

Ofcom Content Sanctions Committee

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| Consideration of sanction against | ITV2 Limited (“ITV2 Ltd” or the “Licensee”), in respect of its service ITV2+1. |
| For | <p>Breaches of the Ofcom Broadcasting Code (the “Code”) of:</p> <p>Rule 2.2: “Factual programmes or items or portrayals of factual matters must not materially mislead the audience.”</p> <p>Rule 2.11: “Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.”</p> <p>Relating to the following conduct:</p> <p>1) Failure to inform viewers on 28 occasions that interactive competitions had concluded in repeat broadcasts of four interactive quiz show programmes (<i>Playalong, The Mint, Make Your Play</i> and <i>Glitterball</i>).</p> <p>2) Failure to inform viewers of three repeat broadcasts of an interactive dating programme (<i>Playdate</i>) that the programme was not live and interactivity was no longer available.</p> |
| Between | 12 December 2006 to 24 October 2007 (inclusive) |
| Decision | To impose a financial penalty (payable to HM Paymaster General) of £275,000 . |

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 a statutory sanction on ITV2 Ltd in light of the serious nature of its failures to ensure compliance with the Ofcom Broadcasting Code (the "Code").
- 1.2 This adjudication under the Code relates to 31 repeat broadcasts of *Playdate*, *Playalong*, *The Mint*, *Make Your Play* and/or *Glitterball* on ITV2+1 between 12 December 2006 and 24 October 2007 (inclusive).
- 1.3 *Playdate*, *Playalong*, *The Mint*, *Make Your Play* and *Glitterball* (each a "programme" and together the "programmes") were all broadcast live on ITV2 on various occasions between 12 December 2006 and 24 October 2007 (the "relevant period"). ITV2+1 re-broadcasts all of ITV2's output with a delay of one hour. Therefore, one hour after broadcast on ITV2, the programmes were repeat-broadcast on ITV2+1, when they were no longer live. Normally, when programming involving a time-critical vote or competition element or some other form of live interactivity is broadcast on ITV2+1, it is captioned to inform viewers that the output is not live and that telephone lines are closed (and/or the telephone number is obscured).
- 1.4 During the relevant period, on 31 occasions, one of the programmes was broadcast on ITV2+1 without, in each case, a caption indicating that the relevant programme had been broadcast earlier on ITV2 and that the viewer interactive competitions (in the case of *Playalong*, *The Mint*, *Make Your Play* and *Glitterball*) or live interactivity (in the case of *Playdate*) had already concluded. However, the PRS entry routes to participate in the programmes remained open and anyone who called was still charged.
- 1.5 Ofcom launched an investigation after a viewer contacted Ofcom in relation to the broadcast of *Make Your Play* on ITV2+1 on 16 March 2007, without the necessary "lines closed" caption. After calling the number on screen, he had heard a recorded message informing him that the lines were closed but that he would still be charged for the call.
- 1.6 ITV2 Ltd admitted that the usual caption had not appeared in the broadcast of *Make Your Play* on ITV2+1 on 16 March 2007, due to human error. Following further investigations, ITV2 Ltd informed Ofcom of 30 further occasions on which the usual caption had not appeared in repeat broadcasts of *Make Your Play* and the other programmes on ITV2+1

Summary of the Committee's Findings

- 1.7 On 31 occasions, programmes that repeatedly and very frequently invited viewers to pay to interact had been repeat broadcast by ITV2 Ltd on ITV2+1. On these occasions, ITV2 Ltd failed to adequately inform viewers that the viewer interactive competitions had included or that live interactivity was no longer available. On the basis of ITV2 Ltd's estimates, approximately 2,400 viewers had called or sent SMS or MMS messages in response to the repeat broadcasts of the affected programmes, without any chance of winning or interacting.

- 1.8 It is important, when a former live competition or a programme featuring live interactivity is re-run and it is no longer possible for the audience to participate by ringing the number given on air, that this is made absolutely clear to the audience. In this case, ITV2 Ltd's failure to take sufficient steps to ensure that viewers would not call and seek to participate in the affected programmes using PRS, demonstrated a lack of proper regard by ITV2 Ltd for the potential for significant financial detriment to the viewers who participated.
- 1.9 Ofcom was very concerned by ITV plc's admission that ITV2+1 had been launched without sufficiently robust controls to ensure compliance with the Code in the area of repeat broadcasts of viewer interactive competitions and other viewer interactive programmes. It should have been easily foreseeable that there was scope for human error in the "manual intervention" that was required to apply "lines closed" captioning (until an automated system was introduced in May 2007). Ofcom was of the view that it would have been prudent either for additional checks to have been implemented or for the process to have been entirely automated from the outset. Both of these steps were, in fact, taken by ITV2 Ltd at a much later stage, following the announcement of the Deloitte Review on 5 March 2007 and two failures that then occurred on 16 and 22 March 2007.
- 1.10 Ofcom was also concerned by inadequacies in ITV2 Ltd's compliance and risk management procedures and its reporting lines. They were, in Ofcom's view, ineffective to ensure compliance with the Code in this area between, at least, 12 December 2006 and 16 March 2007 and ITV2 Ltd was reckless as to the consequences. This was evidenced by the fact that ITV2 Ltd's senior management were not aware of the failures that occurred contemporaneously or shortly after they occurred.
- 1.11 Ofcom noted that ITV plc had voluntarily suspended the use of PRS across all ITV programming from 6 March 2007, pending independent scrutiny by Deloitte, after ITV first became aware of allegations in relation to the use of PRS in an ITV series. However, in this case, two breaches occurred later in March 2007, presumably shortly after ITV Play programming had been "cleared" by Deloitte. Ofcom also noted that ITV had engaged Deloitte to carry out a comprehensive, independent review of PRS across all ITV programming and that Deloitte had made wide-ranging inquiries.
- 1.12 Ofcom considered that the steps ITV plc had taken to remedy the issues (including the consequences of the breaches in this case) were wide-ranging and timely. These included:
- Implementing an extensive reimbursement scheme following completion of the Deloitte Review and promoting the reimbursement scheme through one press announcement (on 18 October 2007), on ITV's website and in a number of broadcast announcements;
 - Extending the reimbursement programme in respect of the affected ITV2+1 programmes very widely to over 33,000 entries, when ITV2 Ltd estimated that the number of entries that had actually been affected was approximately 2,400;

- Donating a total of £7.8 million to the Charities Aid Foundation in respect of all PRS issues (approximately £142,500 of this sum related to the affected or potentially affected ITV2+1 transactions); and
 - Introducing a range of practical procedures and re-structuring to seek to avoid recurrence of the same or similar issues and to guard against systems or editorial failures.
- 1.13 The financial penalty would have been at an increased level had ITV/ ITV2 Ltd not taken such wide-ranging action.
- 1.14 In summary, cases where a broadcaster has materially misled its audience, whether knowingly or not, have always been considered by Ofcom (and its legacy regulators) to be amongst the most serious breaches of the Code. This case involved ITV2 Ltd repeatedly failing to ensure that viewers were not misled by the absence of “lines closed” captioning in repeat broadcasts of programmes containing PRS viewer interactive elements.
- 1.15 Having considered the relevant facts as outlined above and all the representations made by ITV2 Ltd, the Committee decided to impose a financial penalty on ITV2 Ltd of **£275,000** (payable to HM Paymaster General) which it considered to be a proportionate and appropriate penalty in all the circumstances.

Introduction

- 2.1 ITV2 Ltd has held a licence to broadcast its service, ITV2, as a digital television programme service (broadcast on Freeview) since 13 November 1998. Under this licence, it is also able to transmit its parallel service, ITV2+1, on Freeview. ITV2 Ltd has also held a licence to broadcast ITV2 as a cable and satellite service since 16 November 2001. Again, it is able to transmit its parallel service, ITV2+1, on cable and satellite under this licence.
- 2.2 *Playdate*, *Playalong*, *The Mint*, *Make Your Play* and *Glitterball* were all broadcast live on ITV2 on various occasions between 12 December 2006 and 24 October 2007. ITV2+1 re-broadcasts all of ITV2's output with a delay of one hour. Therefore, one hour after broadcast on ITV2, the programmes were repeat-broadcast on ITV2+1, when they were no longer live. Normally, when programming involving a time-critical vote or competition element or some other form of live interactivity is broadcast on ITV2+1, it is captioned to inform viewers that the output is not live and that telephone lines are closed (and/or the telephone number is obscured).
- 2.3 Brief descriptions of the programmes are set out below:
 - 2.3.1 *Playdate* was an interactive dating programme: single people of both sexes were invited into the studio and viewers were invited to call in on a premium rate services ("PRS") telephone line and talk with the studio guests at a cost of 60 pence per minute from a BT landline. Viewers were also invited to send text ("SMS") and picture ("MMS") messages to the studio guests at a cost of 60 pence per message plus standard network charges. On-screen graphics promoted the contestants and verbal "calls to action" were also made. The frequency of "calls to action" varied according to the running order of the programme, but averaged around once per minute. The programme also featured video items showing how the dating service operated.
 - 2.3.2 *Playalong* was a fully automated, interactive quiz show programme, in which viewers were invited to participate in competitions by sending SMS messages, at a cost of 75 pence per message plus standard network charges. On-screen information in relation to entry was automated by means of a ticker/ crawler caption which provided entry information once every 30 seconds and by on-screen graphics which provided entry information. "Calls to action" were also voiced over approximately three times every minute.
 - 2.3.3 *The Mint* was a late-night programme which featured live, interactive studio games, call games, puzzles, stunts and events. Viewers were invited to enter competitions by calling a PRS telephone line at a cost of 75 pence per call from a BT landline, sending a SMS message at a cost of 75 pence plus standard network charges or entering through the www.itv.com website (free entry). A ticker/ crawler caption rotated information on entry and costs, delivering each item of information approximately once every minute. Verbal "calls to action" varied, depending on presenter style and the game being played, but on average one was made between once and three times per minute.

- 2.3.4 *Make Your Play* was an interactive game show programme, in which viewers were invited to participate by calling a PRS telephone line at a cost of 75 pence per call from a BT landline, sending a SMS message at a cost of 75 pence plus standard network charges or entering through the www.itv.com website (free entry). A ticker/ crawler caption rotated information on entry and costs, delivering each item of information approximately once every minute. Verbal “calls to action” varied, depending on presenter style and the game being played, but on average one was made between once and three times per minute.
- 2.3.5 *Glitterball* was a live, late night, interactive quiz show programme, in which viewers were invited to participate by calling a PRS telephone line at a cost of 75 pence per call from a BT landline, sending a SMS message at a cost of 75 pence plus standard network charges or entering through the www.itv.com website (free entry). A ticker/ crawler caption rotated information on entry and costs, delivering each item of information approximately once every minute. Verbal “calls to action” varied, depending on presenter style and the game being played, but on average one was made between once and three times per minute.
- 2.4 During the relevant period, on 31 occasions, one of the programmes was broadcast on ITV2+1 without, in each case, a caption indicating that it had been broadcast earlier on ITV2 and that the viewer interactive competitions (in the case of *Playalong*, *The Mint*, *Make Your Play* and *Glitterball*) or live interactivity (in the case of *Playdate*) had already concluded. However, the PRS lines remained open and anyone who called was still charged.
- 2.5 Ofcom launched an investigation after a viewer contacted Ofcom in relation to the broadcast of *Make Your Play* on ITV2+1 on 16 March 2007, without the necessary “lines closed” caption. After calling the number on screen, he had heard a recorded message informing him that the lines were closed but that he would still be charged for the call.
- 2.6 ITV2 Ltd admitted that the usual caption had not appeared in the broadcast of *Make Your Play* on ITV2+1 on 16 March 2007, due to human error. Following further investigations, ITV2 Ltd informed Ofcom of 30 further occasions on which the usual caption had not appeared in repeat broadcasts of *Make Your Play* and the other programmes on ITV2+1

Effect of the unfair conduct

- 2.7 ITV2 Ltd has accepted that the broadcast of the programmes on 31 occasions during the relevant period without the usual caption informing viewers that the programme had been broadcast earlier and that the live interactivity had already concluded breached the Code. ITV2 Ltd’s gross revenue raised by the affected transactions was £94,973. ITV2 Ltd has donated £142,500 to the Charities Aid Foundation in respect of the affected transactions. It has also made a small number of reimbursements to those viewers who claimed under ITV plc’s reimbursement scheme.

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) of the Act).
- 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) of the Act) 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) of the Act).
- 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) of the Act); 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) of the Act).

The Human Rights Act 1998

- 3.5 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”).
- 3.6 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).

- 3.7 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.

Ofcom Broadcasting Code

- 3.8 Standards set by Ofcom in accordance with section 319 of the 2003 Act are set out in Ofcom's Broadcasting Code (the "Code") which came into force on 25 July 2005¹.
- 3.9 Accompanying Guidance Notes² to each section of the Ofcom Code are published and, from time to time, updated on the Ofcom website. The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Code.
- 3.10 The relevant provisions of the Code are Rules 2.2 and 2.11, which state:

Rule 2.2:

"Factual programmes or items or portrayals of factual matters must not materially mislead the audience".

Rule 2.11:

"Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known".

Licence Condition

- 3.11 Under section 325 of the Act, every programme service licensed by a Broadcasting Act licence includes conditions for securing that the standards set by Ofcom under section 319 are observed. If Ofcom is satisfied that the holder of a licence has contravened a condition of the licence, it may impose one or more of a number of penalties.

Remedies

- 3.12 Section 236 of the Act provides Ofcom with the power to direct cable and satellite programme services licensees to broadcast a correction or statement of findings or not to repeat a programme on contravention of a licence condition.
- 3.13 Section 23 of the Broadcasting Act 1996 (as amended) (the "1996 Act") and section 40 of the Broadcasting Act 1990 (as amended) (the "1990 Act") provide that Ofcom has the power to direct digital television programme services licensees to broadcast a correction or statement of findings or not to repeat a programme on contravention of a licence condition.
- 3.14 Section 237 of the Act provides Ofcom with the power to impose a financial penalty on a cable and satellite services licence holder of a maximum of

¹ The Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

² Guidance Notes can be found at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/>

whichever is the greater of £250,000 or 5% of the licensee's qualifying revenue for its last complete accounting period.

- 3.15 Section 23 of the 1996 Act provides Ofcom with the power to impose a financial penalty on a digital television programme services licence holder of a maximum of whichever is the greater of £250,000 or 5% of the total amount of the shares of multiplex revenue attributable to the licensee in relation to multiplex services in respect of the licensee's last accounting period.
- 3.16 Section 238 of the Act provides Ofcom with the power to revoke a cable and satellite services licence if, following due process, Ofcom is satisfied that revocation is necessary in the public interest.
- 3.17 Section 23 of the 1996 Act and section 42 of the 1990 act provide Ofcom with the power to revoke a digital television programme services licence if, following due process, Ofcom is satisfied that revocation is necessary in the public interest.

Regulation of Premium Rate Services (“PRS”)

- 3.18 Providers of PRS are separately regulated by PhonepayPlus, the industry-funded regulatory body for all premium rate charged telecommunications services. It regulates in respect of the content, promotion and operation of PRS. In particular, PhonepayPlus' Code of Practice requires: clear and accurate pricing information and honest advertising and service content. PhonepayPlus has the power to impose sanctions for any breach of its Code by the person/body operating PRS.

Background

- 4.1 Ofcom carried out an investigation into the failure by ITV2 Ltd to apply “lines closed” captioning to (or to ensure it appeared on) repeat broadcasts of the programmes on ITV2+1, as summarised below. During that investigation, ITV2 Ltd was given the opportunity to make written submissions on the case. In light of the evidence and ITV2 Ltd's responses, Ofcom concluded that ITV2 Ltd's failure to apply “lines closed” captioning (or to ensure it appeared) on 31 separate occasions was in breach of the Code, as outlined above and explained further below.
- 4.2 In addition, Ofcom found the breaches to be sufficiently serious to warrant the referral of the case for the consideration of the Committee. Throughout the consideration of the imposition of a statutory sanction, ITV2 Ltd was given opportunities to make written and oral representations, which are summarised below.

Ofcom's Investigation

- 4.3 Ofcom launched an investigation upon receipt of a viewer complaint concerning the repeat broadcast of *Make Your Play* on ITV2+1 on 16 March 2007. Ofcom initially asked ITV2 Ltd for its comments on the matter with reference to Rules 2.2 and 10.10 of the Code. It also asked ITV2 Ltd to confirm the number of affected transactions and how much in total had been spent by viewers on the affected transactions.

- 4.4 ITV2 Ltd's first response to Ofcom stated that "from [March 2007, when ITV2+1 commenced broadcasting on Freeview] systems [had] been in place to ensure that programming which include[ed] a time-critical vote or competition element [was] captioned – very clearly – to tell the viewer the programme [was] a recording/ was broadcast earlier and phone lines [were] now closed." However, ITV2 Ltd admitted that there had been two occasions since the Freeview launch of ITV Play programming on ITV2+1 on which a systems failure had led to the necessary "lines closed" captioning not appearing on screen.
- 4.5 On 16 March 2007, human error had meant that correct data were not entered into part of the transmission system, which meant that the automated system did not record the caption onto the programme feed at the point at which it entered the "delay box". It had not been possible to add the caption to the signal as it went to air as to have done so would have prompted an automatic shutdown of the channel.
- 4.6 ITV2 Ltd said that there was no means of differentiating callers to *Make Your Play* by channel; there was nothing in the call data stream to show whether viewers were watching ITV2 or ITV2+1. It said that approximately 80% of viewers did not enter the competitions and viewed for entertainment and to play along at home. However, ITV2 Ltd said the audience on ITV2+1 was very small at the time at which *Make Your Play* was broadcast and it was "hard to imagine" why those who did wish to enter would go to ITV2+1 rather than ITV2. ITV2 Ltd considered it was reasonable to assume that very few, if any, of the callers during the real-time run of the "source" programme would have come from ITV2+1, which was borne out by the fact that while *Make Your Play* was still running ITV2 Ltd did not have callers coming through to air an hour late.
- 4.7 Notwithstanding the above, ITV2 Ltd said that it had decided that the appropriate course of action was not to try to apportion the audience between ITV2 and ITV2+1 because there was no way of determining the audience shares definitively. Instead, it had decided to contact, wherever possible, all 2,714 callers who could potentially have entered *Make Your Play* as a result of watching the broadcast on ITV2+1, in order to offer refunds or a donation to charity.
- 4.8 As a result of the incident on 16 March 2007, ITV2 Ltd set about re-designing the process and developing and testing technology solutions aimed at avoiding recurrence. During this process, real-time checks on the ITV2+1 output were implemented in the production gallery.
- 4.9 On 22 March 2007, ITV2 Ltd stated that there had been a further error in data handling which resulted in the necessary "lines closed" caption not appearing. This error was spotted quickly because of the gallery checks that had been implemented as a result of the error on 16 March 2007. On this occasion, ITV2 Ltd had taken ITV2+1 off air promptly. ITV2 Ltd said that it was not aware of any viewers having called in error and, therefore, there was no call to refund in respect of this occasion.
- 4.10 ITV2 Ltd said that as a result of the incident on 22 March 2007 efforts to perfect revised process and technology were redoubled and "the most intense scrutiny" was applied to human intervention processes in the meantime. ITV2

Ltd said that the revised approach and equipment had been rigorously tested and validated. It had then been deployed in May 2007.

- 4.11 Subsequently, ITV2 Ltd wrote to Ofcom to state that, following a wide-ranging review, it had become aware of 29 further occasions on which programmes had gone to air on ITV2+1 without the necessary “lines closed” captions. Twenty-nine of the total 31 failures had resulted from a manual failure to insert a “flag” in the schedule which would have triggered the insertion of the caption on air.
- 4.12 ITV2 Ltd said that there had been two instances on which technical failures had meant that the necessary “lines closed” captioning had not appeared. On 16 August 2007, the caption was omitted for 15 minutes on Sky and for 45 minutes on Freeview as a result of technical breakdown. This “technical breakdown” failure was of a different nature to the previous incidents. Following its occurrence, ITV took a number of steps to prevent recurrence of the same or similar technical breakdown failures. Then, on 24 October 2007, another different technical failure occurred and the last eight minutes of *Make Your Play* “burst through” the captioning, which had been applied. One viewer had called during this eight minute period and he/ she had been refunded. Following the failure on 24 October 2007, ITV plc had decided that the removal of ITV Play programming from the ITV2 schedule was necessary and the responsible course, and that a re-evaluation of transmission technology and process would be needed before time-critical programming could return to any ITV “+1” channel. The final broadcast of ITV Play/ Call TV programming on ITV2 occurred on the night of 30 to 31 October 2007.
- 4.13 ITV2 Ltd said that approximately 49 hours of programming had been affected in total. It said the over-arching reasons for failure on this scale were that the ITV2+1 channel had been launched in October 2006 without sufficiently robust controls to guarantee that exceptional compliance and regulatory requirements could be successfully implemented on transmission, pro-active monitoring to ensure the necessary captions were in place on air and effective procedures to take a programme off air in the event of a broadcast compliance failure. This had been compounded by inadequate management controls within the scheduling operations team, which had been ineffective in dealing with the process failure when it was first identified. ITV2 Ltd said that the issues it faced were confined to the repeat broadcasts of ITV Play programming on ITV2+1. Otherwise, ITV2 Ltd’s compliance record was extremely good.
- 4.14 ITV2 Ltd said that ITV Play had notified ITV Broadcasting on 31 January 2007 that an ITV2+1 viewer had complained to ITV Play about the absence of a blanking caption on *The Mint*, broadcast on ITV2+1 on 30 January 2007. The issue had been handled by the manager in charge of the relevant day-to-day schedule operations, who had spoken to all the schedulers concerned and re-emphasised the need for rigorous application of the relevant manual flags. The scheduler responsible for the failure on 30 January 2007 had volunteered to ITV Play that the failure had not been an isolated event: there had been occurrences during the preceding week. Regrettably, the issue had been treated by the scheduling team as a “standard error” and it had not been escalated further. No formal investigation of the extent of prior failure had been undertaken at that time and ITV Compliance had not been informed. ITV2 Ltd admitted this represented a failure in management controls, which

had meant that more effective action being taken against recurrence was precluded.

- 4.15 ITV2 Ltd said it had made reparation in respect of any viewers potentially misled, undertaken a comprehensive review and revision of its technical and scheduling procedures and begun to investigate options for reducing risk further. While there had been a regrettable and costly series of breakdowns in service delivery, ITV2 Ltd said that there had been no intention to mislead viewers, no pre-meditated deception or attempt to cheat. Viewer trust had been broken “unwittingly as a result of human error/ technical failure, not as a result of a decision being taken which was likely to be detrimental to consumers’ interests.”
- 4.16 ITV2 Ltd stated that while all material harm to consumers was regrettable, the scale of actual harm was likely to be small. ITV2 Ltd said it had extended its programme of reimbursement/ reparation very widely. While it estimated (on the basis of the ITV2+1 audience estimates and average participation rates) that only approximately 2,400 entries to the affected programmes had been made, it had extended its programme of reimbursement/ reparation to over 33,000 entries. The ITV2+1 reimbursements had been promoted as part of ITV plc’s reimbursement scheme in respect of PRS issues, by an ITV plc press release on 18 October 2007 and by 59 announcements broadcast on ITV1.

Ofcom’s Finding on the breaches

- 5.1 Ofcom took ITV2 Ltd’s submissions into account when reaching its conclusions on the question of Code breaches. Before ITV2 Ltd had discovered and disclosed to Ofcom that further failures to apply “lines closed” captioning or to ensure it appeared had occurred, Ofcom concluded that the broadcast of *Make Your Play* on 16 March 2007 without the necessary “lines closed” captioning breached Rule 2.11 of the Code. After ITV2 Ltd discovered and disclosed to Ofcom the further instances on which “lines closed” captioning had not appeared, Ofcom concluded that ITV2 Ltd had breached Rule 2.2 of the Code on three occasions and Rule 2.11 of the Code on an additional 27 occasions.
- 5.2 Ofcom concluded that there were serious breaches of Rule 2.2 and Rule 2.11 of the Code in relation to the 31 instances on which “lines closed” captioning did not appear on repeat broadcasts of the programmes on ITV2+1.

Referral to the Content Sanctions Committee

- 6.1 It was considered that, taking all the circumstances into account, and in particular: the severity and repeated nature of the breaches and the resulting harm caused to those viewers who sought to interact with the affected programmes and to the audience overall, the breaches were sufficiently serious and repeated to warrant the consideration of the imposition of a statutory sanction.
- 6.2 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.

ITV plc's written representations on behalf of ITV2 Ltd on the imposition of a sanction

- 7.1 ITV said that ITV2 Ltd fully accepted the Code breaches and stated that ITV2 Ltd had “always accepted” that they were serious. ITV2 Ltd accepted referral to the Committee for the consideration of the imposition of a statutory sanction.
- 7.2 ITV said that as soon as allegations concerning PRS in ITV programming had emerged in March 2007 and before any allegations had been substantiated, it had taken immediate action, in that it suspended all PRS activity across all ITV channels and appointed Deloitte to carry out an independent review of PRS in all ITV programming. PRS on all ITV channels would only return when it had passed the scrutiny of independent review.
- 7.3 ITV stated that it had announced the findings of the Deloitte Review on 18 October 2007. It believed that the Review “was and still is the most comprehensive review carried out into the use of PRS by any UK broadcaster”, which it submitted showed that:
- it had taken the allegations more seriously than any other UK broadcaster;
 - the findings identified by ITV were likely to be more comprehensive than those identified by any other UK broadcaster; and
 - the processes which ITV had put and was putting into place in reliance on its review and its experience to date would be industry leading among UK broadcasters.
- 7.4 ITV asked Ofcom to note that when it had announced the findings of the Deloitte Review, Michael Grade (ITV plc's Executive Chairman) had stated:
- “Let me say...on behalf of ITV, that we deeply regret what has happened and how sorry we are for breaking trust with our viewers.”
- 7.5 In addition, ITV stated that it had announced on 18 October 2007 that it was “instituting the most effective and generous reimbursement programme in the industry” in relation to various affected programmes/ series. ITV2 Ltd's gross revenue from the affected (or potentially affected) ITV2+1 transactions was £94,973. ITV had donated a total sum of approximately £7.8 million to the Charities Aid Foundation on 3 March 2008 in respect of PRS issues in a number of ITV programmes or series. £142,500 of this sum related to affected (or potentially affected) ITV2+1 transactions. ITV had also made a small number of reimbursements in respect of the affected ITV2+1 transactions, to viewers who had claimed under ITV's reimbursement scheme.
- 7.6 ITV also asked Ofcom to bear in mind that it/ ITV2 Ltd had acted with complete transparency in relation to the Deloitte Review and the announcement of the findings from the Deloitte Review, and the subsequent Ofcom investigation. It said that, in effect, it had pleaded “guilty” publicly before Ofcom had initiated its investigation and that it had accepted full responsibility for any breaches of the Code. It also asked Ofcom to note that ITV2 Ltd had co-operated fully with Ofcom's investigation.

- 7.7 ITV said that, while ITV2 Ltd fully accepted the breaches of Rules 2.2 and 2.11 of the Code and accepted that a number of ITV2+1 viewers had suffered financial loss “for a time”, it was of the view that in light of its programme of reimbursement/ reparation, there had been “no material harm caused to viewers” and that comprehensive steps had been taken to mitigate any harm. ITV said that the amount of reparation far exceeded any financial loss that viewers of ITV2+1 might have suffered.
- 7.8 ITV requested that Ofcom note that ITV2 Ltd was already fully incentivised to try to ensure future compliance. It submitted that Michael Grade had apologised personally for ITV’s past failings and that he had been the “leading voice in recent calls to place viewer trust at the centre of broadcasting”.

Sanctions Hearing

- 8.1 Ofcom’s Content Sanctions Committee (the “Committee”) held a hearing on 21 April 2008 at which ITV plc was given the opportunity to make oral representations on ITV2 Ltd’s behalf before the Committee decided whether the breaches warranted the imposition of a statutory sanction and, if so, of what type and at what level.
- 8.2 The Committee was addressed by Michael Grade, ITV plc’s Executive Chairman, with evidence supplied by John Cresswell, ITV plc’s Chief Operating Officer and Finance Director, Ann Cook, ITV Consumer’s Partnership Director and Controller of ITV Interactive, Andrew Garard, ITV plc’s Group Legal Director and Andy Griffiths, ITV plc’s Group Director of Legal & Regulatory Compliance.
- 8.3 ITV reiterated that ITV2 Ltd fully accepted and sincerely apologised for the breaches of the Code in relation to ITV2+1 and, furthermore, that it had always accepted that the breaches of the Code were serious. ITV emphasised that it/ ITV2 Ltd deeply regretted breaking trust with its viewers and that it/ ITV2 Ltd sincerely apologised for the breaches of the Code.
- 8.4 ITV stated that it had voluntarily undertaken the most comprehensive review into the use of PRS by any broadcaster and that this review had been implemented in March 2007, immediately after the first allegation in relation to the use of PRS in an ITV programme had surfaced. ITV submitted that its review, its subsequent action and its transparency had enabled Ofcom quickly to appreciate the scale and detail of the breaches of the Code. ITV believed that ITV2 Ltd’s viewers had been completely and comprehensively compensated to remedy any harm suffered. Furthermore, ITV said that significant general process improvements across all ITV channels had been planned and implemented to ensure that it did not break trust with its viewers again. These included:
- bringing service provision for telephone competitions/ voting in-house to ITV;
 - increasing scrutiny of operations and presence of ITV Interactive staff in production galleries and voting rooms and empowering those individuals to overrule senior production team members to ensure the fair conduct of competitions and voting;

- increased investment in customer care processes and resource and the introduction of a different and more robust data collection scheme for interactive data (to improve responsiveness to customer complaints and issues);
- the introduction of a formalised review process for PRS involving ITV's internal audit team;
- structural changes in ITV's compliance team;
- increasing levels of training and certification across ITV (including the introduction of "trust" training across the whole of ITV and a PRS training module); and
- suspending SMS and red button entry routes in time-critical competitions and votes until ITV could be sure they were reliable.

8.5 ITV reiterated that its/ Deloitte's exhaustive enquiries had shown that none of the PRS failures were venal, nor were designed to drive revenue or deceive the public. In the case of ITV2+1, the breaches had arisen from human error, in most instances, and technical failure, in two instances. ITV said that the harm that viewers had suffered was, of course, regrettable, but that the scale of the actual harm suffered was likely to be very small, by its estimates, and full compensation had been offered. ITV said that ITV2 Ltd had erred very much on the side of generosity in its approach to reparations. It estimated that around 2,400 transactions might have been affected, but it had extended reimbursement to over 33,000 entrants. It had donated approximately £142,500 to the Charities Aid Foundation in respect of the affected or potentially affected ITV2+1 transactions, whilst the actual revenue received by the ITV2 Ltd had been approximately £95,000.

8.6 ITV said that ITV2+1 had been the first "+1" channel ITV had launched and, therefore, it had faced some new issues that it had not encountered previously. With hindsight, ITV admitted that it had not done a rigorous enough risk assessment of the implications of launching a "+1" channel, given that ITV Play programming was being broadcast on ITV2. It had not ensured that enough processes were in place to prevent viewers from interacting with repeat transmissions of ITV Play programmes on ITV2+1. The launch of ITV2+1 had been signed off by the Executive Committee of ITV plc. ITV said that ITV2+1 was run on the margins of ITV2's existing staff, albeit with a new editor, but he/ she had come from ITV and would have been fully aware of compliance requirements. ITV explained that the issue that had arisen in this case, which had led to the breaches of the Code, was that the application of "lines closed" captioning had required manual intervention and sometimes, due to human error, that manual intervention had not occurred. Regrettably, when failures had occurred due to human error, they had not been reported up the line in a timely fashion.

8.7 ITV said that it had now set up an "Enterprise Risk Management" process, so that a risk profile was run on any new service or acquisition to be made by ITV plc. It hoped that this would enable issues to be dealt with in a proactive, rather than reactive way, going forwards.

- 8.8 ITV explained that ITV's Interactive team would have been involved in the creation of *Playdate*, *Playalong*, *The Mint*, *Make Your Play* and *Glitterball*, but that they would not have been involved in the scheduling of the programmes or their repeat broadcasts on ITV2+1. The responsibility for the scheduling and repeat broadcasts would have lain with the channel management and channel schedulers.
- 8.9 ITV admitted that some failures to apply "lines closed" captioning had occurred after its 5 March 2007 announcement that it had suspended all PRS in ITV programming and that PRS would only return after it had passed the scrutiny of Deloitte's independent review. It said that, very simply, mistakes had been made. The ITV Play programming had "passed" Deloitte's review, but the risk in relation to its repeat broadcast on ITV2+1 had been missed.
- 8.10 In relation to the failure that occurred on 30 January 2007 and the fact that the scheduler responsible had volunteered to his line manager that he thought similar failures had occurred in the previous week, ITV said that regrettably it was apparent the issue had been regarded as a technical failure and less important than mistakes made during the production process.
- 8.11 ITV said that at the relevant time, the responsibility for ITV2+1's broadcast compliance and clearing processes for transmission had rested with ITV's compliance team.

Sanctions Decision

- 9.1 In reaching its decision, the Committee considered carefully all the written and oral submissions made by ITV2 Ltd. The Committee decided, for the reasons set out below, to impose a financial penalty on ITV2 Ltd. In deciding on an appropriate and proportionate level of financial penalty in this case, the Committee had regard to Ofcom's Penalty Guidelines³.

The seriousness of the breaches

- 9.2 Having considered all the evidence and ITV's representations on behalf of ITV2 Ltd, the Committee found that the breaches in this case were serious and repeated, for the reasons set out at paragraphs 9.3 to 9.7 below.
- 9.3 On 31 occasions, programmes that repeatedly and very frequently invited viewers to pay to interact had been repeat broadcast on ITV2+1. On these occasions, ITV2 Ltd failed adequately to inform viewers that the viewer interactive competitions had concluded (in the case of *Playalong*, *The Mint*, *Make Your Play* and *Glitterball*) or that live interactivity was no longer available (in the case of *Playdate*). On the basis of ITV2 Ltd's estimates, approximately 2,400 viewers had called or sent SMS or MMS messages in response to the repeat broadcasts of these programmes, without any chance of winning (in the case of *Playalong*, *The Mint*, *Make Your Play* and *Glitterball*) or interacting (in the case of *Playdate*).

³ 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.

- 9.4 It is essential, when a former live competition or a programme featuring live viewer interactivity is re-run and it is no longer possible for the audience to participate by ringing the number given on air, that this is made absolutely clear to the audience. In this case, viewers who called or sent SMS or MMS messages to the numbers displayed on screen were still charged. Failing to take sufficient steps to ensure that viewers would not call and seek to participate in the programmes, using PRS, demonstrated an absence of proper regard by the Licensee for the potential for significant financial detriment to the viewers who participated. ITV2 Ltd's viewers were materially misled by its failure to apply "lines closed" captioning to or to ensure "lines closed" captioning appeared on repeat broadcasts of the programmes on ITV2+1 on 31 occasions. In the Committee's view, this undermined the fundamental relationship of trust between a broadcaster and its audience.
- 9.5 The Committee was very concerned by ITV plc's admission that ITV2+1 had been launched without sufficiently robust controls to ensure compliance with the Code in the area of repeat broadcasts of viewer interactive competitions and other viewer interactive programmes. In the Committee's view, it should have been easily foreseeable that there was scope for human error in the "manual intervention" that was then required to apply "lines closed" captioning. The Committee considered that it would have been prudent either for additional checks to have been implemented or for the process to have been entirely automated from the outset. The Committee noted that both of these steps had, in fact, been taken by ITV2 Ltd at a much later stage, following the announcement of the Deloitte Review on 5 March 2007 and the failures that then occurred on 16 and 22 March 2007.
- 9.6 The Committee was also particularly concerned that no appropriate action was taken by ITV2 Ltd following receipt of a viewer complaint regarding the absence of "lines closed" captioning on a repeat broadcast of *The Mint* on 30 January 2007. The scheduler responsible, who had been "verbally reprimanded", had voluntarily disclosed to his line manager that he thought a number of similar failures had occurred in the previous week. In the Committee's view, these failures should have been investigated at the time and reported to ITV2 Ltd's senior management and ITV's compliance team. Instead, they had been viewed by the scheduler's line manager as a "standard error". The Committee considered that ITV2 Ltd's compliance and risk management procedures and its reporting lines were inadequate and/or ineffective to ensure compliance with the Code in this area between, at least, 12 December 2006 and 16 March 2007 and that ITV2 Ltd was reckless as to the consequences.
- 9.7 It was the view of the Committee that due to the severity and the repeated nature of the breaches of the Code and the resulting financial harm caused to viewers who sought to interact with the affected programmes and the harm to ITV2+1's audience overall, this was a serious case. Therefore, the Committee considered that the imposition of a financial penalty was warranted.

Precedent

- 9.8 In considering the appropriate level of financial penalty, the Committee took account of its previous decisions in cases relating to the absence of "lines closed" captioning in repeat broadcasts of viewer interactive competitions, as well as the specific representations made by ITV2 Ltd. 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 severity and repeated nature of the breaches in the circumstances of this case.

Incentive

- 9.9 The Committee took into account in setting the level of financial penalty the fact that ITV/ ITV2 Ltd had taken extensive steps to seek to remedy the breaches (in particular, its programme of reimbursement/ reparation in relation to the affected ITV2+1 transactions) and improve its compliance, management and risk management procedures. However, the Committee also noted that the purpose of the imposition of a financial penalty was to deter both the party involved and to third parties from committing future breaches. In this case, the Committee considered that a financial penalty would represent an appropriate incentive to ensure compliance in the future.

Other specific criteria

- 9.10 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.
- 9.11 The Committee noted that ITV2 Ltd had received up to £95,000 in revenue from the affected programmes. However, in this context, the Committee noted that ITV had extended its reimbursement programme very widely to over 33,000 entries and that ITV2 Ltd estimated that the number of entries that had actually been affected was approximately 2,400. The Committee also took into account ITV's extensive programme of reimbursement and reparation.
- 9.12 The Committee noted that the degree of harm caused to viewers and consumers by the breaches of the Code was relatively low (or was likely to have been relatively low). Because of the nature of the programmes, which were broadcast late night on a time-shifted service, audience expectations in relation to them would have been likely to be relatively low.
- 9.13 The Committee noted that ITV2 Ltd is a company with a substantial qualifying revenue and significant resource available to it.
- 9.14 The Committee noted that the majority of the breaches of the Code were not caused by any third party or any circumstances beyond the control of ITV2 Ltd. The Committee accepted that two of the 31 breaches (those that occurred on 16 August and 24 October 2007) had been caused by circumstances that were either beyond the control of ITV2 Ltd or not reasonably foreseeable.
- 9.15 The Committee considered that the duration over which the breaches occurred was a relevant factor. They had occurred over a ten-month period, in total, although the majority of the breaches were concentrated in a three-month period (December 2006 to March 2007).
- 9.16 Finally, the Committee noted that no penalty in respect of the same conduct had been imposed already by Ofcom or another body.

Level of Penalty

- 9.17 Taking all these factors into account (and in light of the severity and repeated nature of the breaches), the Committee considered that the 'starting figure' for any financial penalty should be significant.

Factors tending to increase the level of penalty

- 9.18 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.
- 9.19 The Committee considered that the breaches were repeated. The breaches of Rule 2.11 of the Code were repeated on 28 occasions by the Licensee and the breaches of Rule 2.2 of the Code were repeated on three occasions.
- 9.20 Breaches of the Code continued after a viewer complained about the absence of "lines closed" captioning in a repeat broadcast of *The Mint* on 30 January 2007 and the scheduler responsible volunteered to his line manager that he thought similar failures had also occurred in the previous week.
- 9.21 The Committee was strongly of the view that ITV2 Ltd's senior management ought to have foreseen that there was a risk of breaches of the Code occurring as a result of human error in the manual application of flags to apply "lines closed" captioning. Furthermore, the Committee considered that ITV2 Ltd's senior management ought to have been aware of the breaches that were occurring at the time. ITV2 Ltd was, as ITV had admitted, launched without sufficiently robust controls to ensure compliance with the Code in this area. ITV2 Ltd's management, risk management and compliance procedures were inadequate at the relevant time to ensure compliance with the Code.

Factors tending to decrease 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) might limit or decrease the level of any financial penalty it might impose.
- 9.23 The Committee noted that ITV plc had voluntarily suspended the use of PRS across all ITV programming from 6 March 2007, pending independent scrutiny by Deloitte, after ITV first became aware of allegations in relation to the use of PRS in an ITV series. However, in this case, two breaches occurred later in March 2007, presumably shortly after ITV Play programming had been "cleared" by Deloitte.
- 9.24 The Committee also noted that ITV had engaged Deloitte to carry out a comprehensive, independent review of PRS across all ITV programming and that Deloitte had made wide-ranging inquiries.
- 9.25 The Committee considered that the steps ITV had taken to remedy issues (including the consequences of the breaches in this case) were wide-ranging and timely. These included:
- Implementing an extensive reimbursement scheme in relation to all substantiated PRS issues following completion of the Deloitte Review and promoting the reimbursement scheme through one press announcement

(on 18 October 2007), on ITV's website and in a number of broadcast announcements;

- Extending the reimbursement programme in respect of the affected ITV2+1 programmes very widely to over 33,000 entries, when ITV2 Ltd estimated that the number of entries that had actually been affected was approximately 2,400;
- Donating a total of £7.8 million to the Charities Aid Foundation in respect of all PRS issues (of which approximately £142,500 related to the affected or potentially affected ITV2+1 transactions); and
- Introducing a range of practical procedures and re-structuring to seek to avoid recurrence of the same or similar issues and to guard against systems or editorial failures.

9.26 The Committee noted that ITV/ ITV2 Ltd had dealt transparently with viewers in relation to the Deloitte Review and, furthermore, that ITV/ ITV2 Ltd had dealt transparently and cooperated with Ofcom's investigation.

9.27 Finally, the Committee noted that ITV2 Ltd has a good compliance history, with no breaches of the Code previously recorded against it.

Conclusion

9.28 Cases where a broadcaster materially misleads its audience, whether knowingly or not, have always been considered to be amongst the most serious breaches of the relevant Codes by Ofcom (and its predecessor regulators).

9.29 The Committee was of the view that the breaches constituted a breakdown in the basic relationship of trust between a broadcaster and its viewers. This case involved ITV2 Ltd repeatedly materially misleading its audience as to their ability to enter viewer interactive competitions (in the case of *Playalong*, *The Mint*, *Make Your Play* and *Glitterball*) or interact with a programme (in the case of *Playdate*).

9.30 The Committee considered that ITV2 Ltd and ITV failed to have any proper regard for the necessity to launch and then run a channel with sufficiently robust compliance, reporting, management and risk management procedures to ensure compliance with the Code.

9.31 As set out above, the extensive steps taken by ITV2 Ltd/ ITV to seek to remedy the financial harm to viewers (in terms of ITV's reimbursement programme and donation to charity) and ITV's public apology, as well as the steps taken by ITV/ ITV2 Ltd to seek to prevent recurrence, were taken into account in the Committee's decision.

9.32 Having considered the relevant facts as outlined above and all the representations made by or on behalf of ITV2 Ltd, the Committee decided to impose a financial penalty on ITV2 Ltd of **£275,000** (payable to HM Paymaster General) which it considered to be a proportionate and appropriate penalty in all the circumstances.

Content Sanctions Committee

Philip Graf
Millie Banerjee
Joyce Taylor
Kath Worrall

8 May 2008