

Ofcom Content Sanctions Committee

Consideration of sanctions against	The British Broadcasting Corporation (“the BBC”) in respect of its service Radio 1.
For	Breaches of the Ofcom Broadcasting Code (“the Code”) of: Rule 2.11: <i>“Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.”</i> Relating to the following conduct: Faking the ‘winners’ of a listener competition, Seven Song Shuffle, in a partially pre-recorded episode and a pre-recorded episode of The Jo Whiley Show.
On	20 April 2006 & 12 May 2006
Decision	To impose a financial penalty (payable to HM Paymaster General) of £75,000 and, in addition, to require the BBC to broadcast a statement of Ofcom’s findings on its service Radio 1 in a form to be determined by Ofcom on two specified occasions.

Summary

- 1.1 For the reasons set out in full in the Decision, under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee ("the Committee"), the Committee decided to impose statutory sanctions on the BBC in light of the serious nature of its failure to ensure compliance with the Ofcom Broadcasting Code ("the Code").
- 1.2 This adjudication under the Code relates to the broadcast of *The Jo Whiley Show* ("*Jo Whiley*") on Radio 1 on 20 April 2006 and 12 May 2006.
- 1.3 *Jo Whiley* was a live, music-based programme, which included interviews and other features. It was broadcast on Radio 1 on weekdays from 10:00 to 12:45. During the second quarter of 2006, the programme's average total audience was 1.55 million and the average age of the audience was 33. The programme had a regular, daily, two-part competition called *Seven Song Shuffle*, in which a "*mash-up*" of seven songs was played and listeners were invited to guess the songs and artists. In the first part of the competition, listeners were invited to call in to enter the competition and a caller was selected to go on air. If he/ she did not identify all of the seven songs and artists, listeners were then invited to text or email the remaining answers. A winner was selected from these text messages (or "SMS") and emails and his or her name was read out on air. Entry to the first part of the competition was by telephone and entry to the second part was by email or SMS. *Seven Song Shuffle* did not use premium rate services¹ ("PRS"). Telephone entry was charged at 0870 national rate and typically cost listeners less than 10 pence. SMS entry was charged at local rate and typically cost listeners between 10 and 12 pence. Email entry was regarded as free.
- 1.4 During the broadcast of *Jo Whiley* on 20 April 2006, listeners were invited to enter the *Seven Song Shuffle* competition. The part of the programme containing the competition had been pre-recorded so no listeners who entered had any chance of winning. The 'winner' who was selected to guess the songs and artists in the "*mash-up*" on air was a BBC employee who had been contacted by a member of the production team and asked to pretend to be a listener. In the second part of the competition, listeners were invited to text or email their answers, although they had no chance of winning. A fictitious name was announced on air as the 'winner'.
- 1.5 During the broadcast of *Jo Whiley* on 12 May 2006, listeners were invited to enter the *Seven Song Shuffle* competition. The whole programme had been pre-recorded so no listeners who entered had any chance of winning. The 'winner' who was selected to guess the songs and artists in the "*mash-up*" on air was a member of the public who had been contacted specifically by the production team to be the 'winner' of the first part of the competition. In the second part of the competition, listeners were then invited to text or email their answers, although they had no prospect of winning. A fictitious name was announced on air as the 'winner'. (This programme also included another interactive element, "*What Rox, What Sux*", which, although not a competition and not itself found in breach of the Code, contributed to the misleading impression that the programme was being broadcast live.)

¹ Premium rate services are services that offer some form of information or entertainment and which are charged to consumers' telephone bills. Premium rate calls cost between 10p and £1.50 per call, or per minute, from a BT landline (charges from other networks may vary).

- 1.6 The compliance procedures that were then in place required that a compliance form be completed on the BBC's systems for all pre-recorded programmes. However, no compliance form was completed for the 20 April or 12 May 2006 programmes. In relation to the 20 April 2006 programme, the BBC said that there had been "some ambiguity over compliance requirements for programmes that were partially pre-recorded."
- 1.7 Reacting to press interest in the mishandling of the use of PRS in competitions and voting by a number of broadcasters, including the BBC, the BBC carried out two separate "trawls" of its output. The first was launched on 7 March 2007 and looked into the BBC's use of PRS. The second, launched on 12 July 2007, was much wider in scope, to include any audience deception.
- 1.8 On 18 July 2007 the BBC issued a statement admitting serious breaches of its editorial standards in a number of its programmes, other than *Jo Whiley*, and an Ofcom investigation was launched. In October and November 2007, following an allegation made by a journalist on 20 September 2007, the BBC disclosed to Ofcom that it had identified issues with two *Jo Whiley* programmes. Ofcom's investigation was expanded to cover these programmes.

Summary of the Committee's Findings

- 1.9 The BBC exists to serve the public interest. The breaches of the Code in this case involved the faking of competition 'winners' in a partially pre-recorded edition and a pre-recorded edition of *Jo Whiley*. The 20 April 2006 and 12 May 2006 programmes were then passed off as live and the BBC deceived its audience. The BBC unequivocally accepted that the Code breaches (and its own fundamental principle of straight dealing with its audience) were "absolutely unacceptable".
- 1.10 The trust that the audience places in a broadcaster is essential to their relationship and the audience is entitled to believe when entering into a relationship of trust with a broadcaster that their trust is not misplaced. This is particularly pertinent in the case of the most long-standing public service broadcaster, the BBC, which has a relationship of trust with its radio audiences going back over 80 years.
- 1.11 Ofcom was very concerned by the repeated instances of pre-meditated, deliberate deception in this case. Listeners were actively encouraged to enter the *Seven Song Shuffle* competition in both programmes as broadcast, despite the fact that the production team knew that those listeners who entered would have no chance of winning. Ofcom noted that the decision to fake competition 'winners' in the 20 April 2006 programme had been made, at least in part, because of time pressure. The part of the programme containing the competition was pre-recorded at short notice. The BBC's evidence was that the Producer had decided to fake 'winners' during the pre-recording of the 20 April 2006 programme, on realising that the "programme's plan was facing potential collapse" because the *Seven Song Shuffle* competition could not be run as it normally would during a live broadcast. However, the decision to fake competition 'winners' in the 12 May 2006 programme involved a greater degree of pre-meditation: not only did it involve the faking of 'winners' in a pre-recorded programme, but it also involved the production team taking steps in advance of pre-recording to identify and secure the agreement of a

listener to the programme broadcast the day before (11 May 2006) to pose as a 'winner'. In addition, in that programme, the inclusion of the *What Rox, What Sux* item contributed to the misleading impression that the programme was being broadcast live and, therefore, that those listeners who entered the *Seven Song Shuffle* competition would stand a fair and equal chance of winning.

- 1.12 A number of SMS entries were made to both the affected competitions by listeners. In addition, a number of telephone entries would have been made by listeners, although Ofcom noted that no data was available to ascertain the precise numbers of listeners who had entered by telephone. However, all those listeners who entered the affected competitions during the broadcast of the 20 April and 12 May 2006 programmes stood no chance of winning.
- 1.13 Ofcom was concerned that the deliberate decisions to fake 'winners' in pre-recorded or partially pre-recorded editions of *Jo Whiley* were taken with the full knowledge of and/or at the request of the Producer, who was responsible for the content of the programme and its compliance with the Code. On 20 April 2006, the Broadcast Assistant contacted a friend (also a member of BBC staff) to "play the part" of the 'winner' of the first part of the competition and, therefore, was complicit in the deception. For the 12 May 2006 programme, the production team retained the name of a caller who had called to enter the 11 May 2006 competition to be the 'winner' of the first part of the competition. On both occasions, the 'winners' of the second part of the competition were fabricated by the production team. Therefore, a number of individuals were complicit in the deception.
- 1.14 Ofcom noted that the Executive Producer of *Jo Whiley* was away and was not consulted in relation to the pre-recorded programme broadcast on 20 April 2006. The Executive Producer was aware of the decision to pre-record the 12 May 2006 programme, but had "no prior knowledge of how the *Jo Whiley* production team proposed handling the competition". On both occasions, the decisions to pre-record had been authorised by Radio 1's Head of Programmes, a senior manager, although he had "no role in the details of individual programmes, and had no prior knowledge of how the production team proposed handling the usual competition". Although Ofcom noted that the Producer was "responsible" for the content of *Jo Whiley* and its compliance with the Code, it was of the view that there had been a lack of appropriate management, scrutiny, audit and oversight of the Producer by the Executive Producer and Radio 1's Head of Programmes.
- 1.15 Moreover, there were insufficient systems in place in April and May 2006 to prevent or identify the unfair conduct that occurred in this case. Ofcom was very concerned about these shortcomings. The unfair conduct of the competition in the 20 April 2006 programme only came to light because of an allegation made by a journalist in September 2007. The BBC's investigation that then followed identified the unfair conduct of the competition in the 12 May 2006 programme. In Ofcom's view, neither would have come to light without the enquiry made by a journalist.
- 1.16 Ofcom welcomed the steps taken by the BBC to investigate, seek to address the breaches and prevent recurrence of the same or similar failures, which included:

- Suspending all phone-in competitions and voting on 18 July 2007, while it implemented a comprehensive review of the relevant Editorial Guidelines and processes;
- Carrying out wide-ranging investigations into PRS and instances involving “audience deception” in its programmes;
- Enhancing training programmes on editorial compliance across the BBC and implementing a mandatory training programme for staff called “Safeguarding Trust” (which all BBC production staff and 2,000 freelancers had completed);
- Issuing new guidance and creating a new Code of Conduct in relation to competitions;
- Setting up a new “Interactive Advice and Compliance Unit”;
- Re-writing staff contracts and contracts with external suppliers;
- Taking significant and wide-ranging disciplinary action against a number of staff;
- Apologising publicly on several occasions in general terms for the breaches that occurred in this case and others;
- Creating a new post of “Head of Editorial Standards in Radio 1” and setting up an Editorial Standards and Compliance steering group chaired by the Controller of Radio 1;
- Where programmes are pre-recorded, taking care to avoid using any language that suggests to the audience that the show is being broadcast live;
- Requiring the Executive Producer and Producer of a programme to discuss content and any associated editorial dangers when a normally live programme is authorised to pre-record; and
- Seeking to compensate SMS entrants to the affected *Jo Whiley* competitions.

1.17 However, notwithstanding the steps taken by the BBC, Ofcom considered that this case involved serious failures by the BBC to comply with a basic requirement to conduct competitions fairly. This not only breached the Code, but also the BBC’s own Editorial Guidelines and its fundamental principle of straight dealing with its audiences. The BBC repeatedly deceived its audience, in that it mis-conducted the same interactive listener competition on two separate occasions within a relatively short period of time. This case involved deliberate, pre-meditated decisions to transmit competitions which listeners were encouraged to enter but which they would stand no chance of winning.

1.18 While recognising that any fine would be taken from monies paid by the public (the licence fee payer), the Committee noted that Parliament had decided that it was appropriate in certain circumstances for Ofcom to impose a financial

penalty on the BBC (though at a lower threshold to other Public Service Broadcasters, i.e. set at a maximum of £250,000 on any occasion).

- 1.19 Having considered the relevant facts as outlined above and all the representations made by the BBC, the Committee decided to impose a financial penalty on the BBC of **£75,000** (payable to HM Paymaster General), which it considered to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed the BBC to broadcast a statement of findings in relation to *Jo Whiley* on Radio 1 in a form determined by Ofcom on two specified occasions.

Background

- 2.1 The issues in this case are set out at paragraphs 1.3 to 1.8 in the Summary above.
- 2.2 As set out at paragraphs 1.7 and 1.8 above, the BBC carried out two “trawls” of its output in response to press interest in the mishandling of the use of PRS in competitions and voting by a number of broadcasters, including the BBC. An Ofcom investigation was launched after the BBC issued a statement on 18 July 2007 admitting serious breaches of the BBC’s editorial standards in a number of its programmes, other than *Jo Whiley*. In October and November 2007, following an allegation made by a journalist on 20 September 2007, the BBC disclosed to Ofcom that it had identified issues with two *Jo Whiley* programmes. Ofcom’s investigation was expanded to cover these programmes.
- 2.3 Ofcom carried out an investigation into *Jo Whiley*, as summarised in section 4 below. During that investigation, the BBC was given the opportunity to make written submissions on the case. In light of the evidence and the BBC’s responses, Ofcom concluded that the BBC’s conduct of *Seven Song Shuffle* in the partially pre-recorded and pre-recorded editions of *Jo Whiley* broadcast on 20 April 2006 and 12 May 2006, was in breach of the Code.
- 2.4 In addition, Ofcom found the breaches to be sufficiently serious and repeated to warrant the referral of the case for the consideration of the Content Sanctions Committee (“the Committee”). Throughout the consideration of the imposition of a statutory sanction, the BBC was given opportunities to make written and oral representations, which are summarised below.

Legal Framework

The Communications Act 2003

- 3.1 Ofcom has a duty under section 319 of the Communications Act 2003 (“the Act”) to set standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives.
- 3.2 The standards objectives are set out in section 319(2) of the Act. They include:
 - 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 (section 319(2)(f)).
- 3.3 In discharging its functions, Ofcom’s principal duties are to further the interests of citizens in relation to communications matters and the interests of consumers (section 3(1)) and to secure a number of other matters including:
 - The application in the case of all television and radio services of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services (section 3(2)(e)).

- 3.4 In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, a number of other considerations including:
- The need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g)).
- 3.5 Under section 198 of the Act, Ofcom is required to regulate the BBC's services as well as other activities connected to the provision of the BBC service. Ofcom's duties and powers in relation to the BBC are conferred on it under statute and the BBC Charter and Agreement. Clause 46 of the BBC Agreement which accompanies the BBC Charter states that the BBC must observe certain standards set by Ofcom under section 319 of the Act, including those relating to the application of generally accepted standards so as to provide adequate protection for the public from harmful or offensive material (s.319(2)(f)). Therefore it is in light of this Clause that the BBC is required to comply with Rule 2.11 of the Code, which is relevant to this Adjudication.
- 3.6 Section 198(3) of the Act requires the BBC to pay penalties to Ofcom in respect of any contraventions of the conditions contained in these provisions. The BBC is in a unique position in comparison to other Public Service Broadcasters ("PSBs") with respect to the maximum fine that can be imposed on it. Commercial PSBs can be fined up to a maximum of 5% of their qualifying revenue. The BBC's maximum limit of £250,000 is due to the BBC being funded by the licence fee. Section 198(5) states that
- "the maximum penalty that may be imposed on the BBC on any occasion by Ofcom in exercise of a power conferred by virtue of the BBC Charter and Agreement is £250,000".

The BBC Agreement

- 3.7 Clauses 93 and 94 of the BBC Agreement set out the possible sanctions that Ofcom can impose against the BBC in relation to a breach of the Code. These are:
- a direction to broadcast a correction or statement of Ofcom's findings or both (Clause 93(1));
 - a direction not to repeat a programme (Clause 93(5)); and
 - the imposition of a financial penalty up to a maximum of £250,000 on any occasion (Clause 94).

The Ofcom Broadcasting Code

- 3.8 Standards set by Ofcom in accordance with section 319 of the Act are set out in the Code which came into force on 25 July 2005.²
- 3.9 Guidance Notes accompanying each section of the Code are published, and from time to time updated, on the Ofcom website.³ The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Code.
- 3.10 By virtue of section 198 of the Act and section 46 of the BBC Agreement, the BBC must observe relevant programme Code standards which include, but are not limited to, those relating to harm and offence.
- 3.11 The relevant provision of the Code is Rule 2.11, which states that:
- “Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.”

The Human Rights Act 1998

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

Investigation

- 4.1 In its investigation, Ofcom asked the BBC to address the following key points, among other issues, and to provide certain relevant material. This included details of:
- The nature of the item involving (or purporting to involve) participation by viewers or listeners (e.g., a phone in competition);
 - What efforts were made to anticipate before broadcast any problems that might arise with the item;

² The Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

³ Guidance Notes can be found at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/>

- What compliance processes, standard or otherwise, were in place regarding the management and running of interactive listener competitions; and
- At what point decisions were made that effectively involved deception of the audience (e.g., a decision to fake 'winners').

The BBC's response to Ofcom's investigation

- 4.2 The BBC responded by way of a general statement, which applied to this case and a number of other cases, and specific statements in relation to the 20 April and 12 May 2006 *Jo Whiley* programmes.

General statement

- 4.3 It stated that the conduct was "entirely unacceptable" and there was "no excuse for it". It said that whilst there might be different factors in each of the cases that rendered the decisions made understandable and more or less serious, it did not seek to suggest that any of those decisions were acceptable. It took the view that each of the incidents, in varying degrees, involved production staff falling seriously short of the high standards of conduct it expected, and of misleading the audience and thereby breaching the Code.
- 4.4 The BBC said that the problems had not stemmed from an absence of clear BBC standards and guidelines. It said that in addition to promoting its own Editorial Guidelines, it made "strenuous efforts to ensure that the highest ethical standards of programme-making are observed by all involved in content production".
- 4.5 It stated that whilst each case involved misleading the audience, none was profit-led and that each of the systems and methods used were designed to maintain caller costs at the lowest practical levels for the programme in question; no profit was made by the BBC. It also added that in those cases where there were prizes, nobody on the programmes had benefited, with all of the prizes either being reused shortly afterwards or returned to the BBC.
- 4.6 The BBC said that its Director General, Mark Thompson and other senior BBC managers had discussed the breaches and apologised for them in public and on various BBC services.
- 4.7 It added that although the number of incidents was of particular concern, "it was necessary to maintain perspective". The incidents were relatively infrequent, compared to the number of hours of programmes that were broadcast during the relevant period.
- 4.8 The BBC described in considerable detail the process by which the incidents had been identified, the investigations that had been undertaken and the steps that had been and/or were being taken to address these problems and prevent recurrence. It also stated that given the failures that had occurred, the BBC was urgently examining what steps might need to be taken to ensure that the relevant Guidelines were clearly understood by programme makers and staff; and that key principles, such as not misleading audiences in any circumstances, were driven home. As a first step, the BBC had announced,

on 18 July, that all 16,500 programme and content staff would attend a new mandatory training programme called “Safeguarding Trust”.

Specific statement regarding 20 April 2006 *Jo Whiley* programme

- 4.9 The BBC said that when callers dialled to enter the *Seven Song Shuffle* competition by telephone, calls were answered by an interactive voice recognition system that gave a number of choices, one of which was to go through to the studio to enter the competition. A member of the production team spoke to potential entrants and took a number to call them back on. One caller from those considered suitable would be chosen to be put through to Jo Whiley for the competition. That caller had to identify as many of the “mashed up” songs as possible and won an album for each correctly identified song. If any songs remained unidentified, the audience would be asked to text or email if they thought they knew all the remaining songs. In the second part of the competition, one SMS or email from those with the correct answer was chosen at random and that individual was named on air and also won an album for each song correctly identified.
- 4.10 The BBC stated that, although *Jo Whiley* was usually live, on occasion a decision was made to pre-record parts of the programme. On 20 April 2006, the Queen had been due to open the refurbished Broadcasting House and Jo Whiley had been invited to attend the event. It had not been expected that Jo Whiley would stay for the entire event, but it had also not been possible to predict when security would allow her to leave. Accordingly, it had been arranged that the Producer would pre-record part of the programme in sections, so that Jo Whiley could attend the start of the event and still present as much of the programme live as possible, depending on the precise security arrangements.
- 4.11 The BBC said that the Producer recalled that she had not been informed of the need to accommodate Jo Whiley’s absence from at least part of the normally live programme until the day before broadcast. Although the decision to pre-record part of the programme had been authorised in advance by Radio 1’s Head of Programmes, she had no discussions about the details of the programme, which would not, in any event, be his/her responsibility. The Executive Producer had been away and was not consulted.
- 4.12 It said that the first two hours of the programme had been pre-recorded early in the morning of 20 April 2006. All of the pre-recorded material was broadcast. During the pre-recording, at around 08:00, the Producer had realised that running the *Seven Song Shuffle* competition as normal would not be possible. The BBC reported that the Producer, “realising that the programme’s plan was facing potential collapse”, had asked the Broadcast Assistant to find someone to “play the part” of a competition entrant. The Broadcast Assistant had contacted an old friend, a BBC employee who was a regular listener to the programme, and asked him to pretend to be a competition entrant. He had then been put through to Jo Whiley, and, after exchanging a few remarks and listening to the “*mash-up*”, successfully identified four of the seven songs. Jo Whiley had then asked for the remaining three titles to be identified by email or SMS. After a record was played she had identified all seven songs from the “*mash-up*” and read out that “*Tom in Truro*” had won the remaining three albums. This was a fictitious name.

4.13 The BBC stated that, on 20 September 2007, following an allegation from a journalist and an internal investigation, a member of staff at BBC Radio Jersey had given an account of what had happened on 20 April 2006. He said that he had been contacted by a friend who was working as the Broadcast Assistant on *Jo Whiley* and that his real name and location had been broadcast in the programme. The following day, the BBC had launched an investigation. The Broadcast Assistant confirmed that the account given was largely correct and that the programme's Producer had also been involved.

4.14 On 2 October 2007, the BBC's Director General had informed the Editorial Standards Committee of the BBC Trust and later that day the BBC issued a press release acknowledging the incident. On 3 October 2007 at approximately 10:13, Jo Whiley made the following apology to listeners:

"Right, I need to make an apology here. About eighteen months ago I had to pre-record a section of this show. In that programme we ran a competition, but rather than a listener we used a member of BBC staff as the on-air contestant, which was wrong and for that we're sorry."

4.15 The BBC stated that the Producer had wanted to produce as "normal" a programme as she could and had simply given insufficient consideration to the fact that the programme was pre-recorded. The BBC said that the short notice of the requirement to pre-record, combined with the Producer's lack of relevant experience, led to some oversights in the planning. The Producer maintained that it was an oversight not to realise that an interactive competition would be impossible in a pre-recorded section of the programme. The BBC said that the production team had been working under acute time pressure, caused in significant part by their lack of knowledge of the necessarily secret security arrangements around the Queen's presence in Broadcasting House. The BBC said that when the three members of staff involved were asked why they had not come forward earlier, all three said that they "had simply forgotten an incident that had taken place some fifteen months previously".

4.16 The BBC accepted that a breach of trust had taken place because "listeners were misled into entering a competition they had no chance of winning". It also accepted that listeners were "misled in that a BBC employee was represented as a member of the public who had entered the competition, and an invented name was broadcast as the winner of the text part of the competition."

4.17 The BBC also made the following general representations:

- No individual involved had made any gain, nor had the BBC, and no prizes were actually awarded;
- The cost of SMS and telephone entry had been very small and PRS were not involved; and
- Although there was nothing to prevent children entering the competition, the BBC submitted that they would be at school between 10:00 and 11:00 on a weekday morning and accordingly it was unlikely that children were involved.

Specific statement regarding 12 May 2006 Jo Whiley programme

- 4.18 On 29 November 2007, the BBC informed Ofcom that it had identified a further edition of *Jo Whiley* which appeared to involve a “serious breach” of the BBC’s editorial standards and potentially raised issues under the Code. The BBC said that, during the preparation of the BBC statement in relation to the 20 April 2006 edition of *Jo Whiley*, a review of the records for other pre-recorded editions was carried out. The edition broadcast on 12 May 2006 was identified as containing potential editorial breaches which merited investigation. The Controller of Radio 1 had conducted an initial investigation and interviewed the relevant members of staff.
- 4.19 The programme contained two interactive elements, *Seven Song Shuffle*, as described above, and “*What Rox, What Sux*”. The *What Rox, What Sux* item was an opportunity for listeners to send text messages or emails explaining something good and something bad that had happened recently. There was no prize and the BBC stated that it did not consider this element to be a competition.
- 4.20 The BBC said that the entire programme broadcast on 12 May 2006 had been pre-recorded on 11 May 2006, because of practical considerations relating to Jo Whiley attending the “Radio 1 Big Weekend” on 13/14 May 2006 and the closure of the Radio 1 London headquarters for refurbishment from 12 to 14 May 2006. Studio production for other programmes had been transferred to Manchester. The decision to pre-record *Jo Whiley* had been discussed and approved about a month in advance by Radio 1’s Head of Programmes, although he had no role in the details of individual programmes and no prior knowledge of how the production team proposed handling the usual competition. The Executive Producer was aware of the plan, but had no prior knowledge of how the production team proposed handling the competition. The Producer began detailed planning approximately two weeks before transmission.
- 4.21 The BBC stated that on 11 May 2006 the production team had retained the name of a member of the public who had telephoned to enter *Seven Song Shuffle* that morning. She was contacted and agreed to take part in the pre-recorded programme. Approximately 25 minutes after the start of the pre-record, Jo Whiley had invited listeners who wanted to enter *Seven Song Shuffle* to call in. About twelve minutes later, Jo Whiley announced the competition and said she had “*Michelle on the line*”. After exchanging a few remarks the “*mash-up*” was played and Michelle successfully identified three of the songs. Jo Whiley then invited listeners to send text messages or emails with the remaining songs. After a record was played she then identified all seven songs from the “*mash-up*” and, acting on the Producer’s instruction, read out that “*Karl in Chichester*” had won the remaining four albums. This was a fictitious name.
- 4.22 The BBC stated that, although Jo Whiley had been aware the programme was being pre-recorded, editorial responsibility for its content and its compliance with the BBC’s Editorial Guidelines and the Code lay with the Producer in all BBC programmes, and the presenter worked to the Producer’s directions.

4.23 The BBC said that Producer and the Broadcast Assistant had been interviewed during the BBC's second trawl and had been helpful in other matters. However, neither of them recalled this specific incident.

4.24 On 25 January 2008, Jo Whiley made the following apology on air:

"You might have seen or heard in the media yesterday that the BBC's Director-General Mark Thompson reported two breaches in editorial standards to the BBC Trust, and I'm really sorry to say that one of them happened on this show, 2 years ago. It was back in May 2006: the show had been pre-recorded as the studios had been closed in London and I was travelling up to Radio 1's Big Weekend in Dundee. We invited listeners to enter a competition that had already been recorded. Although the person who was on air was a genuine member of our audience – someone who listened to this show. The name of the second participant mentioned was made up. So on behalf of Radio 1 I would like to apologise and just to let you know there was never any malicious intent to deceive so I'm genuinely really sorry for that."

4.25 The BBC stated that the Producer had wanted to produce as "normal" a programme as she could, and had simply given insufficient consideration to the fact that the programme was pre-recorded. The Producer had said "I was trying to maintain the status quo and keep the show entertaining for the many listeners who enjoy the regular features of the show, but who don't actively contribute. I know I made a mistake, a mistake which I deeply regret, but I had so much to prepare for including the extra planning and responsibilities of working across Radio 1's big weekend, that I simply didn't think and I made the wrong decision." Radio 1's Head of Programmes had said "The job of the Producer was to give the impression of as live a show as possible within the Editorial Guidelines."

4.26 The BBC accepted that a breach of trust had taken place because "listeners were misled into entering a competition they had no chance of winning". It also accepted that listeners were "misled in that an invented name was broadcast as the winner of the text part of the competition." The BBC said that "Michelle", who was a genuine listener, had correctly identified three songs and had been sent three albums. No other individual involved in this had made any gain, nor did the BBC.

4.27 The BBC made the following general representations:

- The cost of SMS and telephone entry was very small and PRS numbers were not involved. The BBC said that compensation would be offered to those who entered by SMS;
- Although there was nothing to prevent children entering the competition, the BBC submitted that they would be at school between 10:00 and 11:00 on a weekday morning and accordingly it was unlikely that children were involved; and
- The BBC's investigations had not discovered any further pre-recorded *Jo Whiley* shows since January 2005 that contained competitions as if those programmes were live (with the exception of the 20 April 2006 edition outlined above).

- 4.28 The BBC outlined a number of ways in which it had sought or was seeking to address the issues that had occurred in this and other cases, including:
- Radio 1 would ensure that all relevant personnel were subject to compulsory retraining in programme compliance.
 - Radio 1 had recently set up an Editorial Standards and Compliance Steering group chaired by the Controller. Its aim was to further strengthen compliance procedures and clarify compliance issues for Radio 1 and 1Xtra, and to plan effective communication around adherence by staff and DJs.
 - All staff joining the BBC would have to sign a form confirming “I agree to comply with the BBC Editorial Guidelines and all its supplements”.
 - The Head of Editorial Standards or the Head of Programmes would now meet all new or promoted staff at Radio 1 to ensure that the Guidelines had been read and understood, which would also present an opportunity for the Guidelines to be discussed in the relevant music radio context.
 - Where shows were pre-recorded, care would be taken to avoid using any language which suggested to the audience that the show was being broadcast live. When normally live programmes were authorised to pre-record, the Executive Producer and Producer were now required to discuss content and any associated editorial dangers.
 - Radio 1 would ensure that on its website there was an open and honest description of how programmes were made. That would include the rules for competitions and the circumstances and nature of pre-recording.

Ofcom’s Findings on the breaches

- 5.1 Ofcom took the BBC’s submissions into account when reaching its conclusions on the question of Code breaches. It noted that on 20 April and 12 May 2006 listeners who had entered the *Seven Song Shuffle* competition by telephone and/or SMS had ‘paid’ to enter on the basis that they had a fair and equal chance of winning. However, due to the fact that the competitions were pre-recorded and fake ‘winners’ had been presented on air, those listeners who paid to enter the competitions in fact had no chance of winning. Therefore, the audience had been deceived as to the fair conduct of the affected competitions.
- 5.2 Ofcom considered the breaches to be sufficiently serious to warrant the consideration of the imposition of a statutory sanction.

The BBC’s written representations on the imposition of a sanction

- 6.1 In respect of the inclusion of the *What Rox, What Sux* item in the 12 May 2006 programme, the BBC said that the contributions used had been genuine contributions from genuine listeners received the week before broadcast and that no names had been made up. It provided further details of the compliance procedures for radio programmes, stating that the BBC Audio & Music compliance procedure required that a compliance form was completed on an in-house computer system called “Proteus” for all pre-recorded

programmes. In relation to the 20 April 2006 programme, it said that “at the time there was some ambiguity over compliance requirements for programmes that were partially pre-recorded and the Producer believed there was no requirement to complete a compliance form. The BBC said that no compliance form had been completed for the 12 May 2006 programme. The BBC confirmed that the Producer of both programmes had been the same individual.

- 6.2 The BBC said that records for the telephone entries to *Seven Song Shuffle* on 20 April 2006 had been destroyed by the telephony supplier. However, the BBC said that 341 calls had been made to Radio 1’s telephone number (which was also the number for entry to the competition) during the relevant period, although it had been unable to determine how many of these had been callers trying to enter the competition. Forty-four text messages were received for the second part of the 20 April 2006 competition. The BBC sent text messages to the mobile phone numbers of those who entered by SMS offering compensation of 50p per entry.
- 6.3 The BBC said that records for the telephone entries to *Seven Song Shuffle* on 12 May 2006 had been destroyed and no data was available about call volumes. One hundred and ten text messages were received for the second part of the 12 May 2006 competition. The BBC sent text messages to the mobile phone numbers of those who entered by SMS offering compensation of 50p per entry.
- 6.4 The BBC stated that it did not dispute the imposition of a financial penalty in relation to the Code breaches and accepted that, at least in principle, it would be appropriate for the BBC to broadcast a statement of Ofcom’s findings. The BBC said that from the outset it had recognised that the issue of breaches of editorial standards in its output were symptoms of a serious problem that needed to be urgently addressed. It continued that it had made the most strenuous efforts to identify and deal with the individual irregularities and had sought to be open and transparent throughout with Ofcom and the BBC Trust. The BBC said it had focused on the lessons learned and applied them across the BBC’s output. The BBC said that in addressing the issues, it had taken numerous, costly and complex steps to examine its internal processes and revise them where necessary. This had involved:

Editorial compliance

- 6.5 The BBC said that a review of its editorial compliance systems had found that overall the systems and processes had been effective and fit for purpose, but that there had been insufficient awareness of them among content producers. The BBC said that it had identified failures by individual producers to submit compliance forms when they should have done so. Its review had recommended that training programmes should be enhanced and that a new editorial compliance forum should be created to co-ordinate and spread best practice around the entire organisation. In addition, efforts would be made to ensure that independent production companies understood the BBC’s compliance procedures. The BBC said that it had undertaken to implement all the proposals of its compliance review.
- 6.6 The BBC said that it was making strenuous efforts to ensure that this commitment was followed up. It said there was now a senior manager responsible for editorial standards in compliance on each of the production

division's boards. A new editorial compliance forum (chaired by the Director of Editorial Policy & Standards) met monthly, which, in turn, reported to the Editorial Standards Board.

- 6.7 The BBC said that the steps it had taken were designed to ensure that there was no repetition of similar breaches to those in the cases under consideration for the referral to the Committee for the imposition of a statutory sanction.

Review of competitions

- 6.8 The BBC said that it had suspended all phone-related and interactive competitions on 18 July 2007 and that it had instituted a comprehensive review of the relevant Editorial Guidelines and processes. It said that new guidance had been issued to content producers and a new Code of Conduct had been created. This had been published and was available on the BBC's website. Further, the BBC said that it had not begun the phased return of competitions until 21 January 2008, over six months after they had been suspended.

- 6.9 The BBC said that it would run far fewer competitions in future and that its internal procedures had been extensively revised, as follows:

- The decision whether to include a competition in a programme now had to be referred to a designated senior manager within the relevant production department. A senior editorial figure would then be made responsible for overseeing the running of the competition;
- Where telephony was involved, there was a separate approval procedure, requiring authorisation by a senior manager;
- All content production staff involved with competitions were now required to complete an on-line training module. There was a second, higher level training module for all those responsible for approving or managing any aspect of competitions; and
- Clear rules on publishing the terms and conditions, stating the start and end of the competition period, ensuring all entrants have a fair chance of winning, contingency plans for failures, turnaround times for announcing winners and the selection of winners had been promulgated.

- 6.10 The BBC said that it had undertaken a publicity campaign to ensure that its audience was aware of these changes. The changes were designed to embed in the BBC's culture the overriding principle that competitions had to be run fairly, and that, where there was a tension between fairness and any other consideration whatsoever, fairness had to prevail. It said that the changes would significantly change the character of large parts of BBC output, particularly in radio.

Telephony

- 6.11 The BBC said that it was clear that a key factor leading to the crisis around interactivity had been a lack of understanding between production teams and the technical teams involved in the design, implementation and delivery of

telephony and text services. It continued that although the BBC Trust, not Ofcom, regulated the BBC's use of PRS, the Trust had requested that BBC management addressed Ofcom's requirements and identified where the BBC intended to comply or diverge, to ensure that the controls implemented by the BBC were at least as effective as those proposed by Ofcom.

- 6.12 The BBC said that its telephony review had recommended the creation of an in-house centre of expertise (provisionally entitled the Interactive Advice and Compliance Unit). The BBC said that using the services of the Unit would be a mandatory part of the commissioning process for interactive services together with being an integral step in the new BBC approvals process for competitions. The BBC said that this was a large commitment: estimated set-up costs were over £1 million and it expected the annual running costs to be around £1.3 million.

Staff contracts

- 6.13 As the BBC had noted in its earlier submissions, all staff in a role which could have an effect on BBC output were required to sign a contract and an Editorial Policy compliance form confirming their agreement to comply with the BBC's editorial standards. In order to address previous shortcomings in this area, the BBC said that line managers were now required to ensure that contracts and, where relevant, the Editorial Policy compliance form, were signed and returned prior to any employee, freelancer or casual member of staff starting work at the BBC. To ensure compliance, no payments would be processed by the BBC for any individual until it had been confirmed that the relevant paperwork had been received. Any individual who refused to sign the contract and/or the Editorial Policy compliance form would be likely to have his/her employment terminated.
- 6.14 The BBC said that newly contracted staff in content areas would also have to complete an interactive online course as part of their induction. In addition, all current staff would be required to sign a new Editorial Policy compliance form stating they agreed to comply with the BBC's Editorial Guidelines. This exercise would be completed by Autumn 2008.

Disciplinary action

- 6.15 The BBC said that it had taken disciplinary action against a number of individuals over the breaches notified to Ofcom and that it had made plain to all its employees that any further breaches of editorial standards might be considered as disciplinary matters.⁴

'Safeguarding Trust'

- 6.16 In relation to its mandatory training programme, 'Safeguarding Trust', the BBC said that by the end of March 2008 the total number of its staff and freelancers who had completed the course was 19,350. It said that only a few dozen of its staff who had been required to complete the course had failed to do so. It continued that all future recruits to the content production areas of the BBC would be required to complete the course.

⁴ The BBC provided further information on the disciplinary action it had taken when it addressed the Committee at a hearing on 17 June 2008. See paragraph 8.13 below.

- 6.17 The BBC said that independent production companies would be required to certify that all of their staff working on BBC commissions had completed the web-based 'Safeguarding Trust' course, available on the BBC's website at www.bbc.co.uk/safeguardingtrust. It said that contracts with such companies now contained clauses requiring them to represent and warrant that their staff had completed the course and detailing the sanctions the BBC might impose if they breached this requirement.
- 6.18 The BBC said that the exercise had been costly. It had already spent over £500,000 on creating the course and training its staff and there would be ongoing costs in operating and maintaining its internal and public websites.

External Efforts

- 6.19 The BBC said that it had undertaken a programme of inquiry into the nature of public trust in broadcasting and the Director General had summarised the findings in a speech delivered on 15 January 2008⁵. The BBC had also taken part in a joint Ofcom/ BBC Trust seminar on 26 November 2007, at which it had been represented by the Director General. Other BBC Executive Board members and senior managers had also been present.

The BBC Trust

- 6.20 The BBC submitted that it was also regulated by the BBC Trust, which had exercised its powers in respect of the breaches. The BBC Trust had requested a number of actions by the BBC Executive and had endorsed the approach taken in the Director General's Action Plan. Later, the BBC Trust had commissioned an independent evaluation of the Action Plan. The BBC said that the findings of this evaluation, which took account of the Trust's requests and the BBC's extensive actions, had been published on 9 May 2008⁶. It submitted that its conduct had been subject to the regulatory oversight and requirements of the BBC Trust and that the Trust's evaluation amounted to a regulator's approval of the BBC's response to the editorial breaches.

Sanctions

- 6.21 The BBC submitted that it had at all times co-operated with Ofcom's investigation.
- 6.22 The BBC reiterated that it had suspended all competitions across all networks on 18 July 2007, thereby ensuring that no further breaches of Rule 2.11 of the Code could take place.
- 6.23 The BBC said that it wished to make a number of general comments on the issue of compensation:
- The BBC reiterated that in all but one of the cases, PRS had not been used and it had not received any revenue from the affected competitions;
 - The BBC said that it had made efforts to compensate the audience where the BBC had retained the relevant data, but that it had no means to

⁵ http://www.bbc.co.uk/pressoffice/pressreleases/stories/2008/01_january/15/trust.html

⁶ http://www.bbc.co.uk/bbctrust/research/editorial_standards.html

identify or contact entrants to the affected competitions, other than by sending a reply to entries submitted by text message. If that reply did not elicit a further response, the BBC said that it simply had no means of taking the matter further;

- In relation to the cases where refunds had been offered (including *Jo Whiley*), the BBC said that the take-up rate had been low. It noted from published sanctions decisions that there had been a very low take-up rate for the compensation offered by ITV plc;
- The BBC said that it could have offered general compensation to anyone who had approached the BBC, but that it would have had no way of verifying that these individuals had entered the affected competitions. It said that this would have potentially exposed the BBC and licence fee payers' money to claims which might not be warranted or might be fraudulent; and
- The BBC noted from published sanctions decisions that where commercial broadcasters had had a similar lack of data or where they had received few responses to offers of compensation, they had made donations to charity. The BBC stated that any payment it made to charity would have to be funded from the licence fee and, under its Agreement with the Secretary of State for the Department of Culture, Media and Sport, it had no ability to make charitable donations. Furthermore, the BBC said that any donation to charity would not, in fact, be compensating those audience members who had been harmed financially. It said that the purpose of a charitable donation for commercial broadcasters had been to divest themselves of profits where restitution could not be made to the relevant viewers.

Referral to the Content Sanctions Committee

- 7.1 It was considered that, taking all the circumstances into account and, in particular, the severity and deliberate and repeated nature of the breaches and the resulting harm caused to the audience overall, the breaches were sufficiently serious, deliberate and repeated to warrant the consideration of the imposition of a statutory sanction.
- 7.2 Therefore, in accordance with Ofcom's outline procedures for consideration of statutory sanctions in content and content-related cases, the case was referred to the Committee.

Sanctions Hearing

- 8.1 Ofcom's Content Sanctions Committee ("the Committee") held a hearing on 17 June 2008, at which the BBC was given the opportunity to make oral representations before the Committee decided whether the breach warranted the imposition of a statutory sanction and, if so, of what type(s) and at what level(s).
- 8.2 The Committee was addressed by Mark Byford (BBC Deputy Director General) and James Eadie QC (Counsel), with evidence supplied by Andy Parfitt (Controller, Radio 1), David Jordan (Director of Editorial Policy and

Standards), Philip Abrams (Complaints Director, Editorial Complaints Unit) and Alexis Hawkes (BBC Legal Advisor).

The BBC's general representations on the cases

- 8.3 The BBC restated that what had happened in these programmes was completely unacceptable and it recognised that the BBC had let down its audiences, “got it wrong” and that trust with the audience had been broken. It continued that these cases went to the absolute fundamental values of the BBC, which were integrity, trust and being straight with the audience. It said that its audiences were entitled to be able to trust what they saw or heard and to receive programmes that were made with integrity and that did not deceive them. The BBC said that whenever the audience entered its competitions, even if it was “a bit of fun for small prizes or as a chance of bit of a bonus for giving money to charity”, the competitions had to be run absolutely fairly. All the entries had to count, the winner(s) had to be picked fairly and the prize(s) had to go to a real viewer or listener. It acknowledged that in the programmes under consideration by the Committee this had not happened.
- 8.4 The BBC said that, to some extent, it had been caught out by the speed of change in the industry. Within BBC programmes, the use of competitions using phones, texts and emails had grown rapidly in recent years, as technology allowed the BBC to connect with its audiences in new ways. It said that interactivity and, especially, interactive competitions were an area of particular risk and that when a competition was conducted there were a number of serious and important editorial issues to be considered. It acknowledged that, in production terms, competitions could go wrong very quickly. Production staff who had not thought a competition through beforehand might have to deal with problems very quickly, in circumstances where problems needed to be addressed with clarity of thought and the right decisions taken straight away.
- 8.5 It said that in the programmes under consideration by the Committee, those involved had not understood or properly focused on either the true nature of the risks or the seriousness of the decisions that they were taking. The relevant individuals had thought that they were doing the right things or, at least, acceptable things, such as “keeping the show on the road” and providing entertainment. They had failed to understand that by putting production values first, they were actually breaching the audience’s trust. The BBC said that although it now appreciated the editorial challenges in competitions “in the round”, it had failed to do so and had not done enough to make sure that all those involved with competitions knew how to avoid the risks and what to do when those risks turned into reality.
- 8.6 The BBC re-emphasised that it was completely unacceptable “always and without exception” to solve a broadcasting problem by breaching the fundamental, unalterable principle of straight-dealing with the audience and telling them the truth. The BBC continued that it had had policies in place during the relevant period, and that it was not saying that the relevant Producers had not been aware of the rules, its Editorial Guidelines and the Code. However, given the scale of the problems that had been uncovered, it believed the key message (that it was never acceptable to breach trust with the audience, whatever the circumstances) had not got through to all areas. With hindsight, it said that it had not done enough to train everyone in how to use interactivity properly and to apply the guidelines properly, which was why,

as a first step, it had put 20,000 people (all its creative programming staff and freelancers) through its “Safeguarding Trust” course, because trust was absolutely crucial.

- 8.7 The BBC said that it did not believe that anyone working within the BBC had an appetite for deliberate deception. However, it accepted that the programme-makers in the cases before the Committee, who made wrong decisions, albeit sometimes under pressure, should have told their managers, and that those managers should have escalated the matter further.
- 8.8 The BBC did not wish to leave Ofcom in any doubt regarding the seriousness with which it had taken these matters and said that it believed the steps it had taken and the standards that it demanded from everyone at the BBC made that clear. The BBC reiterated that it accepted each of the cases in question were serious contraventions of the Code and its own Editorial Guidelines. It accepted the imposition of financial penalties in all eight cases before the Committee and that it should broadcast a statement of Ofcom’s findings in seven of the eight cases. It continued that the cases before the Committee were “a heavy hammer blow”, damaging to the reputation of the BBC as the most trusted public service broadcaster in the United Kingdom, which it said was a damning punishment in itself. The BBC said that it had spent a great deal of time, energy and effort over the past year reviewing, examining and reflecting on what to do about the breaches. It had put new mechanisms in place and believed that it had done a very substantial amount to minimise the risks of recurrence of similar breaches.
- 8.9 The BBC asked the Committee to bear in mind that none of the incidents was profit-led and that it had not made money from any of them. In addition, the programme-makers had not made any money for the BBC or for themselves from the affected competitions and had not taken home any prizes. Some of them had thought they were doing the right thing, such as making better programmes or helping charities. The BBC said that whilst these were not excuses, it made it harder to criticise the motives of someone who genuinely considered they were doing the best for a charity. Whilst this did not make what occurred right, the BBC considered that it deserved some understanding.
- 8.10 The BBC stated that its senior management had taken the issues it had identified extremely seriously. It accepted that the failures included serious management failures: (i) a failure to ensure that the fundamental principle of straight dealing with the audience got through to all those involved in production with sufficient clarity; (ii) a failure to appreciate that interactive competitions, in particular, carried very significant risks of things going wrong; and (iii) a failure to have systems in place that would have ensured escalation of problems of the kind that had occurred to more senior levels of management. It said that it had realised it needed to take a “very careful look” at all its programming across all its services. As a consequence, the two trawls of its programming had been thorough and wide-ranging. Under the leadership of the BBC’s Editorial Standards Board, the BBC had gone over all its compliance procedures, created a new Competition Code of Conduct, developed detailed additional guidance on competitions and launched a new in-house centre of expertise for telephony. The BBC submitted that all and each of these actions demonstrated that it had known it was not dealing with a small failure; it was a big problem that needed major review and reform.

- 8.11 In summarising what had occurred as a consequence of the matters coming to light, the BBC stated that:
- senior managers had investigated the problem programmes;
 - there had been disciplinary action against a number of staff;
 - all phone and interactive competitions had been suspended while procedures were rethought, reconsidered and rewritten and staff were retrained;
 - every member of staff and 2,000 freelancers who were working in the creative programming area were put through the "Safeguarding Trust" workshops (the biggest training programme ever undertaken by the BBC);
 - staff contracts and contracts with external suppliers were rewritten; and
 - the BBC structure had been changed so that there was a senior manager on every divisional board with specific responsibility for editorial compliance and co-ordination.
- 8.12 The BBC said that it had told every member of staff that the kind of lapses that it had seen were "absolutely unacceptable" and that it would not tolerate them. It continued that everyone who was responsible for its output knew now, and better than they used to, that breaching trust with the audience would not be tolerated.
- 8.13 The BBC confirmed that it had taken disciplinary action in relation to every case before the Committee and that the matters had been taken seriously. It said that a range of disciplinary procedures had taken place within the BBC and that the "punishments" ranged from a verbal warning, a written warning, a final written warning and to what the BBC described as "left employment. However, for reasons of confidentiality it was unable to provide more specific details to the Committee.
- 8.14 In relation to a number of the cases before the Committee, the BBC submitted that the relevant programme-makers had not appreciated that they were running a competition. It said that there was now a definition of a "competition" within its guidelines and that alertness to competitions and the issues they raised had been heightened as a result of the steps it had taken.
- 8.15 Although it accepted, in principle, the imposition of a financial penalty in each of the cases before the Committee, the BBC submitted that the appropriate level of financial penalty was important. The reasons for imposing a financial penalty were, in its submission, two-fold. First, to incentivise the person on whom the financial penalty was imposed to seek to ensure that the breach was not repeated and, secondly, to act as a deterrent for others. The BBC submitted that there was no suggestion that it was any part of Ofcom's function to "punish". The BBC believed it had demonstrated in a concrete way to Ofcom that it needed no further incentive to "put its house in order." It submitted that acting as a deterrent for others "should be very much a lesser purpose". Furthermore, that it was hard to see how any fine imposed on the BBC would impact on any other organisations, given the BBC's particular circumstances. Finally, the BBC said that because it was funded by the

licence fee and not by commercial motivation, it was driven (and those who worked within it were driven) by reputation. Therefore, whilst it had accepted, in principle, that directions to broadcast statements of Ofcom's findings were appropriate in seven of the eight cases before the Committee, such directions were the most serious "punishments" that could be imposed on the BBC.

- 8.16 The BBC concluded its general representations to the Committee by stating that its senior managers (the Director General, the Deputy Director General (as Chair of the Editorial Standards Board), all the divisional directors and the channel controllers) had to continue to ask questions, be open to discussion, run proper compliance systems and review them regularly, think carefully about the implications of what their teams were doing and ensure their staff were properly trained and had the right principles. It said that every single person who made a BBC programme had to be absolutely sure that it was produced with "impeccable integrity" because otherwise its audiences, the licence-fee payers, understandably would not give the BBC their trust.

The BBC's specific representations regarding *Jo Whiley*

- 8.17 The BBC said that, following the emergence of the issues in *Jo Whiley*, it had instigated an Editorial Standards Working Group, within Radio 1, chaired by the Controller of Radio 1. In addition, there was a meeting every fortnight with the heads of Radio 1, 1 Xtra, the Asian Network and BBC Switch, at which a full range of compliance and editorial standards issues were signed off.
- 8.18 The BBC reiterated that all of Radio 1's staff had attended its "Safeguarding Trust" training. The Controller of Radio 1 said that he had taken all Radio 1's presenters through "Safeguarding Trust" himself to ensure that they understood the context of editorial standards in which they operated. The BBC said that the pool of individuals who Radio 1 employed regularly on a casual basis to cover permanent staff for annual and sick leave had been narrowed to an approved pool who had attended "Safeguarding Trust".
- 8.19 The BBC said that the number of competitions on Radio 1 had been significantly reduced. Currently, there was just one regular competition on Radio 1, which had been through the full editorial process for competitions which the Controller of Radio 1 had to sign off personally with the Head of Editorial Standards for Audio & Music.
- 8.20 The Controller of Radio 1 said that the BBC had "striven to create a first-class organisation". In 2005, a similar "Safeguarding Trust"-style workshop had been held for all Radio 1's staff and, in the autumn of 2006, the senior team for Radio 1 was restructured and a new post called the "Head of Editorial Standards" was created. The work force for Radio 1 was relatively young and new to the BBC. Along with a new induction process, the BBC had wanted to make sure that editorial standards and compliance issues were at the forefront of people's minds.
- 8.21 In relation to the failures to complete compliance forms for the partially pre-recorded and pre-recorded *Jo Whiley* programmes, the BBC said that the scheduling manager, who worked in the Controller of Radio 1's central team, would have entered the details of commissioned pre-recorded programmes into the compliance system. The Executive Producer and Producer of the programme were required to jointly sign off such programmes. The BBC said that it appeared that a mistake had been made, in that the programmes had

not been entered onto the system as pre-recorded programmes, so no compliance forms had been completed. The BBC said that it had changed its systems so that every programme now had to be entered onto the compliance system, whether or not it was pre-recorded, and all pre-recorded programmes would be flagged up.

- 8.22 On questioning from the Committee in relation to the 20 April 2006, partially pre-recorded programme, the BBC accepted that a higher proportion of children might have been listening than would usually listen to *Jo Whiley*, because it was broadcast during the Easter holidays. However, it said that it did not have any evidence to confirm this because data on audiences was not broken down for particular dates; however, the audience profile for *Jo Whiley* was slightly older than for Radio 1 in general.
- 8.23 In relation to the 12 May 2006 programme, the BBC said that the permission and authorisation to pre-record the programme would have been provided by Radio 1's Head of Programmes in a telephone conversation with the Executive Producer of *Jo Whiley*. The BBC said that the circumstances around that telephone conversation were that the Head of Programmes was concerned with the move of the whole of Radio 1 out of its headquarters and with Radio 1's biggest event of the year, the "Radio 1 Big Weekend". The BBC stated that it was a mistake that there was nothing in its compliance system to flag up that compliance details needed to be completed.
- 8.24 The BBC went on to say that in the 12 May 2006 programme there had been a mix of content. The emails broadcast as part of the *What Rox, What Sux?* item were genuine listener emails received earlier in the week. However, on questioning from the Committee, the BBC accepted that a 'text' read out by the presenter "*Also Andy, sunbathing in his garden at the moment – he said it was the perfect soundtrack to his Friday morning*" had been a mistake and that it had been an error of judgement on the part of the Producers to include it. Furthermore, the broadcast of the *Seven Song Shuffle* competition had been a mistake, where the Producers had not focused on the risk of and the breach of standards and the BBC's Editorial Guidelines.
- 8.25 In relation to the telephone number for entry to *Seven Song Shuffle*, which was broadcast in both programmes, the BBC said that if listeners had called it seeking to enter the competition they would have accessed a voice recognition system, which would have given a number of options, including going through to the studio. The Broadcast Assistant would have been present during the transmission of the pre-recorded programme but the BBC could not say whether any callers would have got through to the Broadcast Assistant or what they might have been told.
- 8.26 The BBC reiterated that the responsibility for the editorial compliance of *Jo Whiley* lay with the Producers. Although the presenter could have thought that the callers to *Seven Song Shuffle* in the 20 April and 12 May 2006 pre-recorded programmes were not genuine callers, she might have thought that the callers were individuals who had previously contacted the programme on previous occasions to take part in the competition. The 'winner' of the first part of *Seven Song Shuffle* in the 12 May 2006 pre-recorded programme had been such a caller.
- 8.27 In response to questioning from the Committee, the Controller of Radio 1 said that he had approved the wording of the apology regarding the 20 April 2006

programme broadcast on Wednesday 3 October 2007. He did not believe he had been aware of the 12 May 2006 programme when he approved the wording of the first broadcast apology. He said that Radio 1 had endeavoured to get the tone of the apology right so that listeners would feel that Jo Whiley was having a conversation with them and that he had tried to ensure that the relevant points were covered. The BBC said that, as a matter of preference, if a presenter remained in place, he/she would broadcast an apology in person.

Sanctions Decision

- 9.1 In reaching its decision, the Committee considered carefully all the written and oral submissions made by the BBC. The Committee decided, for the reasons set out below, to impose a financial penalty and to issue a direction requiring the BBC to broadcast a statement of Ofcom's findings on Radio 1 in relation to *Jo Whiley* in a form to be determined by Ofcom on two specified occasions. In deciding on an appropriate and proportionate level of financial penalty in this case, the Committee had regard to Ofcom's Penalty Guidelines⁷.

The seriousness of the breach

- 9.2 Having considered all the evidence and the BBC's representations, the Committee found that the breaches in this case were serious, deliberate and repeated, as set out at paragraphs 9.3 to 9.10 below.
- 9.3 The breaches of the Code involved the faking of 'winners' in a partially pre-recorded edition and a pre-recorded edition of *Jo Whiley*. The 20 April 2006 and 12 May 2006 programmes were then passed off as live. Listeners were actively encouraged to enter the *Seven Song Shuffle* competition in the programmes as broadcast, despite the fact that the production team knew that those listeners who entered would have no chance of winning, and the BBC deceived its audience. The BBC exists to serve the public interest⁸ and the Code breaches constituted a very significant breakdown in the trust between the BBC and its audience. In this regard, the Committee noted the BBC's unequivocal acceptance that, in this case, the breaches of the Code (and its own fundamental principle of straight dealing with its audience) were "absolutely unacceptable".
- 9.4 Breaches of the Code that result in the audience being deceived or materially misled have always been considered by Ofcom (and Ofcom's predecessor regulators) to be amongst the most serious breaches that can be committed by a broadcaster. The trust that the audience places in a broadcaster is essential to their relationship and the audience is entitled to believe when entering into a relationship of trust with a broadcaster that their trust is not misplaced. This is particularly pertinent in the case of the most long-standing public service broadcaster, the BBC, which has a relationship of trust with its radio audiences going back over 80 years.

⁷ Ofcom's Penalty Guidelines are available at <http://www.ofcom.org.uk/about/account/pg/>. Section 392 of the Act requires Ofcom to prepare and publish a statement containing guidelines it proposes to follow in determining the amount of any penalties imposed by Ofcom, which Ofcom must have regard to in setting any penalty.

⁸ Clause 3(1) of the Royal Charter. The Royal Charter, together with the Agreement between the BBC and the Secretary of State for Culture, Media & Sport, provides the constitutional basis for the BBC.

- 9.5 The Committee was very concerned by the repeated instances of pre-meditated, deliberate deception in this case. Ofcom noted that the decision to fake competition 'winners' in the 20 April 2006 programme had been made, at least in part, because of time pressure. The part of the programme containing the competition was pre-recorded at short notice. The BBC's evidence was that the Producer had decided to fake 'winners' during the pre-recording of the 20 April 2006 programme, on realising that the "programme's plan was facing potential collapse" because the *Seven Song Shuffle* competition could not be run as it normally would during a live broadcast. However, the decision to fake competition 'winners' in the 12 May 2006 programme, in particular, involved a greater degree of pre-meditation, in the Committee's view. Not only did it involve the faking of 'winners' in a pre-recorded programme, but it also involved the production team taking steps in advance of pre-recording to identify and secure the agreement of a listener to the programme broadcast the day before (11 May 2006) to pose as a 'winner'. In addition, in that programme, the inclusion of the *What Rox, What Sux* item contributed to the misleading impression that the programme was being broadcast live and, therefore, that those listeners who entered the *Seven Song Shuffle* competition would stand a fair and equal chance of winning.
- 9.6 A number of SMS entries were made to both the affected competitions by listeners, in the belief that they would stand a fair and equal chance of winning. In addition, a number of telephone entries would have been made to the affected competitions by listeners, in the belief that they would stand a fair and equal chance of winning, although the Committee noted that no data was available to ascertain the precise numbers of listeners who had entered by telephone. Because the 'winners' of the first and second parts of *Seven Song Shuffle* were faked by the production team and the programmes broadcast on 20 April and 12 May 2006 were pre-recorded, those listeners who entered the affected competitions stood no chance of winning.
- 9.7 Unlike other broadcasters, the BBC is funded directly by the public through the licence fee and it is not a commercial organisation. The telephony systems and methods in this case were designed to maintain call and SMS costs at the lowest practical levels for listeners and the BBC did not profit from the calls and text messages. However, whilst the BBC did not receive any money from the interaction with listeners, entry to the affected competitions still entailed some expenditure on the part of listeners. They had to pay the cost of a national rate 0870 call to their telephone provider in order to enter the first part of *Seven Song Shuffle*. For the second part of the competition, if they wished to enter by SMS (as opposed to email) they had to pay the cost of a local rate text message to their mobile phone service provider in order to enter. Therefore, entry to the first part of the competition by telephone and the second part of the competition by SMS was not "free". When *Seven Song Shuffle* was not conducted fairly, this was to the financial detriment of those listeners who had entered by telephone and/or SMS.
- 9.8 The Committee was concerned that the deliberate decisions to fake 'winners' in pre-recorded editions of *Jo Whiley* were taken with the full knowledge of and/or at the request of the Producer, who was responsible for the content of the programme and its compliance with the Code. On 20 April 2006, the Broadcast Assistant contacted a friend (also a member of BBC staff) to "play the part" of the 'winner' of the first part of the competition and, therefore, was complicit in the deception. For the 12 May 2006 programme, the production

team retained the name of a caller who had called to enter the 11 May 2006 competition to be the 'winner' of the first part of the competition. On both occasions, the 'winners' of the second part of the competition were fabricated by the production team. Therefore, a number of individuals were complicit in the deception.

- 9.9 The Committee noted that the Executive Producer of *Jo Whiley* was away and was not consulted in relation to the pre-recorded programme broadcast on 20 April 2006. The Executive Producer was aware of the decision to pre-record the 12 May 2006 programme, but had "no prior knowledge of how the *Jo Whiley* production team proposed handling the competition". On both occasions, the decisions to pre-record had been authorised by Radio 1's Head of Programmes, a senior manager, although he had "no role in the details of individual programmes, and had no prior knowledge of how the production team proposed handling the usual competition". Although the Committee noted that the Producer was "responsible" for the content of *Jo Whiley* and its compliance with the Code, it was of the view that there had been a lack of appropriate management, scrutiny, audit and oversight of the Producer by the Executive Producer and Radio 1's Head of Programmes.
- 9.10 Moreover, there were insufficient systems in place in April and May 2006 to prevent or identify the unfair conduct that occurred in this case. The unfair conduct of the competition in the 20 April 2006 programme only came to light because of an allegation made by a journalist in September 2007. The BBC's investigation that then followed identified the unfair conduct of the competition in the 12 May 2006 programme. In the Committee's view, neither would have come to light without the enquiry made by a journalist. The Committee was very concerned about the shortcomings and welcomed the steps taken by the BBC to seek to address the issues and prevent recurrence of similar breaches.
- 9.11 The Committee was of the view that due to the serious, deliberate and repeated nature of the breaches and compliance failures and the resulting harm caused to those listeners who entered the affected competitions in *Jo Whiley* by telephone and/or SMS, and the audience overall, this was a serious case, involving a fundamental breach of the audience's trust. Therefore, the Committee considered that the imposition of a significant financial penalty was warranted.

Precedent

- 9.12 In considering the appropriate level of financial penalty, the Committee took account of its previous decisions in cases relating to the unfair conduct of interactive competitions, as well as the specific representations made by the BBC. The Committee was satisfied that its decision as to the appropriate and proportionate level of financial penalty to be imposed in this case was consistent with previous cases, and reflected the particular circumstances of this case.

Incentive

- 9.13 In setting the level of financial penalty, the Committee took into account the fact that the BBC had taken wide-ranging steps to investigate and learn lessons from the breaches. In particular, in this case, the Committee noted that the BBC had sought to remedy the breaches by offering compensation to

all those who had entered the affected competitions by SMS. However, the Committee also noted that one of the purposes of imposing a financial penalty was to deter both the party involved and third parties from committing future breaches. In this case, the Committee considered that a significant financial penalty would represent an appropriate incentive to ensure compliance in the future.

Other specific criteria

- 9.14 The Committee considered that the following specific criteria, as set out in Ofcom's Penalty Guidelines, were relevant to adjust the starting figure of any financial penalty:
- 9.15 The Committee noted that the BBC had received no money from the affected competitions. It acknowledged the steps taken by the BBC to seek to compensate SMS entrants to these competitions.
- 9.16 The Committee considered that the harm to those listeners who entered the affected competitions and the audience of *Jo Whiley* overall was significant. The audience was deceived and materially misled by the BBC's deliberate and repeated unfair conduct of the *Seven Song Shuffle* competition. This was a significant breach of the audience's trust.
- 9.17 The Committee noted that the BBC is not a commercial broadcaster. Nonetheless, it is a large organisation with significant resource available to it.
- 9.18 The Committee noted that the breaches of the Code were not caused by any third party or any circumstances beyond the control of the BBC. It further noted that no penalty in respect of the same conduct had been imposed already by Ofcom or another body.
- 9.19 The Committee noted that the two breaches in this case occurred over a relatively short, 22-day period.
- 9.20 The Committee noted that Radio 1 is a mainstream, long-established BBC radio service and that, therefore, audience expectations in relation to its output are likely to be high. In addition, the Committee considered that the audience generally has high expectations for output transmitted by the BBC and, furthermore, it noted that Jo Whiley is an experienced presenter, who has presented programmes on Radio 1 since 1993 and who has a large following. The Committee noted that the average age of the audience of *Jo Whiley* was 33 and that, because of its scheduling, the audience did not normally include large numbers of children. However, the Committee also noted that the BBC had accepted that, given that the 20 April 2006 programme was broadcast during school holidays, a larger number of children might have been listening to this edition.

Level of penalty

- 9.21 Taking all these factors into account (and in light of the severity and repeated and deliberate nature of the breaches), the Committee considered that the 'starting figure' for any financial penalty should be significant. In considering the level of penalty, the Committee took into account that the maximum financial penalty that could be imposed on the BBC on any occasion was £250,000.

Factors tending to increase the level of penalty

- 9.22 The Committee then considered whether any of the factors set out in the Penalty Guidelines (or any other relevant factors) aggravated or tended to increase the level of any financial penalty it might impose.
- 9.23 The Committee considered that the contraventions were repeated. The faking of 'winners' in the *Seven Song Shuffle* competition occurred in two pre-recorded programmes over a relatively short period (22 days).
- 9.24 The Committee was strongly of the view that the BBC's senior management ought to have been aware that the breaches of the Code were occurring or would occur. Oversight, scrutiny and audit of the actions of the Producer of *Jo Whiley*, who was responsible for the programme's editorial compliance, and the production team overall, was insufficient. More specifically, on both occasions, there was a failure to complete the compliance form for pre-recorded programmes that was required under the BBC's own compliance procedures at the relevant time.
- 9.25 The Committee considered that, in April and May 2006, Radio 1's management, risk management and compliance process and procedures were inadequate to ensure the fair conduct of listener interactive competitions and compliance with the Code. How the listener interactive competitions were conducted was entirely within the control of the *Jo Whiley* production team. Moreover, because the necessary compliance forms were not completed and because the Executive Producer and Radio 1 Head of Programmes did not adequately oversee the actions of the Producer and production team of *Jo Whiley*, the fakery of competition 'winners' in partially pre-recorded and pre-recorded editions of *Jo Whiley*, over a relatively short period of time, went on un-noticed. The Committee noted that the deception had only come to light as a result of allegations made by a journalist and that there was no evidence to suggest that it would have come to light through the BBC's own procedures and monitoring. This was, in the Committee's view, unacceptable.

Factors tending to decrease the level of penalty

- 9.26 The Committee then considered whether any of the factors set out in the Penalty Guidelines (or any other relevant factors) in its view might limit or decrease the level of any financial penalty it might impose.
- 9.27 The Committee noted that the BBC had suspended all phone-in competitions and voting on 18 July 2007, while it implemented a comprehensive review of the relevant Editorial Guidelines and processes. Furthermore, the Committee noted that the BBC had carried out wide-ranging investigations into PRS and instances involving "audience deception" in its programmes.
- 9.28 The Committee noted that the BBC had put and was putting extensive new processes and procedures in place to seek to ensure that the same or similar failures were not repeated, including:
- Enhancing training programmes on editorial compliance across the BBC and implementing a mandatory training programme for staff called "Safeguarding Trust";

- Issuing new guidance and creating a new Code of Conduct in relation to competitions;
 - Setting up a new “Interactive Advice and Compliance Unit”;
 - Creating a new post of “Head of Editorial Standards in Radio 1” and setting up an Editorial Standards and Compliance steering group chaired by the Controller of Radio 1;
 - Where programmes are pre-recorded, taking care to avoid using any language that suggests to the audience that the show is being broadcast live; and
 - Requiring the Executive Producer and Producer of a programme to discuss content and any associated editorial dangers when a normally live programme is authorised to pre-record.
- 9.29 The Committee also noted that the BBC had sought to compensate SMS entrants to the affected *Jo Whiley* competitions.
- 9.30 The Committee noted that the BBC had made public the fact that there had been serious editorial failings in a number of its programmes, including *Jo Whiley* and that it had publicly apologised for the issues identified by its “trawls”. It also noted that apologies in relation to the 20 April and 12 May 2006 programmes were broadcast on 3 October 2007 and 25 January 2008 respectively. Whilst it noted the fact that specific apologies in relation to the affected *Jo Whiley* programmes had been broadcast, it considered that neither of the apologies adequately described the unfair conduct that had occurred and therefore they did not, in the Committee’s view, limit or tend to decrease the level of any financial penalty it might impose.
- 9.31 The Committee noted that the BBC had taken wide-ranging disciplinary action in relation to the issues identified in this case and others. Finally, the Committee noted that the BBC had cooperated in a full and frank manner with Ofcom’s investigation.

Conclusion

- 9.32 Cases where a broadcaster deceives or materially misleads its audience, whether knowingly or not, have always been considered to be amongst the most serious breaches of the Code by Ofcom (and its predecessor regulators).
- 9.33 The Committee was of the view that the breaches constituted a significant breakdown in the essential relationship of trust between a long-established public service broadcaster and its audience. Listeners had entered *Seven Song Shuffle* on 20 April and 12 May 2006 and invested trust in the BBC in the belief that they would have a fair and equal chance of winning. This trust was wholly misplaced.
- 9.34 This case involved serious failures by the BBC to comply with a basic requirement to conduct competitions fairly. This not only breached the Code, but also the BBC’s own Editorial Guidelines and its fundamental principle of straight dealing with its audiences. The BBC repeatedly deceived its

audience, in that it mis-conducted the same interactive listener competition on two separate occasions within a relatively short period of time.

- 9.35 The Committee was very concerned by the failure or ineffectiveness of the BBC's compliance, risk management and management procedures and the impact this had on the fair conduct of the *Seven Song Shuffle* competition. In this regard, the Committee welcomed the steps the BBC had taken to seek to address these inadequacies.
- 9.36 The Committee noted that the BBC had publicly apologised in general terms on several occasions for the breaches that occurred in this case and others. The Committee also noted the apologies broadcast on 3 October 2007 and 25 January 2008. However, the Committee noted that the apology broadcast on 3 October 2007 (for the 20 April 2006 programme) did not acknowledge that a fictitious name was used for the second part of the competition. Furthermore, that the apology broadcast on 25 January 2008 (for the 12 May 2006 programme) did not refer to the earlier breach. The Committee was of the view that the apologies broadcast neither fully described the unfair conduct that occurred nor apologised adequately for this. These were serious breaches, which involved deliberate, pre-meditated decisions to transmit competitions which listeners were encouraged to enter but which they would stand no chance of winning.
- 9.37 As set out above, in setting the level of the financial penalty to be imposed, the Committee had regard to the extensive steps taken by the BBC to seek to prevent recurrence and to the steps taken to seek to compensate SMS entrants to the affected competitions. The financial penalty could have been higher had the BBC not taken such wide-ranging action.
- 9.38 While recognising that any fine would be taken from monies paid by the public (the licence fee payer), the Committee noted that Parliament had decided that it was appropriate in certain circumstances for Ofcom to impose a financial penalty on the BBC (though at a lower threshold to other Public Service Broadcasters, i.e. set at a maximum of £250,000 on any occasion).
- 9.39 Having considered the relevant facts as outlined above and all the representations made by the BBC, the Committee decided to impose a financial penalty on the BBC of **£75,000** (payable to HM Paymaster General) which it considered to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed the BBC to broadcast a statement of its findings in relation to this case on Radio 1 in a form to be determined by Ofcom on two specified occasions.

Content Sanctions Committee

Philip Graf
Millie Banerjee
Joyce Taylor
Kath Worrall

30 July 2008