

Ofcom Content Sanctions Committee

Consideration of Sanction against	CHANNEL FOUR TELEVISION CORPORATION
For	Programme Code breaches in giving undue prominence to a commercial product in breach of section 8.4 of Ofcom's Programme Code (ex- ITC)
On	19 July 2004
Decision to Fine	£5,000 and Direction to transmit Ofcom's statement of finding

Summary of Decision

For the reasons set out in full in the Decision, the Ofcom Content Sanctions Committee found as follows:

1. Channel Four Television Corporation (Channel 4 Television) is licensed by Ofcom to run the service known as "Channel Four".
2. On 18 May 2004, the Richard and Judy show, on Channel Four, broadcast a videotape item and discussion on the dangers of excessive caffeine intake. On 19 July 2004, an apology and correction was given in the Richard and Judy show by Richard Madeley stating that there had been factual inaccuracies in the 18 May 2004 item. This was followed by a videotape item in which the benefits of caffeine were examined, with particular emphasis on the "caffeine energy drink" Red Bull.
3. Four viewers complained that the apology given on 19 July 2004 was followed by "what seemed like an advertisement for Red Bull with celebrity endorsements". One viewer described this as a "sponsored advert for the coffee and Red Bull industry". Another "was left wondering whether the item had been produced by the makers of Red Bull and whether the broadcast was made to avoid legal action". Channel 4 Television had admitted and Ofcom had recorded that the material broadcast on 19 July 2004 breached the Programme Code ("the Code"): section 8.4 (undue prominence). The matter was also referred to the Content Sanctions Committee ("the Committee") for consideration of a statutory sanction. The Committee invited Channel 4 Television to attend the Committee meeting to give oral representations if it wished but Channel 4 Television considered, having already given written representations, that this was not necessary. The Committee considered all the relevant material including the matters which Ofcom had raised in correspondence with Channel 4 Television and Channel 4 Television's written representations in response before deciding whether to impose a sanction and, if so, what level of sanction was appropriate.

4. Ofcom has a statutory duty to require compliance with its Code and consider the imposition of a statutory sanction, where a broadcaster has “repeatedly, deliberately or seriously” breached the Code. The Committee viewed the Code breach as sufficiently serious to merit the imposition of a statutory sanction. The material very clearly breached the Code and Channel 4 Television had admitted it was in breach of section 8.4 of the Code.
5. In this case, the Committee considered that whilst the broadcast of 19 July 2004 was clearly intended to make amends for the errors contained in the earlier broadcast, Channel 4 Television had demonstrated uncharacteristically poor judgement resulting in what appeared to be, at the very least, a loss of editorial control. This culminated in the distinct impression that the programme had come under external commercial influence, giving Red Bull undue prominence, both in the number of direct references to that product and also in the use of an “expert” and sporting personalities linked to the product and extolling the benefits of caffeine and Red Bull.
6. Whilst the Committee took into account Channel 4 Television’s overall good compliance record (particularly given its statutory remit to innovate), it also noted that it had been found in breach in 2003 in relation to material broadcast on the Richard and Judy programme (which had been found to be misleading). On that occasion Channel 4 Television had not been subject to any sanction.
7. The Committee also took into account Channel 4 Television’s admission that, on this occasion, it had breached the Code albeit that it did not consider the breach serious enough to merit any sanction.
8. Taking all relevant factors into account, the Committee determined that the Code breach was sufficiently serious that a sanction by way of a financial penalty was necessary together with a direction to broadcast a statement of Ofcom’s finding. The applicable statutory maximum is a fine of 5 per cent of Channel 4 Television’s qualifying revenue, payable to Ofcom for forwarding to The Treasury. The Committee considered that, in view of the seriousness of the infringement and taking into account all the circumstances, an appropriate fine was £5,000.

DECISION

1. The Ofcom Content Sanctions Committee (the Committee) met to consider whether to impose sanction(s) on Channel Four Television Corporation (Channel 4 Television) for breaching Ofcom's Programme Code, formerly the Programme Code of the Independent Television Commission ("the Code") by giving undue prominence in the Richard and Judy programme on 19 July 2004 to Red Bull, a commercial product, contrary to section 8.4 of the Code.

The need to consider sanctions

2. Channel 4 Television is licensed by Ofcom to provide the service known as "Channel Four". The licence requires Channel 4 Television to comply with the Code. One of the requirements of the Code is that no undue prominence may be given in any programme to a commercial product or service. In particular, the Code requires that any reference to such a product or service must be limited to what can clearly be justified by the editorial requirements of the programme - an important yardstick being that no impression be created of external commercial influence on the editorial process. One of the reasons for this rule is to ensure that programmes are not distorted for commercial purposes and that, where commercial interests of a third party are involved, broadcasters retain editorial control of their output.
3. On 18 May 2004, the Richard and Judy show transmitted a videotape item and discussion on the dangers of excessive caffeine intake (the caffeine item). The piece appeared to have been prompted by the death of a young man in a car accident. He had taken no alcohol or drugs on the night of his death but had drunk four cans of Red Bull (referred to in the programme as "a caffeinated energy drink") during the evening. This had resulted in what the Coroner called a "significantly high" amount of caffeine in his body. The Coroner had called for drink-drive limits on caffeine intake. The caffeine item had inputs from Dr David Bull, a regular "TV Doctor" and Dr Sarah Schenker, from the British Nutrition Foundation. A series of vox-pops early in the item seeking views on caffeine intake via energy drinks and coffee revealed a number of side-effects. An 'exercise' was also conducted to try to assess the effects of excessive caffeine intake on driving ability. The exact amounts of caffeine the participants consumed for the exercise were not specified. However in the discussion that followed, it was clear that it was high (i.e. four cans of a caffeinated drink in a short space of time and on top of other caffeine intake such as coffee, tea or chocolate). A statement at the end of the caffeine item was presented as a response from Red Bull. The statement appeared to have been sought by the production team expressly in response to the editorial line taken by the programme.
4. The average person's daily tolerance of caffeine was assessed by Dr Schenker at around 400mg per day. Dr Schenker's contribution, and the report as a whole,

focussed on what could happen if a person exceeded this limit or their own personal caffeine tolerance - something which could occur without the person's awareness if, after a day drinking coffee, they then drank a number of caffeinated energy drinks in the evening.

5. There were four commercial examples of energy drinks displayed in the studio: V-Energy, American Bull, Red Bull and Purdeys. Only the first three of these contained caffeine (80mg per 250ml can in the case of V-Energy and Red Bull). Purdeys is fruit-based and caffeine-free. The packaging on V-Energy recommended a maximum intake of two cans a day though this was not visible or referred to in the programme.
6. In the 19 July 2004 edition of the Richard and Judy show, Channel 4 broadcast, through Richard Madeley, an apology and correction to the 18 May 2004 caffeine item stating that it had contained factual inaccuracies. The statement was as follows:

"And now we have to come to you with a serious apology. On the 18 May we reported incorrectly on caffeine and energy drinks, specifically in relation to driving. Unfortunately, we gave you the wrong information about the amount of caffeine in the energy drink Red Bull. In fact, one can of Red Bull has the same amount of caffeine as one cup of filtered coffee. We also did not involve either the industry or independent experts to highlight the benefits of caffeine so we didn't present a balanced report. So hands up, our research team made a mistake which meant we unintentionally misled you. Now caffeine has been around for hundreds of years and is familiar to generations in the form of tea and coffee. It's now available to us through energy drinks such as Red Bull, power bars and other products. Billions of people have been taking caffeine for centuries and many experts maintain that caffeine and caffeinated drinks in moderation are beneficial in many different situations. Here's how people use caffeine in today's world."

The programme of 18 May 2004, also incorrectly attributed to Red Bull a "response" to the caffeine item. In fact this "response" was neither made by Red Bull nor was it in response to the caffeine item but, in fact, was lifted from an article written by a third party. This error of fact was not corrected by Richard Madeley in his 19 July 2004 apology.

7. Following the oral apology was a videotape in which a number of contributors spoke about the benefits of caffeine as a stimulant. Red Bull was specifically named and recommended four times (as well as other visual references being made to it). Tea and coffee generically were mentioned as sources of caffeine but coffee was disparaged - "you can't tell ...how much caffeine is in it" and "the instant stuff from the machine...is horrible".
8. Furthermore, these contributors ("experts" and others) appeared to have some connection to Red Bull:
 - The most obvious of these was Dr Louise Reyner who, according to the Loughborough University website, received a research grant of £52,962 from Red Bull GmbH in 2002. She said in the videotape: "...an energy drink such as Red Bull is particularly good because it's always got 80mg of caffeine and we're recommending that people

take about 160mg of caffeine....So that equates to two cans...". Internet sources note her talking about the benefits of Red Bull on other occasions.

- The racing driver, Johnny Herbert, was associated with Red Bull through racing for the Red Bull Sauber Ford F1 team in 1996 and the Red Bull Sauber Petronas F1 team in 1997 and 1998.
- The golfer, Paul Casey, is seen in the videotape drinking Red Bull. Paul Casey says: "...Red Bull really assists me in keeping sharp and alert". At the time of Ofcom's investigation, there was a picture of the golfer Paul Casey drinking Red Bull on the company's website. Red Bull is active in golf to the extent of having a "Communications Manager for Golf".

9. After the broadcast of the 19 July 2004, four viewers complained that the apology in the 19 July 2004 Richard and Judy show was followed by "what seemed like an advertisement for Red Bull with celebrity endorsements". One viewer described this as "a sponsored advert for the coffee and Red Bull industry" and another "was left wondering whether the item had been produced by the makers of Red Bull and whether the broadcast was made to avoid legal action".
10. During an investigation, Channel 4 Television explained that due to the inaccuracies in the original caffeine item, and objections raised by Red Bull in relation to those inaccuracies and the fact that its company had not been given an opportunity to contribute to the debate and respond to the criticisms made, there needed to be a follow up item. Channel 4 Television considered this item would need to rectify the inaccuracies and provide an alternative and balancing perspective which would give Red Bull the opportunity to present its arguments on the issue of caffeine in the context which the caffeine item had raised. Channel 4 Television argued that, to achieve this, it was essential that Red Bull was identified by name as it was the product that had been featured prominently and identified in the original May item. However, whilst, at the time of broadcast, Channel 4 Television had been satisfied editorially and in terms of compliance that the July item was a "considered and measured way to resolve the issues of accuracy and fairness", it acknowledged that, despite its best efforts, some viewers clearly had received the impression of external commercial influence on the editorial of the programme. On that basis it accepted that the item broadcast on 19 July 2004 was in breach of section 8.4 of the Code.
11. Ofcom accordingly found Channel 4 Television in breach of the Code and referred the matter for consideration to the Committee. The Committee met on Monday 25 July 2005 to consider the matter and the written representations made by Channel 4 Television in relation to the possible imposition of sanction(s) for breaching the Code.

Relevant Considerations

12. In reaching a decision about whether to impose a sanction and if so, at what level, the Committee took into account Channel 4 Television's written representations including that the Code breach was not sufficiently serious to merit any sanction, that this was a difficult and unusual case; that given Red Bull was the only product to be named in the May item; limited references to Red Bull were justified in the July item; that Channel 4 Television had worked hard to avoid any suggestion of external commercial influence; that it was necessary in view of the serious errors made to discuss in the follow up item the potential

positive impact of caffeine and that Channel 4 Television; and the production company had retained editorial control throughout.

13. However, the Committee considered the breach of the Code, which was admitted by Channel 4 Television, as serious and sufficiently serious to merit the imposition of a sanction. The Committee acknowledged that the broadcast of 19 July 2004 was clearly intended to make amends for the errors contained in the earlier broadcast. However, in the Committee's view, the breach demonstrated uncharacteristically poor judgement resulting in what appeared to be, at the very least, a loss of editorial control. This culminated in the distinct impression that the programme had come under external commercial influence, giving Red Bull undue prominence, both in the number of direct references to that product and also in the use of an "expert" and sporting personalities linked to the product and extolling the benefits of caffeine and Red Bull. The Committee also noted that Channel 4 Television had failed to respond to a number of questions put to it by Ofcom, in particular in relation to the connections between the academic and sporting figures and Red Bull (as outlined in paragraph 8 above).
14. The Committee also took into account Channel 4 Television's overall good compliance record, particularly given its statutory remit to innovate. However, it noted that there had been previous breaches of the Code, in the Richard and Judy show, in relation to an item which the previous regulator (the Independent Television Commission) considered had not been fairly or accurately presented. On that occasion, no sanction was imposed.

Appropriate Sanction

15. Taking all the relevant considerations into account, the Committee determined that a sanction by way of a fine was appropriate and necessary, and that Channel 4 Television should also be directed to broadcast Ofcom's statement of finding in a manner and at a time determined by Ofcom.
16. Under the Communications Act 2003, a financial penalty for Channel 4 Television may not exceed 5 per cent of Channel 4 Television's qualifying revenue. Once received by Ofcom, any fine is forwarded to the Treasury. The Committee considered that a fine in the sum of £5000 was both appropriate and proportionate.

Conclusion

17. For seriously breaching the Code by transmitting material, in the Richard and Judy show on 19 July 2004, giving undue prominence to a commercial product, Channel 4 Television is fined £5000 and directed to broadcast Ofcom's statement of finding in a form and at a time to be determined by Ofcom.

Content Sanctions Committee

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3 August 2005