 said that the two captions at the end of the programme were reporting entirely separate matters and were even separated by actuality of Mr Assange outside court. Channel 4 said that there was no suggestion that these events are related to each other.

- iii) The programme portrayed Mr Assange as "anti-American" and a "hacker" rather than a journalist or publisher.

In response, Channel 4 said that it was an undisputed fact that Mr Assange has been involved in the release of material that the American authorities did not wish to be published. In addition, it was a matter of public record that Mr Assange was at an early stage of his career a well-known hacker. In his interview with Mr Assange, the programme director asked Mr Assange if he

was different to mainstream journalists and his reply was included in the programme.

Channel 4 said that they disagreed that by referring to his hacking past the programme suggested that Mr Assange was a “hacker” rather than a “journalist or publisher.” Mr Assange was captioned throughout as “Julian Assange – WikiLeaks”. The programme made it clear he had been at the heart of key journalistic collaborations between mainstream media outlets. Channel 4 did not consider that there was any unfairness to Mr Assange in this portrayal.

- c) Mr Assange was not given a timely and appropriate opportunity to respond to the allegations made in the programme. In particular, Mr Assange stated that he was not given direct questions to answer in relation to many of the allegations stated in the programme.

In reply, Channel 4 said that the answers from Mr Assange included in the programme were given in response to direct questions and fairly edited and not taken out of their proper context. It would not have been “appropriate” to have provided Mr Assange with each and every actual comment or statement of general opinion expressed by interviewees and attributed to them. Indeed the programme makers did not go back to any interviewees and specifically put to them the specific criticisms Mr Assange made of them. This approach was not required by the Code or the interests of fairness.

Channel 4 said that some trenchant criticisms were made of Mr Assange by a number of interviewees, but he was given an appropriate opportunity to answer his detractors.

Unwarranted infringement of privacy

In summary, Mr Assange complained that his privacy was unwarrantably infringed in the programme as broadcast in that:

- d) Footage filmed of Mr Assange in a nightclub in Iceland was broadcast in the programme without his consent.

Mr Assange said that the person who recorded the video sought his permission to film him in the nightclub and that Mr Assange agreed to this on the basis that it would be for the filmmaker’s personal use only. However, it was broadcast in the programme and Mr Assange had no knowledge of how the programme’s producer sourced this footage. Mr Assange said that he could not understand why this footage had been included in the programme or why it was relevant.

In response, Channel 4 said that Mr Assange did not have a legitimate expectation of privacy in relation to this footage but that, if he did, the material was in the public domain to such a degree that it had lost any quality of privacy. The broadcaster submitted that Mr Assange did not have a legitimate expectation of privacy with regard to the filming of him dancing in a night club because the night club was a place open to members of the public and was not a private or restricted invitation event. Further, Channel 4 said that the filming of Mr Assange was not done surreptitiously and was with his knowledge and permission. In addition, Mr Assange was not engaged in a private act and the footage included nothing of a sensitive or private nature.

In addition, Channel 4 said that if Mr Assange did have a legitimate expectation of privacy, then this had been lost because the footage had been shown so frequently around the world. Channel 4 also stated that the footage was legitimately licensed by Channel 4 from the person who filmed it and that the material is in the public domain and so any privacy rights that Mr Assange may have enjoyed with regard to the footage had been lost. The copyright owner informed the programme makers that he has since 1 April 2011 sold the clip or approved its use on a non-exclusive licence basis to a number of media organisations. The footage has not just appeared on the video sharing website YouTube, but also on the website of well-known publications.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in connection with, the obtaining of material included in the programme.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript, both parties' written submissions and the unedited footage of Mr Assange's interview.

When considering first the complaints of unfair treatment, Ofcom had regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code"). Ofcom took this rule into account when reaching its preliminary view on the individual heads of complaint concerning unfairness detailed below.

- a) Ofcom first considered the complaint that the programme did not obtain Mr Assange's informed consent to appear in the programme. In particular, Mr Assange complained that:
 - i) the programme makers misrepresented to him what the programme would focus on;
 - ii) he was not made aware of other key contributors who would be appearing in the programme; and
 - iii) opportunities to preview the programme were not offered to him but were offered to other contributors such as The Guardian newspaper.

In considering this head of the complaint, Ofcom had regard to Practice 7.2 of the Code which states that broadcasters should normally be fair in their dealings with potential contributors to programmes unless, exceptionally, it is justified to do otherwise. In particular, Ofcom considered whether Mr Assange gave his informed consent to participate in the programme, as outlined in Practice 7.3 of the Code, which sets out that, in order for a potential contributor to a programme to be able to

make an informed decision about whether to take part, they should be given sufficient information about the programme's nature and purpose, as well as their likely contribution. They should also be informed about the areas of questioning and, wherever possible, the nature of other likely contributions; and, any changes to the programme that might affect their decision to contribute.

Ofcom considered the following sub-heads of this complaint in order to reach an overall decision as to whether Mr Assange had given his informed consent to appear in the programme.

- i) The programme makers misrepresented what the programme would focus on.

Ofcom was provided with the release form which was signed by Mr Assange. The release form described the programme as:

"A definitive account of the WikiLeaks affair. It will focus on the core of the story, the substance, content and the impact of the Iraqi, Afghan and diplomatic cables."

Ofcom also noted that prior to Mr Assange confirming his involvement in the programme, email correspondence between his assistant and the programme makers over a number of weeks sought to establish the content of the programme and what it would focus on.

In an email, dated 6 July 2011, for example the programme makers stated that they were interested in asking Mr Assange:

"How has WikiLeaks changed global political interaction, political transparency and why is it so important for the progress of civilization that we have this mine of information in order to understand how humanity operates - potentially forcing us to behave in a moral way. The idea discussed that WikiLeaks has made it impossible for people not to know what is happening in the name of war and diplomacy is very compelling as is the idea that states have been forced into a state of un-deniability over their actions. We are honestly not at all interested in the personal life of Julian but in his work to bring about the biggest leak in history."

Ofcom further observed that, on 22 August 2011, Mr Assange's assistant asked the following point:

"We would also like to be sure that the majority of the interview focuses on the points that you have shown you agree are most important - the effects and philosophies of WikiLeaks."

The response from the programme makers to the above query, sent on 23 August 2011, stated as follows:

"The film is a story of a defining moment in history and we want Julian's account of events as the central protagonist. So I guess our framing of Julian is simply that – as WikiLeaks progenitor, and defining spirit and it's really important that he gives his own account of what happened, and why it did, this covers events, philosophy and results. And yes, in some instances that will involve responding to what others say/their version of events during the process, but what we really want is him recounting and explaining a very important story in his own words."

Ofcom noted that after the broadcaster had published its press release on the programme, Mr Assange sent an email dated 17 November 2011 to the programme makers in which he expressed his view that the programme did not reflect his understanding of what it would focus on and contained many inaccuracies.

Ofcom watched Mr Assange's unedited contribution (provided by Channel 4). In summary, the main content of Mr Assange's interview was as follows:

- the reasons why Mr Assange started WikiLeaks, which included his philosophical and moral impetus for starting WikiLeaks;
- his views on and attitudes to the people who supply WikiLeaks with information and the information itself;
- the media and its interaction with society;
- the issue of redaction and the extent to which individuals should be identified in material that is published;
- his opinion on particular journalists, institutions and governments;
- the political and moral impact of the material he was publishing; and
- his position in relation to the legal trials which were related to him personally or to WikiLeaks.

Ofcom went on to compare the description of the programme, as set out in the release form, email correspondence and the unedited footage of the interview, with the programme as broadcast. Ofcom noted that the programme was a retrospective account of WikiLeaks since its inception, and this was told through the people involved at the time. The main focus of the programme concerned what Ofcom considered to be the heart of the debate on WikiLeaks: the impact of releasing the information and the disagreements which arose from the differing approaches towards redacting portions of material. Ofcom observed that the majority of Mr Assange's contributions in the programme concerned his personal view and wider philosophical approach to certain events and issues which occurred during WikiLeaks' operations. Ofcom further noted that the programme made reference to the allegations of rape which Mr Assange faced, and included opinions from contributors on this matter – in addition to general impressions, opinions and criticisms of Mr Assange and WikiLeaks.

Ofcom considered that the description of the nature and purpose of the programme, as set out in the release form and the email correspondence, was broad in its scope. In Ofcom's view, the programme featured topics and subjects which were inextricably related to the general premise of the programme, which was a "definitive account of the WikiLeaks affair". It was evident from the unedited interview with Mr Assange what the subject areas and approach were which the programme was likely to take and, as described above, the unedited interview with Mr Assange covered in detail the majority of the content areas which were featured in the programme as broadcast. Therefore, Ofcom considered that the programme makers had not misrepresented what the programme would focus on.

By way of response to Ofcom's Preliminary View in this case⁵ which was sent to both parties for their comments, Mr Assange, in summary, stated as follows:

⁵ In accordance with Ofcom's procedures for the handling of Fairness and Privacy complaints, once Ofcom has received a statement from the broadcaster in relation to the complaint, Ofcom prepares its Preliminary View. The Preliminary View is then sent to the complainant and broadcaster for comment, before Ofcom prepares its final adjudication on the matter. In this case Ofcom's Preliminary View was that Mr Assange's complaints of unfairness and unwarranted infringement of his privacy in the programme as broadcast should not be upheld.

- The producer had promised in writing (email dated 6 July 2011 referred to above) that the programme would not focus on any unrelated legal proceedings. Mr Assange also provided Ofcom with a copy of a signed witness statement by Mr John Goetz, dated 15 May 2012, in which he stated that the producer presented the documentary as being “mostly about Mr Bradley Manning and the impact of the release of the diplomatic cables”. The witness statement signed by Mr Goetz also said that the producer said that the Swedish allegations were “off the point and irrelevant”.
- The producer was dishonest during pre-production negotiations in gaining an interview with Mr Assange which purported to tell the story of the “leaks of previously withheld and confidential information on the most important subjects of our time such as the conflicts of Afghanistan and Iraq and international diplomatic relations”. Mr Assange said he covered this subject in great detail in his interview but very little of what he said about this was included in the programme. The release form he signed stated that the programme would focus on the “substance, content and impact on the Iraqi, Afghan and diplomatic cables, looking at the emergence of the Arab spring and the impact on repressive regimes.” However although Mr Assange gave an interview which lasted five hours, the programme focussed less on this material and more on the “unrelated legal proceedings”. Mr Assange also stated that evidence of misrepresentation was evident from the unedited footage of the interviews given by the Der Spiegel journalists (Mr Stark and Mr Goetz) and asked Ofcom to obtain this footage from Channel 4.
- Mr Assange was told that there would not be a narrator providing commentary in the programme during a pre-interview meeting on 17 August 2011. Mr Assange stated that the narrator and how he introduced the programme (e.g. by saying “*have the actions of one man turned triumph into disaster?*”) was a significant point because much of the unfair bias in the programme was introduced by way of narration/voiceover. Mr Assange added that he sent an email to Channel 4 (also provided to Ofcom) withdrawing his consent following a press release by the broadcaster, which indicated that the programme was very different to what he had believed it to be.

Ofcom’s response to these additional representations by Mr Assange is as follows.

In relation to the point that the producer had promised in writing that the programme would not focus on any “unrelated legal proceedings”, Ofcom considered that the allegations that Mr Assange faced in Sweden were not “unrelated” to the subject of the programme. This is because they formed part of the story of the WikiLeaks affair, particularly when taking into consideration that Mr Assange claimed that the charges were politically motivated. Ofcom took account of the fact that Mr Goetz claimed in his witness statement that the producer had stated that the Swedish allegations were “off point and irrelevant”. While Ofcom noted that this may evidence what was said to Mr Goetz at that time and was possibly evidence of what the producer wanted to focus on in his interview with him, however it did not provide clarification of what Mr Assange himself had been told. Ofcom was not provided with any correspondence with the programme makers which stated that the Swedish allegations would not be featured in the programme. Further, as already noted above, Ofcom considered that the combination of what was stated in the emails and the content of the interview itself (in which the Swedish allegations were referenced as part of the unedited interview) suggested that these allegations might form part of the programme.

Ofcom considered Mr Assange's submission that the producer was dishonest in the pre-production negotiations and that very little of what Mr Assange said in the five hour interview was included in the programme. Ofcom noted that the programme was a chronicle of the history of WikiLeaks, told by the people who were involved at the time and a substantial amount of time was devoted to the impact of the dissemination of confidential material. The programme as broadcast appeared to reflect the correspondence between the producer's assistant and Mr Assange's assistant prior to agreeing to an interview and the content of the interview itself. Therefore Ofcom did not consider that Mr Assange had been misled or there was any evidence of dishonesty on the part of the producer. Mr Assange complained that not enough of his interview was included in the programme. However, it is a decision of the broadcaster to select material for inclusion in a programme, so long as material is not edited or presented in a way that is unfair. This issue is dealt with further in this Adjudication. With reference to Mr Assange's request to Ofcom to obtain the unedited footage of the interviews with the Der Spiegel journalists (Mr Stark and Mr Goetz), Ofcom did not consider that it was necessary to obtain this footage in order to decide whether the broadcaster had complied with Section 7 (Fairness) of the Code. The unedited footage of Mr Assange's interview, correspondence between the programme makers and Mr Assange and the programme itself, was sufficient information on which Ofcom could reach a reasoned decision. Since the complaint Ofcom is required to adjudicate on relates to Mr Assange, it did not consider that it would be appropriate to obtain unedited footage from other contributors who were not party to the complaint.

Concerning Mr Assange's complaint about a narrator being used in the programme, Ofcom again reviewed all the correspondence between the programme makers and Mr Assange. It found no reference to whether a narrator would be used in the programme. Mr Assange did raise this issue in a phone call with the producer, but Ofcom noted that this call happened after the interview had taken place. Ofcom considered that the use of a narrator was not something that needed to be confirmed to Mr Assange, as this was an editorial decision by the broadcaster. Whether any unfairness resulted from what was contained in the programme, including what was stated by the narrator, is considered further in this Adjudication.

Having taken account of the further matters raised by Mr Assange, Ofcom concluded that the programme makers did not misrepresent what the programme would focus on.

- ii) Ofcom considered the complaint that Mr Assange was not made aware of other key contributors who would be appearing in the programme.

In relation to this particular aspect of the complaint, Ofcom recognises that there is no obligation on the programme makers or the broadcaster to provide a contributor with a comprehensive list of all contributors. Instead, Practice 7.3 states that contributors should normally be informed about "wherever possible, the nature of other likely contributions".

Ofcom examined the correspondence between the programme makers and Mr Assange's assistant and the unedited interview footage. In particular Ofcom noted in an email dated 22 July 2011 that the programme makers did set out a number of contributors and/or possible contributors to the programme:

"At Der Spiegel we are speaking to Georg Mascolo and Holger Stark. At The Guardian, so far we have been in touch with Alan Rusbridger and David Leigh and we are going to speak to one of two others who dealt with the material but

we have not yet been in touch with them. We are speaking to Dean Baquet and Bill Keller at The New York Times. This is so they can tell us about how the story of the leaks unfolded, their dealings with the US administration and what was significant about the content of the leaks.”

In another email to Mr Assange dated 14 July 2011, the programme makers said:

“Just so you know, Josh Steiber who was part of the Collateral Murder lot, had agreed to take part and talk about why he became a conscientious objector and why it was important to see the reality of war in this way, through the release of the video and we are talking to Ethan McCord who also approved of the leaking of the material because of what it showed the public about what was being done in the name of war. We also have PJ Crowley taking part who obviously didn’t approve of the leaks but did speak out against the torture of Bradley Manning.”

It was clear from the footage of the unedited interview with Mr Assange that a number of the individuals referred to in the correspondence were also mentioned by the interviewer to Mr Assange (such as Mr Domscheit-Berg, Mr Adrian Lamo and Mr Nick Davies). These individuals subsequently appeared in the programme.

Ofcom considered that, although there was no obligation on the broadcaster to provide a definitive list of the key contributors in order to ensure that Mr Assange could provide informed consent, Mr Assange had nevertheless been provided with many of the names prior to consenting to appear in the programme. In Ofcom’s view, the combination of the names which were provided in email correspondence, and Mr Assange’s knowledge of the content of the programme from his own interview (as further set out in sub-head i) above), provided Mr Assange with not only an idea as to the type of contributors who were being asked to participate in the programme, but also what their contributions were likely to consist of.

In response to Ofcom’s Preliminary View, Mr Assange said that he was never told that Mr Domscheit-Berg would be interviewed which, in light of the well-known actions against WikiLeaks that were taken by Mr Domscheit-Berg, constituted a misrepresentation on the part of the producer to gain his involvement.

As stated above, there was no obligation on the broadcaster to provide a definitive list of contributors. Ofcom took into account that it was evident from the correspondence with the programme makers (as set out sub-head i) above) who the contributors to the programme were likely to be. Ofcom also noted that there was no guarantee given by the programme makers concerning who would and who would not be appearing in the programme. Therefore, Ofcom considered that overall Mr Assange had been provided with sufficient information about the contributors.

iii) Opportunities to preview the programme were not offered to him but were offered to other contributors such as The Guardian newspaper.

Ofcom noted from Channel 4’s submission that The Guardian was offered the opportunity to preview the programme for the purposes of fact-checking and because of the commercial agreement that The Guardian had in relation to a film also being made about WikiLeaks.

One of the provisions set out in Practice 7.3 is that participants should normally “be given clear information **if offered an opportunity** [emphasis added by Ofcom] to preview the programme, about whether they will be able to effect any changes to it [i.e. the programme].” It is important to note that there is no obligation on the

broadcaster to provide contributors with an opportunity to preview the programme in order to ensure that they have provided informed consent.

The correspondence between the programme makers and Mr Assange and his assistant showed that at no point did the programme makers or the broadcaster offer Mr Assange an opportunity to preview the programme. In addition, Mr Assange did not request to preview the programme until he raised concerns about the broadcast (following a press release about the programme) in an email to the programme makers dated 17 November 2011, which was 12 days before the programme was shown. Ofcom noted that the broadcaster did not agree to offer Mr Assange at any point an opportunity to preview the programme.

Ofcom took into account: that there was no opportunity offered to preview the programme, the late request from Mr Assange to preview the programme, and that the reasons for offering The Guardian an opportunity to preview the programme concerned their commercial arrangement rather than any editorial reasons. As a result, we did not consider that not offering an opportunity to Mr Assange to preview the programme negated the informed consent he had given to contribute, particularly in light of the information he already had about the programme (as set out in sub-heads i) and ii) above).

In light of all the above factors, Ofcom did not consider that Mr Assange was misled about what the programme would focus on. We concluded that Mr Assange had been made sufficiently aware of the other likely contributors and what their contributions were likely to involve. Further, it was not necessary for Mr Assange to preview the programme in order to ensure that his consent was “informed.” Therefore, Ofcom concluded that the broadcaster and programme makers had taken sufficient measures to ensure that consent given by Mr Assange in contributing to the programme was “informed consent”.

In response to Ofcom’s Preliminary View sent to both parties, Mr Assange stated, in summary, that it was improper to not make the role of The Guardian’s David Leigh as fact checker for the programme clear to both him and the viewers. It was unfair that the audience was not informed of factual inaccuracies when the producer was aware that one side of the dispute was telling lies. Mr Assange added that he did not request preview rights because he was not told these rights were available and nor was he told that they had been granted to contributors from The Guardian. Mr Assange said that the producer did not afford him the opportunity to preview the programme even after he had expressed serious concerns about the factual accuracy of the programme, and he considered this to be unfair.

Ofcom took account of these further representations in finalising our decision. It considered that there was no obligation on the programme makers to offer Mr Assange an opportunity to preview the programme in order to ensure that Mr Assange had given informed consent. As explained above, as a matter of fairness, it is not a requirement to offer a preview opportunity to any or every contributor. Further, the commercial arrangement between the programme makers and The Guardian appeared to be the main reason for granting a preview to representatives of that newspaper rather than as a way of ensuring fairness to any contributor.

Ofcom’s decision is that Mr Assange did provide informed consent and was not treated unfairly in this respect.

- b) Ofcom next considered the complaint that material facts were presented, disregarded or omitted in a way that was unfair to Mr Assange.

When considering this head of complaint, and the individual sub-heads of complaint below, Ofcom had regard to whether, in accordance with Practice 7.9 of the Code, reasonable care was taken by the broadcaster to satisfy itself that material facts had not been presented, disregarded or omitted in a way which was unfair to Mr Assange.

In relation to some of the sub-heads of complaint below, Ofcom also had regard to Practice 7.6 of the Code which states that, when a programme is edited, contributions should be represented fairly.

Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. This is an editorial decision and it would be unreasonable and a disproportionate interference with a broadcaster's right to freedom of expression to require the broadcaster to cede editorial control or to oblige the broadcaster to include contributions in full. Broadcasters must however ensure that material facts and contributions are presented fairly. It is in this context that Ofcom considered whether or not Mr Assange was portrayed unfairly under this head of the complaint.

Ofcom considered the following sub-heads of complaint in order to reach an overall decision as to whether the programme was unfair to Mr Assange.

- i) Ofcom considered first the complaint that the programme broadcast material which was highly prejudicial to Mr Assange's extradition hearing (held in the UK a few days after the programme was broadcast), and other potential legal hearings related to the allegations of rape or WikiLeaks. Mr Assange said that the programme included comments from interviewees, who had no first-hand knowledge of the allegations he faced. In addition, Mr Assange argued that the programme did not interview any of Mr Assange's legal team who had the authority to provide information on the allegations.

A section towards the end of the programme focussed on the allegations of rape made in Sweden against Mr Assange. In particular Ofcom observed the following comments made by Mr Davies and Mr Leigh, which were accompanied by footage of Mr Assange dancing in a nightclub in Iceland:

Mr Davies: *"I woke up to find an email from an American journalist with a link to this Swedish newspaper Expressen, front page claims that Julian is charged with sexually assaulting two women. Now that's obviously a joke, I don't believe it, this is some sort of satirical spoof. I had been in Stockholm with Julian and I had got to know the WikiLeaks co-ordinator there - a very nice Swedish journalist called Donald Bostrom. So I called Donald and before I made the phone call I thought well there are various possibilities here - I mean one is this is women who want to sleep with a celebrity so that they can make up a story and sell it to newspapers. Or maybe it's some crazy right wing group who've set this up to try and discredit him. Maybe out on the outer shores of possibility it is the American authorities who are doing something evil. And I went through to Donald and said what's going on here? And he said, 'My friend I'm sorry to tell you it's true.'*

Mr Leigh: *And it was an extraordinary story, Julian had upset these two women by his incontinent sexual behaviour which had involved, it would appear, jumping on them and not using a condom, even though they,*

they very much wanted him to. After he had had sex with these two women in rapid sequence and had misconducted himself with both of them they had got together and one of the things they wanted was they wanted him to have an AIDS test. And Julian's friend, this man Donald Bostrom, who was a sort of intermediary, he told us, he said I was on the phone all the time between these women and Julian you know and these women are saying we want him to have an AIDS test and Julian is saying, 'Oh I'm not going to do that'. And they are saying well if you don't we're going to go to the police. And by the time he's agreed this, it's ten past five on a Friday in Stockholm and apparently you can't find a clinic that's open at that time in Stockholm. So he didn't have the AIDS test, so the women made good their threat and went to the police".

The narrator of the programme stated that Mr Assange spoke to the police "once and then leaves Sweden, claiming this isn't just a rape enquiry but something more sinister." Archive news footage is also included shortly after this, which reported Mr Assange's statement that the allegations are untrue and were part of a "dirty tricks campaign" and "politically motivated".

Ofcom then observed that Mr Davies made the following comment:

"To see Julian tweeting and giving mainstream media comment which clearly suggested that she [the Swedish woman accusing Mr Assange of rape] was some kind of American dirty trick was very distressing because the guy is supposed to stand for truth and that wasn't true."

Mr Davies said in the programme:

"I am not saying that I know that Julian is guilty of a crime, I don't know the truth about that, I'm saying that Julian misled the world when he claimed, or hinted, that there was some kind of conspiracy by the Americans behind it."

Immediately following Mr Davies' comment, Mr Assange stated:

"It's extremely interesting, it's revealed a whole lot of relationships, it's revealed a really extraordinary [relationship] between Sweden and the United States, that I wasn't aware of. Even my most cynical interpretations of Swedish geo-political behaviour didn't encompass what the actual, what the actuality is. Its revealed interesting relationships about the EU that essentially the elite in one country in the EU and the elite in the other countries in the EU all agree to crush their respective populations for each other."

Ofcom took into account Mr Assange's submission that he was legally barred from talking about the allegations and therefore was unable to speak directly about the allegations of rape when considering whether the broadcaster had taken reasonable care to satisfy itself that material facts were presented in a way that was not unfair to Mr Assange. We noted that the discussion of the allegations in the programme did not reveal anything which was not already in the public domain before the programme was broadcast, and therefore it was likely that many viewers would have been familiar with the allegations and Mr Assange's unequivocal denial of them. In addition, the focus of this part of the programme concerned reactions to the news that Mr Assange had been arrested from those who had been involved with Mr Assange, such as Mr Davies and Mr Domscheit-Berg. Their comments centred on their doubts about Mr Assange's

position that the allegations were “*politically motivated*”. This was evident for example from Mr Davies’ comment when he stated, “*I am not saying that I know Julian is guilty of a crime... I’m saying that Julian misled the world when he claimed, or hinted, that there was some kind of conspiracy by the Americans behind it*”.

Ofcom observed that Mr Assange’s stance (i.e. that he denied the allegations and that the allegations were a result of political campaign against him) was reflected in the programme through the archive news footage set out above, and more generally by Mr Assange himself when he stated that the allegations had “*revealed interesting relationships about the EU that essentially the elite in one country in the EU and the elite in the other countries in the EU all agree to crush their respective populations for each other.*”

Ofcom took into account Mr Assange’s complaint that his legal representatives or anyone who had first-hand knowledge of the case were not approached. However, in Ofcom’s view the programme was not concerned with the veracity or otherwise of the rape allegations, but had included the references to them as forming part of the events of the WikiLeaks story. This was the context in which the information in the programme about the rape allegations was broadcast, and Mr Assange’s denial and his view on there being a conspiracy were already widely documented prior to the broadcast of the programme. In turn the programme also made clear that Mr Assange denied the allegations. Therefore it was not incumbent on the programme makers to seek further comment from either Mr Assange or his legal representatives in order to satisfy themselves that material facts were presented fairly. In any event, as set out in head c) below, the programme reflected Mr Assange’s response to the main allegations made against him.

In relation to the trial of Mr Bradley Manning, the programme informed viewers of issues that were already available in the public domain, such as his alleged confession to Mr Lamo. In addition, the programme stated that:

“the allegation is that harsh treatment of Iraqi detainees persuaded Manning to transfer half a million confidential military and diplomatic cables out of Crypto net into WikiLeaks’ hands”.

Throughout the programme, Mr Manning was often referred to as the “*potential source*” but it was clear from the programme that WikiLeaks had not confirmed this as true.

Taking all the above into account, Ofcom did not consider that the programme was prejudicial to Mr Assange’s UK extradition case (which concerned a technical legal issue, rather than any allegation adverse to Mr Assange dealt with in the programme)⁶, any possible trial concerning the rape allegations or any other

⁶ In early 2012 the Supreme Court of the United Kingdom considered Mr Assange’s final appeal against his extradition from the UK to Sweden to face potential criminal charges related to the Swedish rape allegations. The issue considered by the Supreme Court, as described on the Supreme Court website, did not concern the allegations themselves but was a technical one as to whether a “European Arrest Warrant (“EAW”) issued by a public prosecutor is a valid Part 1 EAW issued by a “judicial authority” for the purpose (and within the meaning) of sections 2 and 66 of the Extradition Act 2003”. On 30 May 2012 the Supreme Court rejected Mr Assange’s appeal against extradition to Sweden. Mr Assange subsequently entered the London embassy of Ecuador and asked for political asylum.

potential trial related to WikiLeaks. Many viewers would have understood that the matters being discussed relating to the rape allegations were reports of what had happened or were speculation or a contributor's opinion, rather than statements about disputed matters of fact. As a result, Ofcom's view is that the programme makers had taken reasonable care to satisfy themselves that material facts had been presented in a way that was not unfair to Mr Assange.

In response to Ofcom's Preliminary View, Mr Assange stated in summary as follows:

- The mere inclusion of the Swedish allegations was unfair to him, irrespective of the manner in which they were presented in the programme. Mr Assange said that Mr Leigh gave a salacious account of the allegations against him by referring to him as *"jumping on"* the two women and that he had *"upset these two women with his incontinent sexual behaviour"*. Mr Assange said that these allegations were dismissed by the first Swedish prosecutor after reading it and the case closed. According to Mr Assange, Mr Leigh's accounts were presented as facts rather than allegations and there was no mention in the programme that Mr Assange had not been charged with any offence. Further, Mr Davies' statement in the programme that Mr Assange was not *"telling the truth about it"* imputed that the allegations were true and this was particularly damaging coming from a reputable journalist such as Mr Davies.
- Mr Assange said that the inclusion of the video of Mr Assange dancing in a nightclub was unfair and was a misuse of the intended purpose of the footage.
- Mr Assange said that he found it extraordinary that Ofcom would find that a programme containing serious libels and allegations against him, broadcast six days before his appeal against his extradition to Sweden at the High Court in London, would have no prejudicial effect on the level of support for him. Mr Assange added that public support was vital in a highly politicised extradition battle.

In response to these additional representations, Ofcom notes that the remarks concerning possible activities of Mr Assange in Sweden made in the programme were clearly referenced as being "allegations". Even though Mr Assange's denial of the allegations was not attributed directly to him, it was very clear to viewers that he denied the charges by the inclusion of the archive news footage and comments made by other contributors in the programme. It was clear to Ofcom that the context in which the Swedish allegations were referred to was as part of the WikiLeaks story, and as an event which suddenly occurred. It was also apparent from the programme that Mr Leigh was reporting what he knew at the time when news of the allegations surfaced and he became aware of them.

In relation to Mr Assange's complaint that the inclusion of the allegations was prejudicial to the legal proceedings, Ofcom took into account that the programme was not concerned with the veracity of the allegations but merely referenced them within the context of the WikiLeaks story. In any event, the legal proceedings in the High Court in the United Kingdom which Mr Assange referred to were concerned with a technical legal point rather than any issue related to the Swedish allegations. In Ofcom's opinion, there was no reasonable possibility of anything in the programme influencing any decision taken by the High Court.

With regard to the inclusion of video footage of Mr Assange dancing in a nightclub, the footage was used in the section of the programme which concerned reactions to the news that Mr Assange had been arrested on suspicion of rape. Ofcom noted that the footage showed Mr Assange dancing in a nightclub but there was nothing in the footage which portrayed Mr Assange in a negative way. Consequently, Ofcom did not consider that the broadcasting of this footage of Mr Assange dancing in a nightclub could cause any unfairness to Mr Assange in the programme as broadcast.

ii) Ofcom next considered the complaint that the programme was unfair to Mr Assange by omitting crucial facts such as:

- the programme omitted that Mr Leigh had broken a written agreement and had revealed a secret decryption key which led to the publishing of the “unredacted cables” [i.e. the Diplomatic Cables]. Instead the programme said that this was an incomprehensible and reprehensible decision made by WikiLeaks.

Ofcom noted the following from the programme:

Mr Assange: *“I personally was in a very precarious position. We were still worried about a surprise sneak attack, simultaneous across all continents where our people were. We also knew that we had a CIA taskforce assigned to us, some 120 people working in the Pentagon against us and other organisations.*

We knew that they knew that we had 251,000 diplomatic cables, over 100,000 of which were classified. So under that basis we were willing to give The Guardian a copy of the material for safekeeping.

Mr Leigh: *This piece of paper was written on by Julian Assange, it's a bit of a souvenir I suppose, in July 2010 when he wrote down the password which was going to enable us to access the entire 250,000 state department cables and he told me that this file would then expire, be deleted within a matter of hours. It says a collection of history since 1966 to the present day and there's a little hash symbol. And he said here's what I've written down but when you put in this password you have to add an extra word so that it says a collection of diplomatic history and I said yes Julian, right, I'll remember that you know and I'll put in that extra word, so it was all very James Bond.*

I went off to Scotland where we have a little cottage and it was my holiday and I spent my holiday not climbing hills in Scotland, as I'd hoped, but closeted with my laptop and this little memory stick wading through this extraordinary collection of American diplomatic communications.

What we had here was material which was capable of complicating or disrupting American relationships with 100 countries...”

Towards the end of the programme, Ofcom noted the following:

Narrator: *"While Manning's defence team are preparing for his trial, a final twist in the WikiLeaks saga. To worldwide condemnation, Julian Assange announces he is planning to put out all the diplomatic cables with nothing blacked out."*

Mr Domscheit

-Berg: *"That's about the worst decision I am aware of, that's like this shouldn't happen, because this is again where you are not a pro whistle blowing organisation, but you're just a mere anti-secrecy organisation. And there's a big difference in these two things."*

Interviewer: *"And the difference is?"*

Mr Domscheit

-Berg: *"One is a responsible thing and the other one isn't."*

Mr Davies: *"It's like a Greek tragedy. You've seen a triumph turn into a disaster, and I mean I don't doubt that The Guardian and The New York Times made mistakes along the way, but ultimately the triumph has become a disaster because of one man's personality flaws."*

Mr Assange: *"There is a view that one should never be permitted to be criticised for being even possibly in the future engaged in a contributory act that might be immoral. And that type of arse-covering is more important than actually saving people's lives. That it is better to let a thousand people die than risk going to save them and possibly running over someone on the way. And that is something I find to be philosophically repugnant."*

Ofcom noted that the parts of the programme set out above were likely to lead viewers to the conclusion that the decision to publish all the Diplomatic Cables in the unredacted form was a decision made solely by Mr Assange. However, we also noted that although the programme contained criticisms from contributors, and most notably from Mr Domscheit-Berg, the programme did not state that this was "an incomprehensible and reprehensible decision made by WikiLeaks", as submitted by Mr Assange in his complaint.

Mr Assange provided Ofcom with a copy of a contract signed by Mr Rusbridger, editor of The Guardian, which stated The Guardian would not publish the material "known as Package 3" (which Ofcom presumes refers to the Diplomatic Cables material). Ofcom also took into account Channel 4's statement that this issue was complicated, there were two conflicting views and misunderstandings about it, and therefore an editorial decision was made by the programme makers not to include this "complicated dispute".

Having reviewed the unedited interview footage and Channel 4's submissions on this point, Ofcom's view is that this issue was quite complicated. It was clear that both representatives of The Guardian and Mr Assange had differing recollections. It is important to note that Ofcom's role is not to resolve conflicts of evidence and to act as a tribunal of fact, but only to consider whether the programme presented, disregarded or omitted material facts in a way that is unfair to Mr Assange.

Ofcom noted from the unedited interview footage that Mr Assange had explained the issue of how and why the cables came to be published in the unredacted form. In Mr Assange's unedited interview he stated that he had found out that another organisation was planning to publish the material and he had asked the organisation not to publish the material unredacted, because the effect would be that "all our redaction work is in vain." Ofcom considered that the effect of omitting Mr Assange's more detailed explanation as to why he had to publish the material unredacted was that viewers may have formed the impression that Mr Assange had a somewhat cavalier attitude to the material he was publishing. However, we further noted that Mr Assange stated that, although he was planning to "*publish the majority of the material by November 29, we'd have to rush this forward and publish all the rest.*" Therefore he did not dispute that his intention was to publish the information unredacted.

Consequently, Ofcom considered that the essential material facts in relation to this point were that Mr Assange had published the material unredacted. In relation to omitting the fact that The Guardian had allegedly broken the written agreement which had in turn allowed the key to the material to be used, Ofcom accepted that the programme makers could not be satisfied that this was what actually happened. It was not therefore incumbent on them to include this in the programme in order to reflect fairly the relevant part of the journalistic story – which was that the Diplomatic Cables were published in unredacted form and this was not a decision which everyone agreed with.

Ofcom also took into consideration that, although the purpose of this programme was to give an overall history of WikiLeaks, it was also an opportunity to inform viewers about the conflicts of view between the various participants in the story which existed at the time. We were mindful that the intention of the programme was not always to state what had happened, but simply to present viewers with the conflicting opinions of the various participants, so that they could in turn form their own opinions and impressions on contentious topics.

Ofcom therefore considered that the reasons given by the broadcaster for omitting Mr Assange's allegations that The Guardian had broken a written agreement were reasonable in the circumstances.

In response to Ofcom's Preliminary View, Mr Assange said in summary that not including a single word of his detailed version of the events which led up to the release of the unredacted cables, and stating in the programme that "*to worldwide condemnation Assange announces he is planning to put out all cables*", deliberately omitted material facts and was intended to produce a biased account favourable to The Guardian, resulting in unfairness to Mr Assange. Mr Assange said that, although as stated in his unedited interview footage he had been preparing to publish the majority of the material by 29 November, he was clearly talking about the redacted versions which is clear in the context within the unedited interview footage.

In response, Ofcom again noted that there was a conflict between Mr Leigh's and Mr Assange's accounts on this point. Ofcom reviewed the unedited interview footage and noted that Mr Assange did state "although we had been planning to publish the majority of material by November 29, we'd have to rush this forward and publish all the rest...". Ofcom acknowledged Mr Assange's point that this reference was in relation to the redacted material

and that the events which led up to the publishing of the unredacted material, as stated in his unedited interview footage, were not included in the programme as broadcast. Ofcom's role is not to state what material should or should not be included but to ensure that, with reference to Practice 7.9 of the Code, programme makers take reasonable steps to satisfy themselves that material facts are not presented, omitted or disregarded in a way that is unfair to a complainant. In this case, the producer had two differing versions of the events but what was not in dispute was that Mr Assange did publish the material unredacted. Therefore, as stated, Ofcom considered that attributing this decision to publish to Mr Assange did not result in any material unfairness to him in the programme as broadcast.

- Ofcom next considered the complaint that the programme attributed the statement *"they're American informants, they deserve to die"* to Mr Assange, but failed to mention that two individuals, Mr Goetz and Mr Stark, who were also present at the time this statement was supposed to have been made, have no recollection of Mr Assange making such a statement.

Ofcom noted that this phrase was reported in the section of the programme which dealt with the issue of redactions. Mr Leigh stated as follows:

Mr Leigh: *"We all went out one night to quite a well known Moorish restaurant called Moro and we all sat down round a table and we had dinner. And we said Julian, we've got to deal with this question of informants you know, you have got to understand that if they're published by you, not by us, because we're not going to do that, but if you're going to dump out all this material and there's stuff in there with informants' names, they could suffer reprisals, they could be killed.*

And Julian said, and this stuck in everybody's minds because there was a sort of pause, as a little chill went round the table, he said, 'Well they're American informants they deserve to die'. That was his attitude and there was a like abyss opened up at that point between the way we saw the world and the way he was seeing the world.

Mr Assange: *There was, there was no row at all, there was no row, there was no, there was not even only hints of a discussion.*

Mr Schmitt: *My colleagues called me the day after and said you wouldn't believe what he's going to do, you've got to help...and so I send him a note and I say Julian, this is crazy, you've got, you've got to be listening to these guys.*

Mr Mascolo: *We had to argue with Afghanistan, this could put people in real harm, so what we told WikiLeaks from the beginning is that we don't subscribe to their idea of simply taking all this material and put it on the internet.*

Mr Davies: *What finally got through to Julian was the political point. It was obvious, even while we were working on the Afghan War Logs, that when we published them we would be starting an information war. And the line that the Pentagon would take would be to say you are helping the bad guys, you are helping*

terrorists by doing this. Now we knew very well that we weren't and what I kept saying to Julian was if you publish this material then you're giving them the ammunition that they need to fire at us.

Mr Schmitt: *And to his credit over night, he did re-think this and ultimately decides that they'll take off the table...".*

Ofcom considered that attributing the statement "*they're American informants, they deserve to die*" to Mr Assange had the potential to cause unfairness to Mr Assange.

Ofcom took into consideration that the broadcaster was told by Mr Stark that he was not present at the dinner referred to in the programme when the comment ("*they're American informants, they deserve to die*") was alleged to have been made. (Mr Assange later confirmed this – see below.)

Ofcom observed from the unedited footage that this particular event (i.e. the discussion at the restaurant) was not focussed on in any great detail, however Mr Assange himself did mention that he denied ever saying that "*informants deserve to die*". In the programme however, in response to the interviewer's question about whether there was a row between Mr Assange and The Guardian, Mr Assange stated that there was no row. Ofcom noted that Mr Assange's general denial of any row, immediately followed Mr Leigh's account of the dinner.

Ofcom considered that although it may have clarified matters to have included Mr Assange's specific account of the dinner, his brief statement denying there was a quarrel was sufficient for viewers to be alerted to a disagreement on whether there was a dispute or not, and therefore whether this statement was even made by Mr Assange or not.

Ofcom noted that the attribution of the comment to Mr Assange was made by a contributor to the programme (Mr Leigh) rather than the programme's narrator. In addition, in light of the fact that Channel 4 had not received any evidence from Mr Goetz or Mr Stark that the statement had not been made, the material facts available to the programme makers at the time were that Mr Leigh said that the statement was made and that Mr Assange broadly denied any "row". By broadcasting these points, it would have been reasonably clear to a viewer that Mr Assange denied Mr Leigh's account, including that he denied making the statement attributed to him. The cumulative impression likely to have been formed by viewers was that there were differences in the accounts and opinions between the contributors in the programme, and viewers would have been in a position to take their own views on the issue.

In response to Ofcom's Preliminary View sent to both parties, Mr Assange stated as follows:

- He mistakenly stated that Mr Stark was at the dinner, when in fact, as stated by Channel 4, it was Mr Marcel Rosenbach. In any event Mr Assange stated that the unedited interview contained a direct rebuttal to Mr Leigh's comment that he said "*informants deserve to die*" however it was not included in the programme.

- Mr Assange also provided Ofcom with a copy of a signed witness statement from Mr John Goetz, dated 15 May 2012. In the statement Mr Goetz said that he was asked “specifically [in an interview with the programme maker which was not recorded] if Julian Assange had made the remark “they’re informants they deserve to die” at that dinner, as has been alleged by David Leigh, and I told him that Julian did not say that at the dinner. I told Patrick Forbes [the director of the programme] that I would not discuss the dinner on camera, because it was a private dinner and it is the policy of ‘Der Spiegel’ not to discuss meetings in a public forum”.

Channel 4 stated in response that:

- The producer of the programme confirmed to them that Mr Goetz did not tell him that Mr Assange did not make the statement “they’re informants they deserve to die” and nor did he say words to that effect. Channel 4 said that there was no independent record of this meeting which could support one account over another. However, Channel 4 said that, while they were not suggesting Mr Goetz’s account to be untruthful, it would be difficult for Mr Goetz to state categorically that Mr Assange did not say these words, particularly when taking into account that the restaurant (Moro) was busy and noisy and the dinner did not take place in a private room. Consequently, Channel 4 said that the credibility of the categorical nature of this statement was questionable.

The submissions on this point by both Mr Assange and Channel 4, and the witness statement made by Mr John Goetz (provided by Mr Assange to Ofcom) resulted in a conflict of evidence between the parties. It is not possible in these circumstances (and nor is it the role of Ofcom) to resolve such conflicts of evidence.

Ofcom considered that the remark made by Mr Leigh did have the potential to create an unfair portrayal of Mr Assange. Ofcom further noted, as stated earlier, that Mr Assange did state in his unedited interview footage that he did not say that “*informants deserve to die*”. Ofcom however considered that, in the context of a programme which was focussed on chronicling the WikiLeaks story and included often conflicting accounts from those involved at the time, it would have been apparent to viewers that there were disagreements between parties and not least between the respective accounts of this dinner of Mr Leigh and Mr Assange. Including in the programme Mr Assange’s specific denial that he made this statement (contained in the unedited footage) would have left viewers in no doubt as to Mr Assange’s position on this issue. Nonetheless, Ofcom considered that the effect of including Mr Assange’s remark (“*there was no row...not even only hints of a discussion*”) served as an effective denial by Mr Assange and therefore did not lead to unfairness to Mr Assange in the programme as broadcast.

- Ofcom next considered the complaint that the programme was unfair to Mr Assange in that it failed to mention that Mr Domscheit-Berg (whose status was misrepresented by being described as a “WikiLeaks spokesperson” in the programme, according to Mr Assange) had: stolen funds and sabotaged WikiLeaks; deleted thousands of submissions revealing war crimes and corruption in financial institutions; and profiteered from and unleashed the chain of events that led to the publishing of the unredacted Diplomatic

Cables. Mr Assange stated that from February 2011 Mr Domscheit-Berg had little to no involvement with WikiLeaks operations after being sacked on 14 September 2010. Mr Assange added that all this information was available in two public statements issued by WikiLeaks.

The programme first introduced Mr Daniel Domscheit-Berg at the beginning of the programme as follows:

"As the secrets poured in, Assange recruited a German deputy, Berlin based computer programmer, Daniel Domscheit-Berg."

A caption which stated *"Daniel Domscheit-Berg, WikiLeaks spokesperson"* appeared on screen.

Mr Domscheit-Berg appeared at various intervals throughout the programme to give his opinion and state his reaction to key events which had taken place. Ofcom observed that at the point in the programme where the arrest of Mr Bradley Manning was discussed the narrator stated as follows:

"The arrest prompts a furious row inside WikiLeaks. Documents arrive anonymised, so is Manning their guy? And if he is, what responsibility do they owe him? WikiLeaks have a mountain of unpublished secrets from the same source. Julian wants to keep going, Daniel doesn't."

Later in the programme, the narrator stated the following:

"Once back in London, he [Mr Assange] acts swiftly to deal with those inside WikiLeaks critical of his leadership. He suspends Daniel Domscheit-Berg for disloyalty, insubordination and de-stabilisation in a time of crisis".

Ofcom took into account Mr Assange's complaint that Mr Domscheit-Berg had "little to no involvement in WikiLeaks after February 2011" after he was sacked on 14 September 2010. We also had regard to the fact that Mr Domscheit-Berg had worked for WikiLeaks during key moments (such as the release of the Collateral Murder footage, the arrest of Mr Manning and the publishing of the War Logs) and therefore he was entitled to give his opinion and reaction to such events which had happened during the time when he was working for WikiLeaks. Ofcom considered that the description "spokesperson" was a generic term and conveyed to viewers the point that Mr Domscheit-Berg had worked at WikiLeaks (which many viewers would have been aware of) and that he therefore had the standing to be able to give his opinion on certain matters.

Ofcom considered whether by omitting the matters in relation to Mr Domscheit-Berg referred to by Mr Assange any unfairness was caused to Mr Assange. The programme signalled to viewers that there was a dispute between Mr Assange and Mr Domscheit-Berg and clearly stated that Mr Domscheit-Berg had been suspended by Mr Assange for *"disloyalty, insubordination and de-stabilisation in a time of crisis"*. Therefore, Ofcom considered that viewers would have been aware of the fact of a dispute (which had also been documented in the media, many months before the programme was broadcast) and that there were matters which were subject to disagreements between Mr Assange and Mr Domscheit-Berg. Ofcom did not consider the matters raised by Mr Assange were material facts which

needed to be presented and that omitting them did not cause any unfairness to Mr Assange. The fact that the programme reported that Mr Domscheit-Berg had been suspended for “disloyalty, insubordination and de-stabilisation” reflected to viewers that there was a serious disagreement between them and this would have been taken into account by viewers when watching the programme and hearing Mr Domscheit-Berg’s account of the matters discussed in the programme.

Ofcom considered that Mr Domscheit-Berg’s contribution (in addition to those of other participants) was confined to matters regarding his opinion on key events rather than as a factual, definitive source on what actually happened and this would have been clear to viewers.

- Ofcom considered the complaint that the programme disregarded the fact that the reason that Mr Assange did not want The New York Times to be involved in the publishing of the Diplomatic Cables was because this newspaper had told the White House about earlier releases of information.

Ofcom noted the following in the programme:

- Narrator: *“But just a day later The New York Times publishes a front page profile of Julian. He’s described as increasingly dictatorial, erratic and intolerant of dissent. It claims that the Swedish trial is having a terrible effect on morale inside WikiLeaks.”*
- Mr Keller: *I think all of my exchanges with Julian Assange have consisted of him complaining to me or haranguing me for things that The New York Times had done.*
- Mr Assange: *They produced a sleazy hit piece, targeting me personally and WikiLeaks as an organisation, full of factual inaccuracies that could have easily been fact checked. It was a sleazy tabloid hit piece.*
- Narrator: *Furious, Julian insists that The New York Times are out. They will have no part in the last and most significant batch of documents from that initial leak. A quarter of a million secret reports from US ambassadors around the globe.*
- Mr Keller: *You know we had learned early on that we were dealing with an unpredictable element. So I wasn’t shocked to learn that he intended to exclude us.*
- Mr Schmitt: *He made it known that we hadn’t played nicely and The New York Times was not going to play in the big game that is the Diplomatic Cables. And then The Guardian came to our rescue.*
- Mr Leigh: *I took a few decisions which is that I am going to keep The New York Times in the loop on this and I am not going to betray our partners and I give The New York Times a copy of my memory stick with these cables on.”*

Ofcom considered from the above exchange that at this point in the programme the impression viewers were likely to have was that Mr Assange's reasons for not wanting The New York Times to be involved in the publication of the Diplomatic Cables was directly linked to the "*sleazy, hit piece*" of journalism which has been previously published by The New York Times. This impression was further strengthened by Mr Schmitt's comments that Mr Assange "*had made it known that we hadn't played nicely and The New York Times was not going to play in the big game, that is the Diplomatic Cables.*"

Ofcom reviewed the unedited footage and noted that the interviewer asked what Mr Assange's "beef" was with The New York Times. Ofcom has marked in bold below the parts of Mr Assange's contribution that were included in the programme:

"Our beef with The New York Times was number one, they produced the hit story on Bradley Manning where they stripped him down of any admirable motivation at all, stripped him down and talked about his homosexuality, I mean it was just dirty tabloid crap. Number two, that they killed the Taskforce 373 story, even though it had been written for them, and then number three, that they produced a story the day after our collaborations with them on the Iraq War Logs, um a **sleazy tabloid piece targeting me personally and WikiLeaks as an organisation, full of factual-factual inaccuracies that could've been easily checked. It was a sleazy tabloid hit piece....**So we saw, The New York Times as, yes, influential, within its market, but on the other hand so corrupting of the material that we were trying to get out, and so hostile to us as an organisation in order to save itself, in order to distance itself, um that we were not only betraying the impact of the material, but **we were shooting ourselves as an organisation every time we work with The New York Times.**"

Ofcom considered that it was clear from Mr Assange's unedited contribution that **one** of the reasons Mr Assange did not want to work with The New York Times was because of the article that they had published about him and WikiLeaks.

Ofcom noted that earlier in the interview, Mr Assange was asked about his reaction to The New York Times' decision to speak to the White House.

"Well my view has always been that **the organisation you're exposing um should not know before the victims.** Um one might even argue that it should know after the victims, and that is because as soon as it knows, it will engage in an action to spin the whole issue, set up its whole press lines, get all its consultants and its leverage and pull it all together to try and defeat your exposure. **And if you are producing journalism with the goal of it producing justice, then you don't want that goal undermined.**"

Approximately five minutes later in the programme, Ofcom noted that Mr Assange's words highlighted in the unedited footage were broadcast in the programme as follows:

Narrator: "*No sooner has peace broken out than The New York Times threaten it. They're going to tell the White House what they plan to publish.*"

Mr Assange: *We were shooting ourselves every time as an organisation every time we work with The New York Times. If you're producing journalism with the goal of it producing justice, then you don't want that goal undermined."*

Ofcom considered that the programme reflected Mr Assange's contribution fairly and that part of his reasons for not wanting to work with The New York Times was because of the article they had produced **and** (emphasis added by Ofcom) because, they were, in Mr Assange's view, undermining his goal of justice. Ofcom therefore considered that all relevant and material reasons given for not working with The New York Times were stated accurately in the programme.

In response to Ofcom's Preliminary View, Mr Assange said that the producer did not include the fact that the most important issues he had with The New York Times were: their coverage of the Afghan War Logs and Iraq War Logs, that they had stripped the alleged source, Mr Bradley Manning, of any higher moral motivations and that they had killed the Taskforce 373 story, both of which were referenced in the unedited interview. Instead, the programme used the less significant reason, which was that The New York Times had written a "*sleazy hit piece*" about Mr Assange.

Ofcom took into account these further representations made by Mr Assange. Ofcom considered that the programme reflected two reasons why Mr Assange did not want to continue working with the newspaper: because of the article about him and WikiLeaks that it had previously published and because in his view The New York Times was undermining his goal of producing justice. The programme could have included other and more detailed explanation, according to Mr Assange. However, this was a matter of editorial judgment and the decision to present this issue, as the programme did, did not result in any unfairness in the way Mr Assange was portrayed.

- Ofcom next assessed the complaint that the programme disregarded the banking blockade against WikiLeaks and the ongoing harassment of WikiLeaks volunteers. Mr Assange said that the programme gave the impression that WikiLeaks suspended publication on 27 October 2011 due to financial blockades that were imposed on WikiLeaks, before the High Court made its decision on 2 November 2011.

Ofcom noted that at the end of the programme, the following captions appeared on screen:

Caption: November 2nd 2011. The High Court rejects Julian's appeal, Julian is appealing - again.

Caption: WikiLeaks suspends all publishing.

The above captions were separated by footage of Mr Assange outside court. Ofcom also took into account Mr Assange's complaint that the order in which the events occurred was not reflected in the captions and that this may have given viewers the impression that the reason WikiLeaks suspended publishing was because the High Court had rejected Mr Assange's appeal. Ofcom observed that the reasons for WikiLeaks suspending publications was not discussed anywhere in the programme and therefore there would be many viewers who would not have automatically made this connection. The

programme was broadcast on 29 November 2011: it had been widely reported that financial blockades had been imposed on WikiLeaks, prior to the broadcast of the programme. Therefore, Ofcom considered that it was reasonable to assume that many viewers would have been aware of the reasons why WikiLeaks had suspended publishing.

Ofcom acknowledged that providing the reasons why WikiLeaks had suspended publishing may have provided clarity on the events, however including this information was not necessary in the circumstances to avoid any unfairness to Mr Assange.

Taking all the above factors into account, Ofcom took the view that material facts were not presented in a way that was unfair to Mr Assange.

In response to Ofcom's Preliminary View, Mr Assange said it was untenable to conclude that the sequence of the above captions would not mislead viewers, and that events which happened over a month before the broadcast would still be so fresh in viewers' minds.

Ofcom noted that Mr Assange disagreed with Ofcom's Preliminary View on this issue but for the reasons stated the reasoning set out in the decision remains unaffected by Mr Assange's comment.

- iii) Ofcom considered the complaint that the programme portrayed Mr Assange as "anti-American" and a "hacker" rather than a journalist or publisher.

Ofcom noted that at the start of the programme, a short biography of Mr Assange was given:

"Born in Australia in 1971, Julian Assange attended 37 schools as a child, started and dropped out of a Physics degree at Melbourne University and established himself as Australia's foremost hacker, his tag mendax; translation - given to lying.

In 1996, he was prosecuted for a hack into Telecoms giant Nortel. His conviction, one of the world's earliest. In 2006, he set up WikiLeaks as a website openly committed to whistle blowing, seeking classified information worldwide."

The next reference to hacking in the programme was made in relation to Mr Lamo, who was described as *"one of Assange's few rivals for most famous hacker in the world"*.

Ofcom noted that the programme introduced Mr Leigh, who stated that he had met Mr Assange at a *"journalist conference"* in Norway and that Mr Assange was one of the speakers at the conference. In addition Mr Leigh stated that in making the Collateral Murder footage available to the public, he had *"performed a great journalistic service"*.

Ofcom observed the following statement made by Mr Assange in the programme:

"When I was in, did a conference at Berkeley, and I said there "are you a journalist or are you an activist?" I then thought who cares you know, isn't it more interesting just what you, what you let the, let the information speak for itself? But why is that? Well, you know as far as journalism is getting information the public doesn't know and processing it, verifying it's true, giving it to the public in various

ways, well I'm a journalist. But if I had to choose between the goals of justice and the goals of whatever that is. I would choose the goals of justice. So to that degree I am an activist."

Ofcom considered that the reference to being a hacker was only made in the context of Mr Assange's past. In particular, Ofcom noted the narrator stated that in 1996, Mr Assange was "*convicted*" for hacking into Nortel and that in 2006, his website WikiLeaks was set up and that this was "*openly committed to whistle blowing*". On examining the programme, Ofcom could not see any additional references or material broadcast which might lead viewers to think that Mr Assange was still a "hacker". Ofcom also took the view that Mr Leigh's explicit reference to Mr Assange providing a "journalistic service" combined with Mr Assange's comment that in some respects he was a "journalist" and the knowledge that WikiLeaks was a website "*openly committed to whistle blowing*" would, in Ofcom's view lead viewers to think of Mr Assange as a journalist and a publisher, whose stated aim was to expose wrongdoing.

In relation to Mr Assange's complaint that the programme portrayed him as "anti-American", Ofcom could not find any references in the programme that could reasonably lead viewers to this conclusion. However, it considered that when taking into account the effect that WikiLeaks had on the US Government and that the material it had published had the biggest implications for the US Government, there may be some viewers who arrived at the conclusion that he may be anti-American. However, Ofcom did not consider that this was a theme or view which the programme itself created.

In response to Ofcom's Preliminary View, Mr Assange stated that the programme contained many examples to paint him as an "anti-American", "hacker", "systematiser", "activist" or "engineer", rather than as a journalist or publisher. For example Mr Leigh stated that Mr Assange claimed that the informants were "**American** (emphasis added by Ofcom here and other highlighted words in this paragraph) informants, they deserve to die". Mr Davies referred to the allegations made against Mr Assange by the two women in Sweden as an "**American** dirty trick" and "dirty tricks by the **Pentagon**". In relation to the portrayal of Mr Assange as a hacker, the narrator stated that an "unexpected issue threatens the mould-breaking alliance between hacks and hacker". Mr Assange remarked that this was in the present tense, which implies that he is a "hack" and not a journalist, and was not consistent with the view that the reference to hacking was only in the context of Mr Assange's past. Mr Assange added that he was not anti-American but anti-corruption, and the work done by WikiLeaks to expose corruption in other countries supports this view.

In response to the examples that Mr Assange pointed out, Ofcom did not consider that various references to "American" would lead the reasonable viewer to conclude that Mr Assange was anti-American, although Ofcom took the view that, as a result of some of the actions taken by Mr Assange, some viewers may independently arrive at this conclusion.

Ofcom noted that the narrator stated that "*an unexpected issue threatens the mould, breaking the alliance between hacks and hacker.*" However, Ofcom considered this reference to be no more than a throw away comment which viewers were unlikely to attribute much weight to, particularly when the other references made to Mr Assange as a hacker were concerned with his past, and other comments that Mr Assange was providing a "journalistic service" were prominent in the programme. Ofcom

considered that it was clear from the programme that Mr Assange's aim in releasing the material was to expose corruption and wrongdoing to the public.

- c) Ofcom considered the complaint that Mr Assange was not given a timely and appropriate opportunity to respond to the allegations made in the programme. In particular, Mr Assange stated that he was not given direct questions to answer in relation to many of the allegations stated in the programme.

In considering this head of the complaint, Ofcom had particular regard to Practice 7.11 of the Code which states that, if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

The provisions of the Code require broadcasters to put allegations of wrongdoing or incompetence or other significant allegations to those concerned. In Ofcom's view, the fact that Mr Assange was not provided with each specific criticism voiced against him in the programme did not necessarily amount to unfairness. However, in presenting the significant allegations, reasonable care must be taken not to do so in a way that causes unfairness to individuals and organisations and to provide an opportunity for the individual or organisation to respond to such allegations.

As set out in head a) above, Ofcom noted that when Mr Assange was approached to contribute to the programme, there was detailed email correspondence between his assistant and the programme makers for the purposes of establishing the content of the programme. The interview with Mr Assange itself also provided him with sufficient information to be informed about the stated purpose of the programme, what issues and subjects were likely to be tackled in the programme and that there would be contributors who were likely to criticise certain decisions taken by him or WikiLeaks.

Ofcom examined the unedited footage (and transcript) of the section of Mr Assange's interview about the publication of unredacted documents. Ofcom highlighted below in bold the parts of this part of the interview which were broadcast in the programme. As discussed in head a) above, Ofcom noted that the content of Mr Assange's interview covered all the overarching issues and criticisms which arose in the programme. Ofcom observed the following by way of example:

Interviewer: "So come on, redactions are going on at the same time, now there is or isn't a row going on about redaction, I haven't the faintest clue whether there is or isn't...?"

Mr Assange: No, there's no row going on about redactions at all....There was a group of reports where although they were not really intelligence informants there were sort of hotline tips...something called threat reports comprised one in five of the Afghan War Logs and so we held them back for a line by line redaction...But what we didn't do was redact one in five lines, putting black marker through it, we just removed them, and so it looked like we hadn't redacted everything but in fact we had redacted a fifth of all material, and this permitted an attack, a political attack, to come from The Times of London.... So The Times did a proxy war on The Guardian through us by attacking us....
So most of those names were meant to be there, it is right for them to be published, it is right to publish the names of politicians, generals bureaucrats, etc, who are involved in this sort of activity, it is right even to publish the names of corrupt radio stations in Kabul that were taking SYOPS programme content. It is

also right to publish the names of those people who have been killed and murdered and who need to be investigated and it is right to publish the names of all incidental characters who themselves are not at serious and probable risk of physical harm. Those incidental characters are someone who owns a company for example is just involved in shipping operations.... So then there is the question **were there any sort of villagers or so on who gave information that might lead to reprisals**, were there some of those? Um **there were some villagers who - who had given information, um so that is a regrettable oversight, but it is not our, not merely our oversight it was the oversight of the United States military who should've never included that material and who falsely classified it, and who then made it available to everyone and it then got out."**

Ofcom took the view that the interviewer's questions were not specific questions. However they were indicative of particular issues raised in the programme and the parts which were broadcast in the programme provided viewers with the alternative version (i.e. Mr Assange's) of events. Throughout the interview the questions posed to Mr Assange enabled him to express at some length his opinions and version of events and they were reflected in the programme, to counter other contributors' opinions on events or criticisms levelled at him.

Ofcom took into account that the programme did not contain any material new or unfamiliar to Mr Assange. Further, the documentary was not investigative in nature. The aim, as stated by the broadcaster, was to present the history of WikiLeaks. This would have included differences of opinions and in some instances harsh criticisms; however it was largely up to the viewer to reach their own conclusions on the matters covered by the programme.

Ofcom concluded that although as stated in Mr Assange's complaint he was not given "direct" questions to answer, he would have been aware of the significant allegations and criticisms to be made against him, which had been rehearsed on many occasions prior to the programme being broadcast. Therefore Ofcom considered that Mr Assange, particularly when taking into consideration his position as founder of WikiLeaks, was given the opportunity to provide, and was capable of providing, robust responses to his critics, and these were fairly represented in the programme.

In response to Ofcom's Preliminary View, Mr Assange said that the producer had said that the benefit of interviewing Mr Assange last in the production filming schedule, was that he could put to Mr Assange what other contributors have stated (as referenced in an email dated 18 August 2011 which was also provided to Ofcom). However despite this Mr Assange was not afforded a right of reply to a number of allegations as set out by Mr Assange below:

- The producer did not afford him a right of reply to the comment made by Mr Leigh that *"they're informants they deserve to die"*.
- Further, Mr Assange stated that he was not given a chance to respond to the allegations that he had not taken care of redacting material in the programme with respect to the Afghan War Logs material. Further, he said that he was not given a chance to reply to the claim that he unilaterally, and with no prior cause or reasons, decided to publish the Diplomatic Cables.

- Mr Assange stated that he was not able to respond to the Swedish rape allegations, with respect to comments made by Mr Leigh or that he was “lying” about the American/Pentagon “dirty tricks”, as stated by Mr Davies.
- Mr Assange also said that he and his assistant had been led to believe that he would be given a chance to reply to “anything said by the other talking heads” (email dated 22 August 2011). However the unedited interview footage proves that he was not given a chance to give a reply to remarks made by other interviewees during the interview. Mr Assange also said that a number of his answers were used out of context in the finished programme, which did not amount to a proper right of reply in response to serious libels that were made by other interviewees.

Ofcom again took into account these further representations made by Mr Assange. It considered that these points did not materially affect the decision made by Ofcom on these points. Ofcom’s decision makes clear that the interview provided Mr Assange with the opportunity to respond to all the material issues raised in the programme. The programme was not investigative in nature, but was intended to chart the history of WikiLeaks through those people who were involved first hand at the time. Consequently, the programme did not level allegations against Mr Assange, which necessitated a right of reply in each respect. Disagreements, differences of opinion and approaches towards key events and philosophies of WikiLeaks were apparent from the programme.

In conclusion, Ofcom took the view that specifying each and every allegation or criticism against Mr Assange was not necessary, and that the programme makers had provided Mr Assange with a timely and appropriate opportunity to respond to significant allegations made in the programme.

Privacy

- d) Ofcom considered the complaint that footage was filmed of Mr Assange in a nightclub in the programme without his consent. Mr Assange said that the person who recorded the video sought his permission to film him in the nightclub and that Mr Assange agreed to this on the basis that the footage would be for the filmmaker’s personal use only. However, it was broadcast in the programme and Mr Assange had no knowledge of how the programme’s producer sourced this footage. Mr Assange said that he could not understand why this footage had been included in the programme or why it was relevant.

In Ofcom’s view, the individual’s right to privacy has to be balanced against the competing rights of the broadcasters to freedom of expression and the audience’s right to receive information. Neither right as such has precedence over the other and, where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

In considering Mr Assange’s complaint, Ofcom had regard to Practice 8.6 of the Code. Practice 8.6 of the Code states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained

before the relevant material is broadcast, unless the infringement of privacy is warranted. It also had regard to Practice 8.10 which states that broadcasters should ensure that the re-use of material (i.e. use of material originally filmed or recorded for one purpose or used in a later or different programme) does not create an unwarranted infringement of privacy. This applies both to material obtained from others and the broadcaster's own material.

In considering whether or not Mr Assange's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which he had a legitimate expectation of privacy that footage of him dancing in a nightclub would not be broadcast in the programme without his consent.

Ofcom noted that the footage of Mr Assange dancing in the nightclub which was broadcast in the programme lasted for approximately one minute. The footage showed Mr Assange dancing in a nightclub. Ofcom noted that because of the dark lighting, Mr Assange was not easily recognisable; however it was clear from the commentary which accompanied the footage that it was Mr Assange who was dancing in the nightclub. Ofcom therefore considered that Mr Assange was identifiable from the footage.

Ofcom took into consideration that: Mr Assange was aware that he was being filmed and had given permission to the videographer to be filmed; and Mr Assange also complained that the videographer had stated that the filming was for his personal use only but subsequently uploaded this onto the video sharing site, YouTube.

The Code states that "legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and whether the individual concerned is already in the public eye. There may be circumstances where people can reasonably expect privacy even in a public place. Some activities and conditions may be of such a private nature that filming or recording, even in a public place, could involve an infringement of privacy. People under investigation or in the public eye, and their immediate family and friends, retain the right to a private life, although private behaviour can raise issues of legitimate public interest."

The footage was filmed in a nightclub, which is a public place, and Mr Assange was not shown engaged in an activity which could reasonably be considered to be private or in circumstances which could normally give rise to a legitimate expectation of privacy. Ofcom also took into account that Mr Assange has been in the public eye since the launch of WikiLeaks. Further, the footage had been made available to the public in a number of items on the internet months before the programme was broadcast.

Mr Assange complained that the footage was filmed on the condition that it would be "for personal use". However Ofcom noted that Channel 4 stated that the person who filmed the footage said that he did not know who Mr Assange was and that the material had been licensed legitimately. Therefore, there was a conflict between the parties' evidence as to the circumstances and purpose of the filming and Ofcom was not provided with any evidence which could assist it in determining this issue.

Ofcom took the view that there could be circumstances in which the use of material obtained from the internet and already available to the public may give rise to a legitimate expectation of privacy. The simple fact of material appearing

on the internet does not mean a broadcaster does not have to consider the requirements of Section Eight (privacy) of the Code. However, in the particular circumstances of this case, and taking into account all the factors set out above, Ofcom considered that Mr Assange did not have a legitimate expectation of privacy that the footage (which had already been made freely available to the public on numerous websites) would not be included in any other programmes.

Having found that Mr Assange did not have a legitimate expectation of privacy in these circumstances, it was not necessary for Ofcom to go on to consider whether the use of the footage in the programme was warranted.

In response to Ofcom's Preliminary View on this issue, Mr Assange said that although the video had been on the internet that did not mean it had lost "any quality of privacy" as stated by Channel 4 and that it could be included in a television programme in a prime-time slot and redistributed all over the world. Mr Assange also said that there was no public interest justification for the broadcast of this footage.

Ofcom noted that Mr Assange disagreed with its provisional determination that Mr Assange did not have a legitimate expectation of privacy in the particular circumstances of this case. Ofcom acknowledged that uploading a video to the internet does not mean that it automatically has lost "any quality of privacy". It is clear however that Ofcom's decision on this issue is based on all the relevant and particular factors in this case as set out above, including this specific point made by Mr Assange.

In conclusion, Ofcom did not consider that Mr Assange had a legitimate expectation of privacy in relation to the nightclub footage and it was therefore not necessary to go on to consider whether the use of that footage was warranted.

Accordingly, Ofcom's decision is that Mr Assange's complaints of unjust or unfair treatment and of unwarranted infringement of privacy in the programme as broadcast should not be upheld.

Not Upheld

Complaint by Ms Frances Livingstone

Black Mirror: The National Anthem, Channel 4, 4 December 2011

Summary: Ofcom has not upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy made by Ms Frances Livingstone.

Channel 4 broadcast a drama in which a fictional princess was kidnapped and the kidnapper demanded that, before the princess was returned, the fictional Prime Minister must have sex with a pig, live on television. At one point in the programme, fictional news coverage included a number of “vox pop” style interviews in the street. One of these was given by Ms Frances Livingstone.

Ofcom found that:

- Ms Livingstone was not portrayed unfairly in the broadcast.
- It was not unreasonable for the programme makers to conclude that Ms Livingstone had given implied consent for her participation in the programme.
- There was no unwarranted infringement of Ms Livingstone’s privacy in connection with the obtaining of material used in the programme, as filming was conducted with her knowledge and consent.
- There was no unwarranted infringement of Ms Livingstone’s privacy in the programme as broadcast, as footage of her was included in the programme with her implied consent.

Introduction

On 4 December 2011, Channel 4 broadcast an episode of a drama series entitled *Black Mirror*. This episode, *The National Anthem*, written by journalist, screenwriter and broadcaster Charlie Brooker, was a satirical look at the transformation of modern life by technology, the speed with which information is disseminated and the power of public opinion. The programme was a political thriller in which a fictional princess was kidnapped and the kidnapper demanded that, before the princess was returned, the fictional Prime Minister must have sex with a pig, live on television. At one point in the programme, news coverage on a fictional broadcaster included a number of “vox pop” style interviews in the street. The first of these showed a woman, who was not named, saying:

“I don’t think anyone should concede to any sort of humiliation under that kind of threat”.

The clip lasted about four seconds. Following the broadcast of the programme, the woman, Ms Frances Livingstone, complained to Ofcom that she was treated unjustly or unfairly in the programme as broadcast and that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

Summary of the complaint and broadcaster's response

Unjust or unfair treatment

Ms Livingstone complained that she was treated unjustly or unfairly in the programme as broadcast. Details of Ms Livingstone's specific complaints are set out under heads a) and b) below.

By way of background and in response, Channel 4 said that the story was partly inspired by the events surrounding the apology made by former Prime Minister, Gordon Brown, to Mrs Gillian Duffy after he was heard making unguarded remarks about her on a live microphone at the time of the last general election, when the power was swiftly taken out of his hands and dictated by the media. Channel 4 explained that the programme developed that idea and suggested that once information was disseminated on the internet and into the public domain it was out of the hands of the gatekeepers and the online collective consciousness would set the agenda.

The specifics of Ms Livingstone's complaint, with Channel 4's comments in response, were as follows:

- a) Ms Livingstone complained that the programme misrepresented her values in a way that portrayed her unfairly.

By way of background, Ms Livingstone said that she had spent her life trying to express values of respect and care for all life, including humans, animals and the environment. She was therefore distraught at her inclusion in and association with a programme that depicted in graphic and painful detail values which were abhorrent to her.

In response and in summary Channel 4 said that Ms Livingstone's comment lasted less than five seconds in the programme. Channel 4 said that the programme makers had no knowledge of Ms Livingstone's personal beliefs and values. It said that the programme served as a cautionary tale about the power of the collective "hive mind" that was social media, focusing on the idea of the collective consciousness, and using the grotesque nature of the act the Prime Minister had to perform, in order to take that idea into the realm of the absurd. Channel 4 said that, given this satirical absurdity and the obviously dramatic nature of the programme, reasonable viewers would not have taken the view that any of the contributors were condoning a real act, let alone a lack of respect or care for life, animals or the environment. The broadcaster added that in any event, Ms Livingstone's contribution did not suggest that she condoned a lack of respect for animals, humans or the environment or betray her values, nor did it misrepresent what she said in her interview.

Channel 4 noted that Ms Livingstone had not seen the whole programme and that she may therefore be unaware that the Prime Minister's act was not depicted "in graphic and painful detail", with the horror of his predicament and that of the animal being conveyed through his facial reaction and the reactions of those watching on television. It was clear by the end of the programme that the general public, in the final analysis, experienced revulsion at the spectacle brought about by their insatiable appetite for humiliation television.

- b) Ms Livingstone complained that footage of her was included in the programme without her informed consent.

Ms Livingstone said that, while out shopping, she was approached by two men, one of whom was carrying a camera. She was asked for her opinion of an idea for a forthcoming programme and if she knew of Charlie Brooker. She said she did not, that she had no television and that she might not be the best person to ask. She thought that it was some kind of opinion poll or survey for internal use. Ms Livingstone said that one of the men outlined the idea of the programme to her and that she had replied to the effect that she was not a Royalist but thought that members of the Royal family were entitled to the same care as anyone else. She had also said that no one should have to submit to humiliation and being forced to betray their values in the way being asked of the fictional Prime Minister and that she felt very sorry for any animal involved. She had said she found the programme idea "debased and dehumanising". Ms Livingstone said that when she was approached by the programme makers, she had no idea how the footage might be used.

In summary and in response, Channel 4 said that Ms Livingstone voluntarily allowed herself to be filmed commenting on the scenario described to her by the programme makers. Channel 4 said that she was an adult who was fully aware that she was being filmed, in connection with a Channel 4 drama programme, and that she was filmed in a public place, commenting on matters which were in no way private to her. Channel 4 said that at no point did Ms Livingstone give the producers any indication that her filmed comments were not to be used by them or that there was any restriction on their use of her comments.

Channel 4 said that the director of the vox pops had given the producers the following account of his dealings with Ms Livingstone:

"I was the director on the day responsible for finding and interviewing potential contributors for inclusion as vox pops in *The National Anthem* film. The plan was to approach people on the street - much in the way a pollster or charity canvasser does, explain to them what I was doing and ask if they would be happy to be interviewed for the film...My initial verbal approach would be to say "Excuse me I'm from Channel 4. Could I have a word with you please...?", in an effort to engage someone's attention. As with pollsters, the majority of people we approached walked straight on by and it was a minority who stopped and allowed me to explain further. I would then tell the person that I was doing some filming for a Channel 4 drama and I was interviewing people to hear their views on a hypothetical situation. I told them that the situation was quite outlandish but to bear with me while I explained it. I would then run through the scenario...and what did they think the PM should do in such a situation. In many cases members of the public responded with laughter, disgust, outrage, ridicule etc. I would then ask them to clarify or articulate their reaction and possibly ask follow-on questions depending on what they had said. I cannot remember in detail the conversation with Frances Livingstone and her companion. However, I remember it being reasonably good natured but that she was not particularly engaged in the subject. After I explained what I was doing, she gave a brief reaction to the hypothetical situation and then in a friendly but firm way she told me she thought the idea or premise for the programme's idea was rubbish and asked me to clarify my role on the production (to which I explained that I was the director of the vox pops section of the film). She then repeated that she didn't think the film's idea was a good one, apologised for not being more forthcoming and walked away".

Channel 4 said that Ms Livingstone knew she was being filmed and knew that the filming was in connection with a Channel 4 drama. She was made fully aware of the plot scenario about which she was being asked to respond to on camera. As regards Ms Livingstone's suggestion that she thought she was being interviewed for "an opinion poll or survey for internal use", Channel 4 said that it was difficult to see why she believed that to be the case when opinion polls and surveys were not usually conducted on camera and when, as indicated above, the director of the vox pops told her that the filming was for Channel 4 in connection with a television drama. It was also clear that Ms Livingstone made her responses in front of a standard hand held camera which was pointed directly at her. Channel 4 said that the untransmitted footage that remained of her interview indicated that Ms Livingstone contributed of her own volition. Channel 4 said that it was clear that Ms Livingstone gave no indication that her filmed contribution should not be used in the drama and expressed no concerns as to how her contribution would be used. She left the producers wishing them well with the programme.

Unwarranted infringement of privacy

In summary, Ms Livingstone complained that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that:

- c) Footage of her was filmed without her informed consent.

Channel 4 said that, as set out under head a) above, Ms Livingstone was made aware that the filming was for a Channel 4 drama, responded thoughtfully to the scenario laid out by the production team and wished the production team good luck with the project. She was filmed in a public place and was not asked to and did not comment on any matter that was private to her personally.

Ms Livingstone also complained that her privacy was unwarrantably infringed in the programme as broadcast in that:

- d) Footage of her was broadcast without her knowledge or consent.

By way of background, Ms Livingstone said that she felt sickened every time an acquaintance said that they had seen her in the programme and that her professional reputation as an artist and a member of the Linnean Society of London¹ had been compromised as a result.

Channel 4 said that, as set out under head c) above, Ms Livingstone was made aware that the filming was for a Channel 4 drama and she was filmed in a public place and was not asked to comment on any matter that was private to her personally. Channel 4 said that Ms Livingstone gave the producers no indication that what she had said to camera was private or that she had any concerns about how her contribution was to be used. As regards Ms Livingstone's suggestion that her reputation "as an artist and a member of the Linnean Society had been compromised", Channel 4 said that she had provided no evidence that this was the case and said that it and the producers denied that there had been any such damage to Ms Livingstone's reputation nor did they consider that there was any reason why her reputation should be so damaged.

¹ The Linnean Society of London aims to promote and encourage the study of all aspects of the biological sciences, with particular emphasis on evolution, taxonomy, biodiversity and sustainability.

Representations on Ofcom's preliminary view

Ofcom prepared a preliminary view that Ms Livingstone's complaint should not be upheld. In commenting on that preliminary view, Ms Livingstone's main points and those of Channel 4 (in so far as they were relevant to the complaint entertained by Ofcom) were, in summary, as follows.

Ms Livingstone said that Ofcom had failed to explore why, in relation to her circumstances, the standard industry practice of obtaining a release form was not pursued. She said that in failing to examine how her consent was obtained and whether her consent was informed, the outcome of Ofcom's preliminary view did not properly assess the degree or nature of her consent. Ms Livingstone said that she had not appreciated how the footage of her would be used, and that as the transcript (of the unedited footage) showed the programme makers told her that the drama would be "going out on Channel 4". She said that it was perfectly reasonable to believe that a short interview with a random member of the public would not form part of a televised drama.

Ms Livingstone also said that Ofcom's preliminary view and its Entertainment Decision² had misrepresented her complaint to Ofcom. In particular, Ms Livingstone said that her complaint about being broadcast without her knowledge or consent was misrepresented by Ofcom as having been filmed without her consent. She also said that Ofcom misrepresented her complaint by stating that the drama had misrepresented her values and that her view had been unfairly portrayed in the programme as broadcast. Ms Livingstone said that the drama could only represent its own values and that her point had been that by being included in the broadcast programme at all this misrepresented her values. Ms Livingstone said that she did not claim that she was unfairly portrayed, but that to portray her at all was unfair.

Ms Livingstone said that the "unedited rushes" provided by Channel 4 had not included her explanation why she had stopped to talk to the programme makers.

In summary, Channel 4 submitted that it had no substantive representations to make on Ofcom's preliminary view and stated that Ms Livingstone in her comments had produced no new evidence to Ofcom that should cause it to change or alter its preliminary view on her complaint.

However, in response to Ms Livingstone's comments about the absence of a "release form", Channel 4 said that release forms were only written evidence of a contributor's consent; and that consent, either express or implied, could be provided verbally and/or contained in the footage filmed as "rushes consents". Channel 4 said that the "rushes consents" were commonly obtained by programme makers, and that it agreed with Ofcom's preliminary view that in the circumstances of Ms Livingstone's case it was not unreasonable for the programme makers to believe that they had Ms Livingstone's implied consent for her participation in the programme.

² On receiving a complaint, Ofcom will assess it and will decide whether or not to entertain the complaint based on the submissions from the complainant and the broadcast material. This decision is called the "Entertainment Decision". The Entertainment Decision, which is provided to both parties to a complaint (and which they can comment on if they wish so that Ofcom can consider amending it if necessary), indicates whether (and to what extent) Ofcom will be proceeding with consideration of the complaint. Mrs Livingstone did not comment on the Entertainment Decision in this case until she provided her comments on the preliminary view.

Channel 4 said that it had provided Ofcom with a complete copy of the unedited rushes of the exchange between Ms Livingstone and the programme makers. It said that the reference made by Ms Livingstone to the unedited rushes being anything other than complete was baseless and made without any evidence to support it.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript, both parties' written submissions and a transcript and recording of untransmitted footage of the interview with Ms Livingstone. Ofcom also took careful account of the representations made by Ms Livingstone and Channel 4 in response to Ofcom's preliminary view on this complaint (which was not to uphold). While Ofcom had attentive regard to all of Ms Livingstone's and Channel 4's comments in finalising its decision, it concluded that the further points raised by the parties did not materially affect the outcome of this complaint.

In relation to Ms Livingstone's comments that her complaint was misrepresented in the Ofcom's preliminary view, Ofcom considered that the preliminary view accurately presented the substance of Ms Livingstone's complaint as it was entertained in its Entertainment Decision made on 7 March 2012 – a copy of which was supplied to Ms Livingstone and which she could therefore comment if she believed it misrepresented her complaint in any way. In drawing up the Entertainment Decision, Ofcom took careful note of the manner in which Ms Livingstone had set it out in her completed complaint form submitted to Ofcom. Ofcom was not aware at any time before receiving her comments on the preliminary view that Ms Livingstone harboured any concerns about the Ofcom's interpretation of her complaint. Nor, in Ofcom's view, has Ms Livingstone demonstrated that the manner in which Ofcom phrased her complaint in the preliminary view materially altered the substance of the complaints she had made to Ofcom and that were entertained by Ofcom on 7 March 2012. In these circumstances, Ofcom was satisfied that the Ofcom had not misinterpreted Ms Livingstone's complaint and that it was accurately represented. For this reason, Ofcom considered that Ms Livingstone's comments in this regard did not affect the way her complaint is reflected in this decision.

Unjust or unfair treatment

When considering complaints of unfair or unjust treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code"). Ofcom had regard to this Rule when reaching its decision on the individual heads of complaint detailed below.

- a) Ofcom first considered the complaint that the programme misrepresented Ms Livingstone's values in a way that portrayed her unfairly.

In considering this part of the complaint, Ofcom had regard to Practice 7.10 of its Code, which states that programmes – such as dramas and factually-based dramas – should not portray facts, events, individuals or organisations in a way which is unfair to an individual or organisation.

Ofcom noted that, as the story of the kidnap and the ransom demand unfolded and the fictional Prime Minister and his staff had failed to prevent it becoming public, a fictional news item was shown, in which the newsreader said:

"It's a day like no other, the kidnap video has now been watched by over 18 million people, the social networking sites are abuzz with an estimated 10,000 tweets per minute, so while we wait for Downing Street to make a formal response there's no doubt that the nation is voicing its opinion".

This was followed by a montage of "vox pop" style interviews, with people commenting on the Prime Minister's predicament. Some were horrified by the situation, others were amused by it. The first of these interviews was with Ms Livingstone, who said:

"I don't think anyone should concede to any sort of humiliation under that kind of threat".

Ofcom also noted Ms Livingstone's position that she had spent her life trying to express values of respect and care for all life, including humans, animals and the environment, and was therefore distraught at her inclusion in and association with a programme that depicted in graphic and painful detail values which were abhorrent to her.

Ofcom further noted that, although the Prime Minister did meet the kidnapper's demand, the sexual act was not shown on screen at all. The situation was conveyed by showing the reactions of those involved and those watching it on television. Ofcom took the view that it was an absurd situation, used to convey the power of both the media and social media, and noted that the public were shown as being fascinated to begin with by the story, but then they found it distasteful and horrifying.

In Ofcom's view the use of the vox pop style interviews was a legitimate dramatic device to show the role played by public opinion in the story. It considered that the very brief clip of Ms Livingstone suggested that she found the situation distasteful and that she was opposed to both the threat and the humiliation involved in the scenario put to her in the interview. Ofcom did not consider that her inclusion in the programme would have led viewers to have formed any opinion on the values held by Ms Livingstone, beyond her view that she did not approve of people being humiliated and threatened. There was nothing in her contribution that would have led viewers to think she did not respect and care for all life. Ofcom therefore did not consider that Ms Livingstone was portrayed in a way that was unfair to her.

Ofcom therefore found no unfairness to Ms Livingstone in this respect.

- b) Ofcom next considered the complaint that footage of Ms Livingstone was broadcast without her knowledge or consent.

In considering this part of the complaint Ofcom had regard to Practice 7.3 of the Code which states that where a person is invited to make a contribution to a programme (except where the subject matter is trivial or their participation minor), they should, amongst other matters, normally be told about the nature and purpose of the programme and what kind of contribution they are expected to make. Taking the steps set out in this Practice is likely to result in any consent given being “informed consent”.

Ofcom noted Ms Livingstone’s position that she felt sickened every time an acquaintance said that they had seen her in the programme and that she felt that her professional reputation as an artist and a member of the Linnean Society of London had been compromised as a result of her inclusion in the programme.

As noted above, a person who is invited to contribute to a programme should be given sufficient information about the programme’s nature and purpose to enable them to make an informed decision about whether or not to take part. In assessing whether a contributor has given informed consent, Ofcom will look at information that was provided to the contributor prior to the recording of the contribution, untransmitted footage and the programme itself.

Ofcom viewed the untransmitted footage provided by Channel 4. It noted that filming appeared to begin mid-conversation, with the director saying to Ms Livingstone and her friend:

“...has to have sex with an animal, a pig, on television...I’m not...hear me out, hear me out. I’m not, you know...”.

The conversation continued as follows:

Ms Livingstone: “It doesn’t sound like Channel 4 to me, I have to be honest”.

Director: “Well it is, I can tell you, but what do you think?”.

Ms Livingstone: “This is going to be useless to you because a) I’m not a Royalist and I wouldn’t care anymore about them than anyone else and I don’t think anyone should concede to any sort of humiliation under that kind of threat whether I don’t care if it’s the royal family or somebody who lives locally, makes no difference to me that I’m not a royalist so there we are. That’s my answer”.

The conversation continued with some discussion of political views and the director said:

“So you think he shouldn’t do it then?”

Ms Livingstone replied:

“I’m not sure what this sort of rubbish idea is about to be honest...It sounds so trashy to me in every way...It’s just the whole concept is kind of trashy whatever the point of it”.

The conversation then concluded as follows:

Ms Livingstone: “I mean what’s your job?”

Director: "What's my job? I'm a director. Of this section".

Ms Livingstone: "Of what, is it a drama?"

Director: "It's a drama. It's going out on Channel 4".

Ms Livingstone: "Well it's definitely one I won't be watching but good luck to you...".

Ofcom was not able to determine what conversation had taken place between Ms Livingstone and the director before the filmed footage provided by Channel 4, however it took the view that the material provided did not demonstrate that Ms Livingstone had given explicit consent to be filmed for inclusion in a television programme.

Ofcom noted that the extract used in the programme was filmed at the beginning of the conversation recorded by the programme makers and that it was only at the end of the conversation that the director said that he was filming for a drama. Ofcom also noted that Ms Livingstone's references to the programme sounding "trashy" and "rubbish". In these circumstances it appears to Ofcom that the programme makers should have appreciated that Ms Livingstone may have had some concerns about a vox pop of her being included in the broadcast drama. However, Ofcom took into account that: Ms Livingstone could have walked away from the programme makers at any time and did not need to give an interview at all; Ms Livingstone was made aware in very broad terms of the scenario she was being asked to comment on; the director did tell her that he was filming for a Channel 4 drama (albeit at the end of the conversation) and Ms Livingstone could at that point have stated that she did not wish to be included in the programme. Therefore Ofcom considered, on balance, that it was not unreasonable for the programme makers to conclude that they had Ms Livingstone's implied consent for her inclusion in the programme.

Further, Ofcom noted that the programme aimed to make a serious point about the power of the media and of public opinion, that it was considered controversial and that it attracted widely differing views both before and after broadcast. Ofcom took the view that, although Ms Livingstone was commenting on a controversial and distasteful, albeit fictional, scenario, her appearance was very brief and that viewers were unlikely to have formed any particular opinion about her as a result. In these circumstances, Ofcom considered that her participation in the programme was relatively minor.

Taking into account Ofcom's view that it was not unreasonable for the programme makers to conclude that they had Ms Livingstone's implied consent for her participation in the programme and its view that, in any event, her participation was relatively minor, Ofcom therefore found no unfairness to Ms Livingstone in this respect.

Ofcom noted: Ms Livingstone's comments on the preliminary view that Ofcom had failed to explore why she was not asked to complete a release form; and Channel 4's response to this point that not all "consents" need to be obtained in writing and that some consents can be obtained on film. Ofcom takes the view that consent did not rest on the existence of a signed consent or release form from Ms Livingstone. Rather, Ofcom takes into account the type and degree of information available to the complainants when consenting to participate and, having assessed this information, it will consider whether it was reasonable for

the programme makers to have believed that the consent provided by the complainants was truly “informed consent”. In the circumstances of Ms Livingstone’s case, it was clear from the preliminary view that Ofcom took account of all relevant factors concerning consent in the preliminary view: for example, whether or not she had been an active and willing participant during the filming process, that she had been aware of the general scenario for the filming, and that it was for a drama to be broadcast on Channel 4. For these reasons, Ofcom maintained its original view on this issue was valid, and its decision not to uphold Ms Livingstone’s complaint in this respect remained unchanged.

Unwarranted infringement of privacy

In Ofcom’s view, the individual’s right to privacy has to be balanced against the competing rights of the broadcasters to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

- c) Ofcom considered the complaint that Ms Livingstone’s privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that footage of her was filmed without her informed consent.

In considering this part of the complaint, Ofcom had regard to Practice 8.5 of the Code, which states that any infringement of privacy in the making of a programme should be with the person’s consent or be otherwise warranted.

In order to establish whether or not Ms Livingstone’s privacy was unwarrantably infringed in connection with obtaining material included in the programme, Ofcom first assessed the extent to which she had a legitimate expectation of privacy in respect of the recording of the interview with her.

As set out under Ofcom’s decision at head b) above, Ofcom noted that Ms Livingstone’s position was that the director told her he wanted to talk about “an idea for a programme”, while Channel 4 said he had referred to “a programme”. Since the untransmitted footage provided by Channel 4 began while Ms Livingstone and the director were mid-conversation, Ofcom was not able to determine precisely what the director told Ms Livingstone about why he was filming. However, Ofcom also noted that Ms Livingstone was filmed in a public place, namely a public street and that she was filmed openly and considered that she was therefore filmed with her knowledge. Ofcom also took the view that, although she was clearly not impressed with the idea, she engaged willingly in conversation with the director.

In these circumstances, Ofcom considered that it was reasonable for the programme makers to take the view that Ms Livingstone had impliedly consented to the filming and that she did not have a legitimate expectation of privacy in relation to the filming. Given this conclusion it was not necessary for Ofcom to consider whether any intrusion into Ms Livingstone’s privacy in connection with the obtaining of material included in the programme was warranted.

Ofcom therefore found that there was no unwarranted infringement of Ms Livingstone's privacy in connection with the obtaining of material included in the programme.

- d) Ofcom then considered the complaint that Ms Livingstone's privacy was unwarrantably infringed in the programme as broadcast in that footage of her was included in the programme without her informed consent.

Ofcom took into consideration Practice 8.6 of the Code, which states that if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

Ofcom noted that Ms Livingstone said that her professional reputation as an artist and a member of the Linnean Society of London had been compromised as a result and observed that it was not its role to consider damage to a complainant's reputation, but rather to consider whether Ms Livingstone's privacy had been unwarrantably infringed as a result of the inclusion of the footage of her in the programme.

In considering whether Ms Livingstone's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which she could have legitimately expected that the footage of her would not be broadcast and whether her consent was required.

As set out under head c) above, Ofcom considered that it was reasonable for the programme makers to take the view that Ms Livingstone had consented to the filming of the interview. As regards the broadcast of the footage, Ofcom noted that the filming was conducted in a public place, that Ms Livingstone was aware that filming was taking place and that she engaged willingly in a conversation with the programme makers. Ofcom also noted that the clip of Ms Livingstone in the programme did not reveal anything of a personal or sensitive nature and that her contribution was relatively minor (lasting only four seconds). However, Ofcom further noted that this was an unusual vox pop scenario, to be used in a fictional rather than factual programme, and that the programme itself was the subject of considerable controversy, with a distasteful scenario being conveyed by showing the reactions of those involved and those watching it on television.

Ofcom then went on to consider whether Ms Livingstone had given consent to the footage being broadcast. For the reasons set out under the decision at head b) above, Ofcom did not consider that anything Ms Livingstone was recorded as saying suggested that she was giving her explicit consent for the footage of her to be used in a broadcast programme. However, Ofcom took the view that it was not unreasonable for the programme makers to conclude that Ms Livingstone had impliedly consented to her inclusion in the programme, given her engagement in the conversation and given that, when she was told the filming was for a drama on Channel 4 she did not suggest that she did not wish to be included, and the other factors referred to above. Ofcom therefore found, on balance, that Ms Livingstone did not have a legitimate expectation of privacy in relation to the broadcast because of her implied consent to her inclusion in the programme.

Having found that Ms Livingstone did not have a legitimate expectation of privacy in relation to the broadcast of the footage of her, it was not necessary for Ofcom to consider whether or not her privacy was unwarrantably infringed as a result of the inclusion of the vox pop in the programme.

Ofcom therefore found that Ms Livingstone's privacy was not unwarrantably infringed in the programme as broadcast.

Accordingly, Ofcom has not upheld Ms Livingstone's complaint of unfair treatment and unwarranted infringement of privacy.

Not Upheld

Complaint by Bostads AB VätterHem

Den Hemlige Miljonären (The Secret Millionaire), Kanal 5 (Sweden), 8 February 2012

Summary: Ofcom has not upheld this complaint of unjust or unfair treatment made on behalf of Bostads AB VätterHem by its Managing Director, Mr Christer Ask.

This programme followed Ms Anna Benson, a millionaire who travelled to the city of Jönköping in search of people and organisations she might help financially. Ms Benson, whose real identity was not initially disclosed, spent a week living in a rented apartment on the Raslatt Housing Estate (“the Raslatt Estate”) in Jönköping, Sweden, and meeting residents of the city to determine who she might donate an amount of money to.

During the course of the programme, Ms Benson was shown on the Raslatt Estate on a number of occasions. On her arrival, Ms Benson was shown walking through the streets of the Estate and was shown in her apartment. Ms Benson was also shown shopping for food, talking to a local resident “Peter”, and playing table tennis at a youth club on the Raslatt Estate.

Mr Ask, the Marketing Manager of Bostads AB VätterHem, the company which owns and operates the Raslatt Estate, complained to Ofcom that the Raslatt Estate was unfairly or unjustly portrayed in the programme as broadcast.

Ofcom found that the broadcaster had taken reasonable care to satisfy itself that the material facts were not presented, omitted or disregarded in a way that portrayed Bostads AB VätterHem, the owners of the Raslatt Estate, unjustly or unfairly in the programme as broadcast.

Introduction

On 8 February 2012, Kanal 5 broadcast an edition of *Den Hemlige Miljonären*, which is the Swedish version of *The Secret Millionaire*. Kanal 5 is a Swedish satellite television channel licensed in the UK. Its Ofcom licence is held by SBS Broadcasting Networks Limited (“SBS Broadcasting”). This programme was part of a series, all broadcast in Swedish, in which individuals who have attained considerable financial success spent a week undercover in a relatively impoverished area to visit organisations and individuals undertaking charitable work and to select to which/whom they wished to give significant sums of money in order to further their work. In this episode, Ms Anna Benson visited the city of Jönköping in Sweden and stayed in an apartment in the Raslatt Housing Estate (“the Raslatt Estate”). SBS Broadcasting provided Ofcom with a transcript of the programme, translated from the original Swedish. All quotations from the programme cited in this decision are taken from that transcript.

The programme began by showing Ms Benson in Stockholm and explained that she had been a former professional table tennis player and was now a successful entrepreneur and painter. Ms Benson’s wealthy lifestyle was illustrated with footage of her in her luxurious apartment and images of her drinking champagne with friends.

The programme's commentary explained that Ms Benson would "...*abstain from all luxuries and glamour, and live with poor, vulnerable people out in society*". The programme explained further that Ms Benson had agreed to live on a budget of 300 Swedish kroner a week. The programme then showed Ms Benson driving to Jönköping and stating:

"The reason that I chose Jönköping is that I have heard that they are having a recuperation week [there] this week – from breast cancer".

The commentary stated that:

"The apartment that Anna has rented is in Raslatt, that is known for its high crime rates. Raslatt is Jönköping's poorest area, with both high levels of unemployment and crime: an environment that is completely new to Anna".

Ms Benson observed:

"Raslatt feels slightly like a new part of the world. The first thing I saw when I got out of the car was a car that had been blown up. It feels rather scary here in Raslatt".

The footage which illustrated this particular part of the programme showed Ms Benson arriving in Raslatt and general footage of the area. This included graffiti, two burnt out cars, a shop front with a broken window, and Ms Benson walking through the Estate to her rented apartment.

The programme then showed Ms Benson inside her new apartment, where she observed that the ceiling appeared to be made of tin and later said:

"I am going to really lock up well tonight, with an extra lock. I don't know what I have got myself into. What type of area this is. But it does not feel really safe. I am glad that I am on the sixth floor. Now, I think and hope, I can sleep anyway".

The programme then explained that on the next day, Ms Benson had "*found a night-lodging for homeless people in the area*". Ms Benson was shown visiting the centre where she spent some time volunteering and meeting some of the homeless people who used its facilities. Some of the centre's users talked to Ms Benson about their addictions to drugs and alcohol and the help the centre had offered them.

After her visit to the centre, Ms Benson visited "Lars", a man who the programme explained had recently lost his wife to breast cancer. Ms Benson spent some time with Lars and his children and they discussed how he had coped since the loss of his wife. Ms Benson also visited a charity running a "*Recuperation week*" for cancer sufferers. Ms Benson met "Ann-Marie" who had suffered from cancer 26 years before and who now helped others affected by the disease.

Later in the programme, Ms Benson was shown donating sums of her own money to Ann-Marie's centre, to Ann-Marie personally for her to "*treat herself*". She also donated money to Lars so that he could afford to devote some time to himself. Ms Benson explained at the end of the programme that:

"This week has given me incredibly much [sic]. I will always have it inside me and I feel humble about my life. And I am so incredibly grateful for the life which I live".

Following the broadcast of the programme, Mr Christer Ask, the Managing Director of Bostads AB VätterHem (which owns and operates the Raslatt Estate) complained to Ofcom that the company was treated unjustly or unfairly in the programme as broadcast.

Summary of the complaint and broadcaster's response

In summary, Mr Ask complained on behalf of Bostads AB VätterHem, the company that owns and operates the Raslatt Estate, that it was unjustly or unfairly treated in the programme as broadcast in that it was portrayed unfairly. In particular, Mr Ask cited the following parts of and matters in the programme in support of the complaint:

- i) The area was described in the programme as having a *"high level of crime"*. Mr Ask said that in reality the crime level at the Raslatt Estate was the same as the average level across the greater Jönköping area.

In response and before addressing the particular elements of the complaint, SBS Broadcasting said that part of the format for the programme was that the millionaire was required to live in a "poorer" area and that the research carried out by the programme makers resulted in the decision to rent an apartment in Raslatt for Ms Benson.

In response to this sub-head of complaint, SBS Broadcasting said that the programme makers had carried out thorough research before deciding on the location and had numerous contacts with the authorities in Jönköping as well as charity and relief organisations. SBS said that it had been in contact with the police authorities in Jönköping after the broadcast of the programme who confirmed that three areas in Jönköping with the highest levels of crime were Raslatt, Oxnehaga and Osterangen. SBS Broadcasting said that, according to the statistics provided to it by the police, Raslatt had the highest number of crime reports to the police out of the three areas identified. SBS Broadcasting said that in the period between 1 January 2012 and 31 May 2012, Raslatt had 242 reported crimes, Oxnehaga had 148 and Osterangen had 200 reported crimes.

- ii) Ms Benson unwarrantedly expressed concern about whether rain would come through the "tin roof" of the flat she stayed in on the Raslatt Estate and talked about feeling too frightened to sleep.

SBS Broadcasting said that these comments were made by Ms Benson when she first moved into her apartment and that her comments were no more than a true reflection of her feelings at the time. SBS Broadcasting said these comments were juxtaposed against the luxury of her own apartment, which she has just left, and that she was nervous and unsure of her new surroundings. SBS Broadcasting said that given the difference from what Ms Benson was used to, this was understandable and reflected her opinion. Although the complainant disagreed with Ms Benson's comments, that alone did not invalidate Ms Benson's opinion or make her opinion unfair or unjust. Moreover, SBS Broadcasting said that the programme showed Ms Benson's attitude changed as she adjusted to her surroundings over the course of the programme.

- iii) The programme included footage designed to show the "devastation" at the Raslatt Estate. Mr Ask complained that some of the footage in question (i.e. a burnt out car, a broken window, and graffiti on buildings) had not been filmed on the Raslatt Estate.

Mr Ask said that: the broken window was filmed in Torpa, an area more than five kilometres from Raslatt; the graffiti on buildings was filmed in the east side of the city which was almost 10 kilometres from Raslatt; and, the burnt out car was filmed on a roundabout adjacent to the suburb of Raslatt.

In response, SBS Broadcasting said that the programme included footage designed to show the “devastation” not only on the Raslatt Estate, but also in the overall area of Jönköping. It said that the footage of the burnt out car referred to by the complainant was taken on a roundabout at one of the entrances to Raslatt and that the other footage of a burnt out car used in the programme was taken from a parking lot in Raslatt.

SBS Broadcasting said that some of the footage referred to by the complainant (e.g. a broken window and graffiti on buildings) was not filmed on the Raslatt Estate, but was taken in other areas of Jönköping. SBS Broadcasting said that as the programme was about Jönköping and that the fact that these scenes existed in the city meant that their portrayal in the programme was neither unfair nor unjust. It said that the following excerpt from the programme demonstrated that Ms Benson was contradicted when she expressed views about the “devastation” in the area.

Narrator: *“On the way to the library, Anna meets Peter who runs a local youth club.....*

Ms Benson: *...What types of crime are committed in Raslatt?*

Peter: *There is some vandalism lately, there have been car fires...but we see that it largely takes place when it is not open here...not general vandalism”.*

SBS Broadcasting said that broken windows and graffiti were evident in Raslatt at that time of filming and it provided Ofcom with photographs taken on 9 and 10 June 2012 (i.e. after filming) to demonstrate that such conditions persisted.

- iv) The Raslatt Estate was exemplified by interviews and stories from: a “halfway house” (the RIA Centre¹); a charity for women suffering from cancer; and, an individual (namely, Lars) who had lost his wife to cancer despite that fact that these charities were all located and Lars lived some distance away from the Raslatt Estate. Mr Ask said that most of the sections of the programme were not from Raslatt, however, the programme made it appear that they were.

SBS Broadcasting said in response that the programme was about the entire city of Jönköping and that Raslatt was only incidental in that it was the place where Ms Benson was staying.

SBS Broadcasting said that the narrator had made this clear during the programme:

Narrator: *“Anna has rented an apartment in Jönköping [and] that she has chosen [it] for a particular reason.*

¹ A support centre for alcoholics run by a Christian charity.

Ms Benson: *The reason that I chose Jönköping is that I have heard that they are having a recuperation week [there] this week – from breast cancer”.*

SBS Broadcasting said that it was clear from the programme that Ms Benson travelled to several different locations throughout the city looking for people whom she could help. It said that what came through in the programme was that despite Ms Benson’s initial concern about the physical state of Jönköping and the Raslatt Estate when she first moved into her apartment, Ms Benson’s perception was quickly changed by the stoicism, courage, dignity and generosity of spirit of the people she met during the programme.

SBS Broadcasting said that even if the complainant’s impressions were correct and that viewers believed that all these sequences took place in Raslatt, it did not believe that this would be unjust or unfair as the programme portrayed the inhabitants of the Raslatt Estate and Jönköping as a positive and caring community who, although not enjoying the “best” of material things in life, faced their own difficulties and lived their lives with a dignity, humour and humility.

Decision

Ofcom’s statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording and translated transcript of the programme as broadcast, and both parties’ written submissions, including supporting material. Both parties to the complaint were given the opportunity to make representations on Ofcom’s Preliminary View, however, none were received.

When considering complaints of unjust or unfair treatment, Ofcom has regard to whether the broadcaster’s actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals or organisation, as set out in Rule 7.1 of Ofcom’s Broadcasting Code (“the Code”). Ofcom had regard to this Rule when reaching its decision on the complaint.

Ofcom considered the complaint that Bostads AB VätterHem, the company that owned and operated the Raslatt Estate, was unjustly or unfairly treated in the programme as broadcast in that it was portrayed unfairly.

When considering the complaint and the individual sub-heads of complaint below, Ofcom took into consideration Practice 7.9 of the Code which states that, before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

In reaching its decision, Ofcom considered the following sub-heads of complaint in order to reach an overall decision as to whether Bostads AB VätterHem was portrayed unfairly in the programme as broadcast.

- i) Ofcom considered first the complaint that the area was described as having a *“high level of crime”*.

In considering this sub-head of complaint, Ofcom noted the comments made in the programme related to the crime level in the area. When Ms Benson first arrived at the Raslatt Estate she was shown walking through the area with the accompanying commentary:

“The apartment that Anna has rented is in Raslatt, that is known for its high crime rate. Raslatt is Jönköping’s poorest area, with both high levels of unemployment and crime. An environment that is completely new to Anna”.

A short time after she arrived in the Estate, Ms Benson met “Peter” a local resident. Ms Benson asked Peter *“What crimes are committed here in Raslatt?”* Peter replied that:

“There is some vandalism lately, there have been car fires...but we see that it largely takes place when it is not open here...not general vandalism”.

Ofcom also noted the information provided by SBS Broadcasting to substantiate the statement made in the programme that Raslatt was an area with a *“high level of crime”*. This was provided by the police authority with responsibility for the area. The number of reported crimes in Raslatt from 1 January 2012 to 5 May 2012 was 242, and this compared with 148 reported crimes in Oxnehaga and 200 reported crimes in Osterangen, areas that the Jönköping police authority identified as having the three highest crime rates in the Jönköping area.

Ofcom noted that the information provided to it by SBS Broadcasting in relation to the crime reporting statistics was dated June 2012 and, therefore, obtained after the broadcast of the programme. The broadcaster did not provide any other specific information to demonstrate what evidence the programme makers had relied on to justify including the statement in the programme as broadcast, save that “programme makers had carried out thorough research”. However, Ofcom considered that the statements made about the level of crime in the programme were consistent with the information provided to the programme makers by the police authority responsible for the Jönköping area and, despite it being obtained after the broadcast of the programme, the period of time to which the statistics relate covered the period when the programme was broadcast.

Taking these factors into account, Ofcom considered that it was reasonable for the programme makers to have included the reference to Raslatt having a *“high level of crime”* as it appeared to be a fair reflection of the rates of reported crime in the Jönköping area at the time. Therefore, Ofcom considered that the broadcaster had taken reasonable care to ensure that the material facts had not been presented in the programme in a way that was unfair to Bostads AB VätterHem.

- ii) Ofcom considered the complaint that Ms Benson unwarrantedly expressed concern about whether rain would come through the *“tin roof”* of the flat she was staying in on the Raslatt Estate and about feeling too frightened to sleep.

Ofcom first noted the comments made by Ms Benson in the programme in relation to the *"tin roof"*:

"Tin ceiling. Yes, yes".

Ofcom carefully read the translated transcript of the programme as broadcast and noted that although Ms Benson referred to a *"tin ceiling"* she did not express concern that rain would come through it. Ofcom also noted that the *"tin roof"* referred to in the complaint was an internal ceiling tile which was clearly shown in the programme.

Ofcom noted too, Ms Benson's comments about feeling too frightened to sleep:

"I am going to lock up really well tonight, with an extra lock. I don't know what I have let myself into. What type of area this is. But it does not feel really safe. I am glad that I am on the sixth floor. Now, I think and hope, I can sleep anyway".

Ms Benson's comments come at the beginning of the film, shortly after she arrived on the Raslatt Estate for the first time.

It is important to note that it is not Ofcom's role to establish whether the substance of Ms Benson's opinions were correct or not, but to determine whether in broadcasting her opinions, the broadcaster took reasonable care not to present, disregard or omit material facts in a way that was unfair to Bostads AB VätterHem, as the owners of the Raslatt Estate. In doing so, Ofcom considered the context of Ms Benson's opinion as expressed in the programme and whether the programme's presentation of her opinion resulted in unfairness to the company.

Ofcom noted that Ms Benson's role in the programme was as a contributor, she was not portrayed as an expert or authority in a particular field, or as an unbiased reporter or journalist. Ms Benson was introduced in the programme as an *"author and artist"* and later as a *"successful businesswoman, author and artist"*. It noted too that Ms Benson explained at the beginning of the programme that she has chosen to participate in the programme as her ex-partner has suffered from breast cancer and that she wanted *"to have an influence, do something, for people, relatives who...are affected"*.

Ofcom considered it was clear that Ms Benson's comments were made in this context, and that they were presented in the programme as the personal reflections of an individual experiencing a new and unfamiliar environment. Ofcom noted that this section of the programme was juxtaposed with the previous footage which showed the luxury lifestyle Ms Benson was accustomed to. In these circumstances, Ofcom considered that it was legitimate and relevant to include Ms Benson's initial views of her apartment on the Raslatt Estate.

Ofcom went on to consider whether the presentation of Ms Benson's comments in the programmes resulted in any unfairness to the complainant. Her comments had been couched in terms of personal opinion based on Ms Benson's firsthand experience and impressions of the apartment and her new environment. Moreover, given that footage of the *"tin roof"* was included in the programme, and that the programme had referred to the *"high crime levels"* in Raslatt, Ofcom took the view that viewers would have been in the position to determine for

themselves whether they agreed or disagreed with Ms Benson's remarks or whether they could be justified in the circumstances.

Given the factors considered above, Ofcom concluded that Ms Benson was entitled to express her views about the circumstances in which found herself and for broadcaster to include them in the programme. It considered that the context in which Ms Benson's comments were included in programme was such that viewers would have understood them to be her personal opinions and were not presented as a factual, authoritative statement. In these circumstances, Ofcom considered that the broadcaster had taken reasonable care to ensure that the programme did not present Ms Benson's comments in a way that resulted in unfairness to Bostads AB VätterHem.

- iii) Ofcom considered the complaint that the programme included footage designed to show the "devastation" of the Raslatt Estate.

Ofcom noted that the section of the programme referred to by the complainant depicts Ms Benson's arrival to the Raslatt Estate where she was shown walking through the Estate where there were graffiti and burnt out cars. The commentary over this footage explained that:

"The apartment that Anna has rented is in Raslatt, that is known for its high crime rate. Raslatt is Jönköping's poorest area, with both high levels of unemployment and crime: an environment that is completely new to Anna".

Ofcom noted that the three disputed pieces of footage (i.e. the graffiti, the broken window, and the burnt out cars) all appeared in the section of the programme.

In relation to the footage of the first burnt out car, Ofcom noted that the complainant stated that the car was on a roundabout adjacent to the Estate. It noted too SBS Broadcasting's submission that the footage was taken at one of the entrances to the Raslatt area. Ofcom noted too that a second burnt out car appeared in the same part of the film, though it was not disputed that this was on the Raslatt Estate. Ofcom also noted the comments from local resident, "Peter", who told Ms Benson in the programme that *"There is some vandalism, lately there have been car fires..."*.

Ofcom considered that the proximity of the first burnt out car to the Raslatt Estate (i.e. that it was on a roundabout at one of the entrances to the area of Raslatt) in conjunction with the evidence in the programme of another burnt out car on the Estate, and the testimony from a local resident, ensured that the inclusion of this particular footage did not create unfairness to the complainant.

Ofcom then considered the footage of the graffiti and broken window, which SBS Broadcasting confirmed in its submission were not located on the Raslatt Estate. This footage was shown at the beginning of a section of the programme where Ms Benson arrived on the Raslatt Estate and was presented as part of the first impression viewers would have had of conditions in the area.

The images of the broken window and the graffiti lasted two and three seconds in duration respectively and that the section of the film where Ms Benson first arrived in Raslatt was in total one minute 44 seconds in duration. Ofcom also considered the photographs taken after the filming (9 and 10 June 2012) provided by SBS showing graffiti and broken windows on the Raslatt Estate, and the assertion by SBS that these conditions were evident at the time of filming.

Ofcom considered that showing images of one area and presenting it as being another place has the potential to mislead viewers and create material unfairness to individuals and organisations in a programme. However, in the circumstances of this case, Ofcom took the view that the similarity of the nature of the footage of the broken window and the graffiti and the context in which it was used (i.e. illustrative of the area rather than a direct factual depiction of it) was unlikely to materially and adversely affect viewers' perception of the Raslatt Estate in a way that was unfair to Bostads AB VätterHem.

- iv) Ofcom next considered the complaint that although most of the sections of the programme were not filmed in Raslatt, the programme made it appear that they were and that the Raslatt Estate was exemplified by interviews and stories from: a "halfway house"; a charity for women suffering from cancer; and, an individual who had lost his wife to cancer despite the fact that these charities and this individual were all located some distance away from the Raslatt Estate.

Ofcom carefully considered the translated transcript of the programme and noted the reason given by Ms Benson and presented in the programme for her choosing Jönköping:

"The reason that I chose Jönköping is that I have heard that they are having a recuperation week [there] this week – from breast cancer".

The programme explained that Ms Benson had rented an apartment in the Raslatt Estate and that *"Raslatt is Jönköping's poorest area"*. The programme's commentary stated later that:

"The reason that Anna chose Jönköping and Raslatt, is that there is an organisation called the 'Recuperation Week' this week".

There were a number of sections of the programme where footage of Ms Benson on the Raslatt Estate was shown, for instance her arrival at the Estate, shopping at a supermarket, attending a local youth club and talking to a resident.

Ofcom noted that in the first part of the programme, the Raslatt Estate was referred to three times (once in commentary, twice by Ms Benson). In part two of the programme Raslatt, the area, was referred to twice (once in commentary and once by Ms Benson) and in the third part of the programme, the Raslatt Estate was referred to once (in commentary). However, the commentary at the start of the film clearly explained that Ms Benson had chosen Jönköping as the city she would visit and that the apartment in which she would stay would be in Raslatt area of the city. In this context, Ofcom did not consider that viewers would have understood that the whole programme was about Raslatt or the Raslatt Estate. It considered that viewers would have expected that the places Ms Benson visited in the programme to be in and around Jönköping and the programme was not restricted to Raslatt. Ofcom took the view that the programme had made it sufficiently clear that the focus of the programme was Ms Benson's visit to *Jönköping*, and that Raslatt and the Estate were incidental insofar as Ms Benson happened to be staying in an apartment located on the Estate and that some of the places she visited were also located within the Raslatt area.

In relation to the references to the organisations and individuals Ms Benson visited and met during her stay, Ofcom noted the following commentary from the programme:

“Anna has found a night-lodging for homeless people in the area”.

Ofcom noted that prior to Ms Benson’s visit to the cancer charity run by “Ann-Marie” the commentary explained that, *“It is an idealistic organisation run by an ardent enthusiast Ann-Marie”*, and prior to Ms Benson’s visit to “Lars”, whose wife had recently died from cancer, the commentary explained:

“In the library, Anna finds a blog that interests her. In the blog Lars writes about how life has been difficult since his wife passed away from breast cancer. Anna has said she is recording a documentary and Lars has agreed to meet her”.

Ofcom observed that the two organisations featured in the programme and “Lars” were portrayed in a way that was positive and the work that the organisations were involved in was celebrated and commended by Ms Benson. Ofcom considered that the inclusion of these charitable organisations and of Lars could not reasonably be regarded as portraying the Raslatt Estate in a way that was unfair to Bostads AB VätterHem.

Having considered each of the specific sub-heads of the complaint made by Mr Ask that the programme portrayed Bostads AB VätterHem unfairly in its depiction of the Raslatt Estate, Ofcom concluded that, overall, the broadcaster had taken reasonable care to satisfy itself that the material facts (as detailed in the sub-heads above) were not presented, omitted or disregarded in a way that portrayed the company unfairly.

Accordingly, Ofcom has not upheld Bostads AB VätterHem’s complaint of unjust and unfair treatment in the programme as broadcast.

Not Upheld

Complaint by Miss Katie Jennings

Peter Andre: My Life, ITV2, 11 April 2012

Summary: Ofcom's decision is that this complaint of unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast made by Miss Katie Jennings should not be upheld.

ITV2 broadcast an episode of its reality series *Peter Andre: My Life*. The programme included footage of an impromptu speech which Mr Andre made to a group of head teachers at the NEC Education show which was held in Birmingham. Audience reaction shots to Mr Andre's speech were broadcast in the programme and this included two brief shots of Miss Jennings' face.

Miss Jennings (a teacher) complained to Ofcom that her privacy was unwarrantably infringed both in the obtaining of material included in the programme and in the programme as broadcast.

In summary, Ofcom found that Miss Jennings did not have a legitimate expectation of privacy in connection with the obtaining of material included in the programme or in the programme as broadcast. Ofcom took the view that Miss Jennings was not filmed in a private place or doing anything which could be described as private or sensitive. In addition the programme as broadcast did not reveal anything about Miss Jennings which could be considered as private.

Introduction

On 11 April 2012, ITV2 broadcast an edition of its reality series *Peter Andre: My Life*, which followed the daily life of singer and celebrity Mr Peter Andre. During the programme, Mr Andre attended the NEC Education Show in Birmingham, to give a speech to inspire teachers and young people about music in education. This event was open to the public and was attended by a large number of fans of Mr Andre and, as a result, a decision was taken, on safety grounds, that he should give his speech to a gathering of senior teachers in a more secure room. Footage of this speech and of the audience was included in the programme.

Miss Katie Jennings is a teacher who attended the NEC Education Show, and who appeared in three shots during footage which was broadcast of the seminar audience in the programme. Two close up shots of Miss Jennings face were broadcast and had a total duration of seven seconds and showed Miss Jennings as she listened to Mr Andre's speech. A third shot showed Miss Jennings as part of the audience group in the seminar room. Following the broadcast of the programme, Miss Jennings complained to Ofcom that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

Summary of the Complaint and the broadcaster's response

Miss Jennings complained that her privacy was unwarrantably infringed in connection with obtaining of material included in the programme in that:

- a) Footage of her was filmed without her consent.

By way of background, Miss Jennings said that the footage was filmed when she attended a private seminar at the NEC Education show. She said that she was not informed that Mr Andre was attending and she would not have given consent to be filmed. Miss Jennings said that the seminar was not held in the public space of the NEC but in a private seminar room. She said that no one in the room was allowed to leave when it was announced that Mr Andre was appearing at the seminar because of crowd control. Miss Jennings said that it now appeared that the seminar was being filmed without the consent of the audience, and without her consent.

In summary and in response, ITV said that it had been intended that Mr Andre would address an audience made up of visitors to the show in an area set aside for this purpose. Notices informing visitors that filming for the programme would be taking place that day had been sent to the organisers prior to the event and had been put up at the entrance to the building. Unfortunately, due to concerns over health and safety raised by the organisers of the event, it was not possible for Mr Andre to address the group as originally planned. Instead, he was offered the opportunity to address a group of senior educators in a seminar room. ITV said that as the change was arranged at relatively short notice, there was no opportunity to also put up the notices in the seminar room prior to Mr Andre's speech. ITV said that they recorded Mr Andre's address to this group on two cameras, a static camera at the back of the hall and a mobile camera at the front. Both of these would have been clearly visible to the entire audience as it was recording Mr Andre's speech and also audience reaction shots. ITV said that they understood that there was also a camera recording the event on behalf of the conference organisers.

ITV said that the programme makers were given permission by the organisers to film the event and were not aware at the time of anyone having any objection to being filmed. ITV also said that they had no control over the event organiser's decision to change the original venue of the address by Mr Andre and they did not consider that the fact that the event took place in a seminar room to an invited audience, rather than what the complainant described as "public space" of the NEC show, altered the essential nature of the event itself, which was not a "private event". ITV acknowledged that they did not obtain individual consent from every one of the audience members, however they said that there was nothing of an intrinsically private nature recorded during the filming. ITV also said that it would have been impractical, unnecessary and disproportionate to secure formal consent from every individual member of the audience in these circumstances.

Miss Jennings also complained that her privacy was unwarrantably infringed in the programme as broadcast in that:

- b) Footage of her was broadcast without her consent.

By way of background, Miss Jennings said close up shots of her were included in the programme.

In summary and in response, ITV said that Miss Jennings was shown very briefly for a few seconds, along with other members of the audience. ITV said that there was nothing intrinsically private about the address and that nothing of a private nature was broadcast about Miss Jennings, who was featured in the programme as an anonymous member of the public. In such circumstances, ITV submitted that Miss Jennings did not have a legitimate expectation of privacy in the footage that was shown in the programme.

ITV added that when Miss Jennings made them aware that following the broadcast of the programme, she was unhappy at being shown, ITV apologised for any upset caused to her and removed the shots of her from the subsequent repeats of the programme. ITV said that they had also taken steps to ensure that only the edited version of the programme would be broadcast in the future.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in programmes included in, such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording and a transcript of the programme as broadcast, and both parties' written submissions.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcasters to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

- a) Ofcom first considered the complaint that Miss Jennings' privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that footage of her was filmed without her consent.

In considering this complaint, Ofcom had regard to Practices 8.5 and 8.8 of the Code. Practice 8.5 states that any infringement of privacy in the making of a programme should be with the person's and/or organisation's consent or be otherwise warranted. Practice 8.8 of the Code states that when filming or recording in institutions, organisations or other agencies, permission should be obtained from the relevant authority or management, unless it is warranted to film or record without permission. Individual consent of employees or others whose appearance is incidental or where they are essentially anonymous members of the general public will not normally be required.

Ofcom first assessed the extent to which Miss Jennings had a legitimate expectation of privacy that she would not be filmed. Ofcom took into consideration that the event was the NEC Education Show, which is mainly aimed at educational professionals and is described on its website as "the UK's leading education event for the promotion and development of all learning and teaching". Therefore the majority of attendees at the event were likely to be in the

education profession. Ofcom however took into account that the event was open to members of the public and that a large number of fans of Mr Andre were in attendance. Ofcom also noted that the broadcaster stated that the organisers of the NEC Education Show had given them permission to film at the event and that they had put up notices informing visitors that filming for the programme would be taking place that day at the entrance to the building.

Miss Jennings stated in her complaint that Mr Andre's talk was held and filmed at a "private" seminar room and the teachers in the audience were not expecting to be filmed. ITV however pointed out that Mr Andre was not scheduled to speak to the group in this way: the location for the talk had to be changed to a seminar room as a health and safety measure at short notice because of the numerous fans that had attended the event to see Mr Andre. Consequently, Ofcom took the view that the group of educators in that room, including Miss Jennings, would not have necessarily expected that Mr Andre would be speaking to them and that they would be filmed.

Ofcom acknowledged Miss Jennings' complaint that the seminar room was a "private" room. However, Ofcom did not consider that this materially affected the degree to which Miss Jennings had a legitimate expectation of privacy, taking into account that the event: was part of the NEC Education Show (which was open to the public and had signs at the entrance warning delegates that filming was due to take place), did not deal with a sensitive subject such that it was likely that members of the audience might not wish to be identified, and took place in one of the rooms in use for the NEC Education Show. We also noted that although Miss Jennings complained to the broadcaster about the inclusion of her image in the programme after it was broadcast, we are not aware of any complaint or grievance raised by Miss Jennings during or immediately after filming.

Ofcom observed from the programme as broadcast that the filming of Miss Jennings was brief and incidental. Miss Jennings was captured in the filming, along with other members of the group listening to Mr Andre's talk. In addition, Miss Jennings was not filmed doing anything of a private or confidential nature. She was filmed as she listened to Mr Andre giving a speech to a group of teachers about a subject which did not appear to Ofcom to be of a controversial or sensitive nature: inspiring teachers and emphasising the importance of a good education. The cameras appeared to be in full view of the group and Miss Jennings appeared to be aware that she was being filmed. As already pointed out, we are not aware of any complaint or grievance raised by Miss Jennings during or immediately after filming.

Taking all these factors into consideration, Ofcom considered that while Miss Jennings may not have expected to be filmed, the circumstances in which she was filmed and the footage of her that was filmed were not so sensitive to attract a legitimate expectation of privacy.

Having found that Miss Jennings did not have a legitimate expectation of privacy, it was not necessary for Ofcom to go on to consider whether or not the broadcaster needed to obtain the consent of Miss Jennings or whether any infringement of her privacy was warranted.

Ofcom therefore found that Miss Jennings' privacy was not unwarrantably infringed in this respect.

- b) Ofcom next considered the complaint that Miss Jennings's privacy was unwarrantably infringed in the programme as broadcast in that footage of her was broadcast without her consent.

By way of background, Miss Jennings said close up shots of her were included in the programme.

In considering this part of the complaint, Ofcom had regard to practice 8.6 of the Code. This states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

Ofcom first assessed the extent to which Miss Jennings had a legitimate expectation of privacy that footage of her would not be broadcast to a wider audience.

Ofcom noted from the programme as broadcast that Miss Jennings' face was shown incidentally in two brief camera shots, during Mr Andre's speech. No other information, such as Miss Jennings' name, address or any other information which could be regarded as sensitive or private to Miss Jennings, was broadcast in the programme. Further the context in which Miss Jennings' image was used was as audience reaction to Mr Andre's speech, rather than being focussed on any particular audience member personally. Ofcom noted that the broadcaster was unaware of any concern from Miss Jennings about the inclusion of her image in the programme until after it was broadcast.

Miss Jennings did not provide her consent to be included in the programme. However, given that the information imparted, i.e. audience reaction, could in no way be characterised as personal or sensitive information and that the circumstances could not rise to any legitimate expectation of privacy in the obtaining of the material (as set out in head a) above), Ofcom considered that Miss Jennings' prior consent before broadcasting the footage was not required.

Taking all the factors above into account, Ofcom did not consider that Miss Jennings had a legitimate expectation of privacy in relation to the broadcast of her image in the programme, and that her consent was not required before broadcast of the two brief and incidental shots of her in the audience. Given this conclusion, it was not necessary for Ofcom to consider whether any intrusion into Miss Jennings' privacy was warranted.

Ofcom therefore found that Miss Jennings' privacy was not unwarrantably infringed in this respect.

Accordingly, Ofcom's decision is that this complaint of unwarranted infringement of privacy in the obtaining of material included in the programme and in the broadcast of the programme should not be upheld.

Other Programmes Not in Breach

Up to 20 August 2012

Programme	Broadcaster	Transmission Date	Categories
Last Action Hero	Channel 5	17/06/2012	Violence and dangerous behaviour
Saturday Night Dance	102.5 The Bridge	04/08/2012	Offensive language

Complaints Assessed, not Investigated

Between 7 and 20 August 2012

This is a list of complaints that, after careful assessment, Ofcom has decided not to pursue because they did not raise issues warranting investigation.

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
Advertisements	ITV channels, Channel 4, E4 and Channel Five	n/a	Advertising minutage	1
Alhiwar Alsaahir bead Altarawih	Al Mustakillah Television	14/07/2012	Religious/Beliefs discrimination/offence	1
America's Got Talent	ITV2	07/08/2012	Advertising minutage	1
Bad Education	BBC 3	15/08/2012	Generally accepted standards	1
Bad Education (trailer)	BBC 3	07/08/2012	Generally accepted standards	1
BBC News	BBC News Channel	n/a	Outside of remit / other	1
BBC News at Six	BBC 1	06/08/2012	Generally accepted standards	3
BBC News at Ten	BBC 1	16/08/2012	Outside of remit / other	1
BBC Radio 4 News	BBC Radio 4	08/08/2012	Outside of remit / other	1
Born to Kill	Channel 5	26/07/2012	Disability discrimination/offence	1
Born to Kill	Channel 5	09/08/2012	Disability discrimination/offence	1
Bratcamp	n/a	14/08/2012	Harm	1
Britain's Got Talent	ITV1	09/05/2012	Flashing images/risk to viewers who have PSE	1
CBS Reality (trailer)	CBS Reality	12/08/2012	Offensive language	1
Celebrity Bedlam	Channel 4	10/08/2012	Generally accepted standards	1
Cheekybingo.com's sponsorship of The Jeremy Kyle Show	ITV1	n/a	Crime	1
Cheekybingo.com's sponsorship of The Jeremy Kyle Show	ITV1	n/a	Generally accepted standards	2
Cheekybingo.com's sponsorship of The Jeremy Kyle Show	ITV1	n/a	Scheduling	1
Cheekybingo.com's sponsorship of The Jeremy Kyle Show	ITV1	n/a	Violence and dangerous behaviour	1
Choice Breakfast Show	Choice Radio	06/08/2012	Commercial communications on radio	1
Chorley FM	Chorley FM 102.8	21/07/2012	Offensive language	4
Chris Evans	BBC Radio 2	10/08/2012	Outside of remit / other	1
Come Dine with Me	Channel 4	08/08/2012	Offensive language	1
Comedy store	Comedy	n/a	Race	1

	central		discrimination/offence	
Competition	Original 106 FM (Aberdeen)	n/a	Competitions	1
Cooking with Jason Lloyd	Ace TV	09/08/2012	Generally accepted standards	1
Coronation Street	ITV1	03/08/2012	Promotion of products/services	3
Coronation Street	ITV1	06/08/2012	Promotion of products/services	2
Coronation Street	ITV1	13/08/2012	Promotion of products/services	1
Coronation Street	ITV1	n/a	Promotion of products/services	1
Dispatches: Tricks of the Dole Cheats	Channel 4	13/08/2012	Materially misleading	3
Doctor Who	Watch	15/08/2012	Outside of remit / other	1
Drama programming	Various	n/a	Violence and dangerous behaviour	1
Electronic Programme Guide	Sky	n/a	Outside of remit / other	1
Embarrassing Bodies	Channel 4	09/08/2012	Disability discrimination/offence	1
Emmerdale	ITV1	31/07/2012	Sexual orientation discrimination/offence	1
Emmerdale	ITV1	09/08/2012	Offensive language	1
Family Guy	BBC 3	03/08/2012	Generally accepted standards	1
Football promotion	Sky Sports 2	04/08/2012	Materially misleading	1
Format	Chorley FM	n/a	Format	1
Four in a Bed	Channel 4	02/08/2012	Scheduling	1
Frontline Police / Police Interceptors	Channel 5	n/a	Outside of remit / other	1
Geoff Lloyd's Hometime Show	Absolute Radio	25/07/2012	Crime	1
Halfords' sponsorship of Motoring on Dave	Dave	07/08/2012	Gender discrimination/offence	1
Harry Hill's Shark Infested Custard / Harry Hill's TV Burp	Cartoon Network	n/a	Scheduling	1
Hell's Kitchen USA	ITV2	14/08/2012	Offensive language	1
Holby City	BBC 1	17/07/2012	Disability discrimination/offence	1
Holby City	BBC 1	14/08/2012	Product placement	1
Horizon	BBC 2	06/08/2012	Drugs, smoking, solvents or alcohol	1
Hot Rod	E4	04/08/2012	Information/warnings	1
I'm Sorry I Haven't A Clue	Radio 4	30/07/2012	Offensive language	1
International Football	ITV1	15/08/2012	Offensive language	1
ITV documentaries (trailer)	ITV1	11/08/2012	Sexual material	1
ITV documentaries (trailer)	ITV1	12/08/2012	Generally accepted standards	1
ITV News	ITV1	09/08/2012	Harm	1

Jimmy Carr	Channel 4	30/07/2012	Generally accepted standards	1
Jimmy's Forest	More4	06/08/2012	Animal welfare	2
Jubilee Coverage	BBC 1	03/06/2012	Outside of remit / other	1
Let's Do Lunch... With Gino and Mel	ITV1	24/07/2012	Religious/Beliefs discrimination/offence	1
Medical Detectives (trailer)	CBS Reality	31/07/2012	Generally accepted standards	1
Most Haunted	Pick TV	03/07/2012	Scheduling	1
News, Sport, Weather	Sky News	10/08/2012	Due impartiality/bias	1
Newsnight	BBC 2	n/a	Due accuracy	1
Nick Ferrari	LBC 97.3FM	09/08/2012	Race discrimination/offence	3
Olympics 2012	BBC 1	05/08/2012	Generally accepted standards	1
Olympics 2012	BBC 1	09/08/2012	Race discrimination/offence	7
Olympics 2012	BBC 1	09/08/2012	Generally accepted standards	2
Olympics 2012	BBC 1	09/08/2012	Outside of remit / other	1
Olympics 2012	BBC 1	12/08/2012	Outside of remit / other	1
Olympics 2012	BBC 1	n/a	Outside of remit / other	1
Olympics 2012	BBC 3	12/08/2012	Generally accepted standards	1
Olympics 2012	BBC Red Button	n/a	Outside of remit / other	1
Olympics Tonight	BBC 1	05/08/2012	Race discrimination/offence	1
Paralympics - Meet the superhumans (trailer)	Channel 4	n/a	Generally accepted standards	1
Phone 4 U's sponsorship of Films on 4	Channel 4	04/08/2012	Generally accepted standards	2
Phone 4 U's sponsorship of Films on 4	Film 4	06/08/2012	Generally accepted standards	1
Postcode	CBBC	19/07/2012	Scheduling	1
Project Parent	BBC 1	13/08/2012	Scheduling	1
QI	Dave	12/08/2012	Offensive language	1
Rattlesnake Republic	Animal Planet	08/08/2012	Animal welfare	1
Real Crime	ITV1	30/07/2012	Due impartiality/bias	6
Roy	BBC 1	19/07/2012	Disability discrimination/offence	1
Ruth Rendell's Thirteen Steps Down	ITV1	13/08/2012	Generally accepted standards	2
Sadie J	CBBC	14/08/2012	Disability discrimination/offence	1
Science Month competition	Eden	16/07/2012	Sexual material	1
Sex Story: Fifty Shades of Grey	Channel 4	29/07/2012	Generally accepted standards	1
Skunk Whisperer	Animal Planet	n/a	Materially misleading	1
Sky News at Nine	Sky News	10/08/2012	Due accuracy	1
Sky News with Dermot	Sky News	01/08/2012	Violence and	1

Murnaghan			dangerous behaviour	
Sky Sports (trailer)	Sky Sports News	27/07/2012	Harm	1
Sunrise	Sky News	01/08/2012	Violence and dangerous behaviour	1
Superscrimbers: Waste Not, Want Not	Channel 4	01/08/2012	Materially misleading	1
Superstar	ITV1	23/07/2012	Generally accepted standards	51
T4 link	Channel 4	11/08/2012	Generally accepted standards	1
Taylor's of Harrogate's sponsorship of Sky Arts	Sky Arts	n/a	Materially misleading	1
The Accused (trailer)	BBC 1	13/08/2012	Scheduling	1
The Girl Who Became Three Boys	Channel 4	07/08/2012	Materially misleading	1
The Girl Who Became Three Boys	Channel 4	07/08/2012	Generally accepted standards	1
The IT Crowd	E4	08/08/2012	Disability discrimination/offence	1
The Million Pound Drop	Channel 4	11/08/2012	Outside of remit / other	1
The Riots: In Their Own Words	BBC 2	13/08/2012	Generally accepted standards	1
The Waterboy	E4	11/08/2012	Generally accepted standards	1
This Morning	ITV1	02/08/2012	Scheduling	1
Tipping Point	ITV1	24/07/2012	Offensive language	1
Tommy Noon	Halton Community Radio	n/a	Materially misleading	1
Total Drama Island	Cartoon Network	n/a	Scheduling	1
Undercover Boss	Channel 4	16/07/2012	Generally accepted standards	1
Weather	Channel 5	10/08/2012	Product placement	1

Investigations List

If Ofcom considers that a broadcast may have breached its codes, it will start an investigation.

Here is an alphabetical list of new investigations launched between 23 August and 5 September 2012.

Programme	Broadcaster	Transmission Date
Alan Brazil's Sports Breakfast	Talksport	16 August 2012
Borkotmoy Sehri	NTV	30 July 2012
Cowboy Traders	Channel 5	11 April 2012
EastEnders	BBC 1	31 August 2012
Rock All Stars	Scuzz	19 August 2012
Siri Guru Ravidass	MATV	18 March 2012
X-Men Origins: Wolverine	Channel 4	26 August 2012

It is important to note that an investigation by Ofcom does not necessarily mean the broadcaster has done anything wrong. Not all investigations result in breaches of the Codes being recorded.

For more information about how Ofcom assesses complaints and conducts investigations go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>.

For fairness and privacy complaints go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>.