

Ofcom Broadcast Bulletin

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Introduction

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes which broadcasting licensees are required to comply. These include:

- a) Ofcom's Broadcasting Code ("the Code") which took effect on 25 July 2005 (with the exception of Rule 10.17 which came into effect on 1 July 2005). This Code is used to assess the compliance of all programmes broadcast on or after 25 July 2005. The Broadcasting Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>
- b) the Code on the Scheduling of Television Advertising ("COSTA") which came into effect on 1 September 2008 and contains rules on how much advertising and teleshopping may be scheduled in programmes, how many breaks are allowed and when they may be taken. COSTA can be found at http://www.ofcom.org.uk/tv/ifi/codes/code_adv/tacode.pdf.
- c) other codes and requirements that may also apply to broadcasters, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant licensees must provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code. Links to all these codes can be found at <http://www.ofcom.org.uk/tv/ifi/codes/>

From time to time adjudications relating to advertising content may appear in the Bulletin in relation to areas of advertising regulation which remain with Ofcom (including the application of statutory sanctions by Ofcom).

It is Ofcom policy to state the full language used on air by broadcasters who are the subject of a complaint where it is relevant to the case. Some of the language used in Ofcom Broadcast Bulletins may therefore cause offence.

Standards cases

In Breach

Five News at 7

Five, 5 February 2009, 19:00

Introduction

A viewer complained about an item during this edition of *Five News at 7*, in which a Garmin GPS running watch was reviewed. The complainant considered the tone and nature of the review to be promotional for the watch, that it made unflattering comments about a competitive brand and that Garmin might have had paid for the coverage. Generally, the complainant questioned the appropriateness of a news programme including an item of this nature.

Ofcom sought Five's comments under the following Code rules:

- Rule 10.3 – Products and services must not be promoted in programmes...
- Rule 10.4 – No undue prominence may be given in any programme to a product or service.
- Rule 10.5 – Product placement is prohibited.

We also requested background information about how the watch came to be reviewed and what arrangements to feature it might have been made with the manufacturer or supplier.

Response

Overall, Five denied that the item was in breach of Rules 10.3 and 10.5 of the Code, but accepted that "on balance" the item may have been unduly prominent of the watch and therefore in breach of Rule 10.4.

Five explained that *Five News at 7* had been relaunched at the beginning of 2009, targeting a young male audience. As part of the revamp an *ad hoc* gadget review feature was introduced. This feature has included reviews of netbooks, video goggles and a mini cinema projector. The format of the review offered a pre-recorded piece followed by a live studio 'chat' with a "gadget expert".

The broadcaster confirmed that no product is ever featured through agreement with manufacturers and that no "valuable consideration" was received by Five in return for including the Garmin watch in the programme.

After a decision to review runners' watches, the production staff selected five possible models, but could obtain only the Garmin and the Timex watches. The Timex was received only after the pre-recorded report had been completed. Also, no expert could be found to discuss the watch in the live studio segment and the reviewing reporter therefore had to fill that role.

In respect of the pre-recorded report, Five pointed out that references were made to the watch being "*chunky*" and "*oversized on girly wrists*", and that it is complicated to use: "*the simple functions seem anything but simple*".

Further, the broadcaster commented, during the live interview it was said that the Garmin watch comes with a substantial price tag: *“but all of this comes at a price, £279 to be precise”*; *“comes at a price, it’s quite expensive”*; *“they are expensive, they are a luxury”*; *“there are other brands that are cheaper”*; *“...you get what you pay for with these [GPS watches generally]”*. Five also drew attention to the Timex watch being referred to by name and shown in close-up on a Timex branded stand.

As to editorial justification, Five argued that GPS watches are no longer limited to elite athletes and that, bearing in mind the new target audience of the programme - young males - it considered a feature on running watches was editorially justified.

Taking into account all these points, Five did not accept that the item was in breach of Rules 10.3 or 10.5: in Five’s view, it was neither promotional, nor did it amount to product placement.

However, the broadcaster did *“...accept that some of the references and information may have gone too far when considering this [the undue prominence] rule”*. Further, Five accepted that the item could have given the impression of external commercial influence on the programme, although there was in fact no influence. Five acknowledged that making the report only when all of the watches intended for review were available would have been preferable.

Five said that the requirements of the Code had been discussed in detail with the production staff to avoid any further problems of this sort.

Decision

Ofcom notes that Five stated that there was no commercial arrangement in place and we saw no evidence that product placement took place.

However, Five did recognise that the item may have, on balance, breached the rules on “undue prominence” (Rule 10.4 of the Code).

In Ofcom’s view the item clearly gave undue prominence to the Garmin watch. Particularly important in this respect were the manner of the listing of the product’s features combined with the positive comparison with the only other watch featured, and the nature of the shot in which the Garmin watch and attachments were set out in sequence on a table, teleshopping-style.

Ofcom’s guidance to Rule 10.4 states that:

“Undue prominence” may result from:

- the presence of, or reference to, a product or service (including company names, brand names, logos) in a programme where there is no editorial justification; or
- the manner in which a product or service (including company names, brand names, logos) appears or is referred to in a programme.

The item comprised a pre-recorded report and a live studio discussion about the Garmin watch. Within the report, a number of close-ups of the watch were shown, the watch’s on-screen functions were focused on, a heart monitor accessory was shown separately, the watch was shown being used with a wireless laptop link (including a screen shot), and a table-top shot showed the watch surrounded by all its accessories (which appeared one after another).

The audio included the following comments in reference to the watch:

“...small but genius invention”;

“...as easy to charge as a mobile phone”;

“...this watch gives you the best of both worlds - I say this watch, generally running watches”;

“...you get what you pay for with these”;

“...there are other brands that are cheaper - there are other models of Garmin that are cheaper - but you got a lot less functions”;

“...with that you're getting GPS, you're getting a speedometer, you're getting a pedometer; but you go for something more basic, like the Timex one you have there in your right hand and you're getting little more than a stopwatch and a light”; and

“...And is it worth it though?” “I think it's pretty good - you can actually buy them online cheaper than that £279. They are expensive, they are a luxury, but I think they're quite good.”

In Ofcom's view, the manner in which the watch was described and shown in the programme resulted in undue prominence.

Further, the way the watch was demonstrated and the editorial nature of the report appeared to have some features in common with a teleshopping promotion. For instance, the watch and its accessories were displayed on a table-top in a stop-frame sequence in the pre-recorded report.

A further factor in judging the context of undue prominence is the nature of the programme in which a report or sequence appears. In this case the review appeared as part of a news programme, part of the discussion provided by the show's news presenter. In such a context viewers would expect more balanced reporting and perceive the content as carrying particular authority. In such circumstances, the audience is likely to expect a more exacting test of undue prominence.

As to Rule 10.3 (that prohibits the promotion of products and services in programmes), in Ofcom's view the position of the item was very much more doubtful than argued by Five.

Rule 10.3 states that: “Products and services must not be promoted in programmes...”. Broadly, Ofcom determines whether a product or service has been promoted within programmes by assessing both the degree of prominence given and the manner in which the products or services are discussed or referred to. Either can lead to ‘promotion’ on its own, depending on the extent and emphasis given to the coverage. Although promotion will frequently be active promotion – calls to action to purchase and the like – that is not, in itself, a necessary condition for breach of the rule.

In Ofcom's view this was not only a particularly egregious example of undue prominence, especially as it appeared in a news programme, but the product was featured so heavily and in terms that were essentially uncritical, that the report also breached Rule 10.3.

Breach of Rules 10.3 and 10.4

In Breach

The Alan Titchmarsh Show

ITV1, 23 March 2009, 15:00 and 26 March 2009, 15:00

Introduction

The Alan Titchmarsh Show is a daily magazine programme that celebrates the 'best of British', featuring items such as food and wine, fashion, showbiz, music, gardening, current affairs and consumer issues. The programme is broadcast either live or 'as live'.

23 March 2009

During this programme, Alan Titchmarsh interviewed the actress Jane Seymour. Ofcom received a complaint from a viewer who was concerned that the interviewee's jewellery range and clothing range were heavily promoted.

Ofcom noted that the interview was prefaced with a montage of clips from Ms Seymour's recent films, and included discussion of her role as the face of the clothing brand CC (Country Casuals), her new book, the availability of her new Open Heart jewellery range at H Samuels and her upcoming films.

26 March 2009

During this programme, Alan Titchmarsh interviewed the actress Stephanie Beacham. Ofcom received a complaint from a viewer who was concerned that Harley Street Skin Care products were "promoted in a prominent fashion".

Ofcom noted that during the five minute interview, the first half focussed on Ms Beacham's role in *Coronation Street*, and the second half focussed on appearance and skin care. Both Alan Titchmarsh and the interviewee referred to the Harley Street Skincare products which were displayed on the table in front of them. On one occasion, Alan Titchmarsh also referred to the website www.harleystreetskincare.co.uk.

Having viewed the website, Ofcom noted that Ms Beacham had worked with Harley Street Skin Care to create the range of products which were referred to during the programme.

Ofcom asked the broadcaster for its comments on both programmes with regards to the following Code Rules:

- 10.3 – Products and services must not be promoted in programmes. This rule does not apply to programme-related material;
- 10.4 – No undue prominence may be given in any programme to a product or service; and
- 10.5 – Product placement is prohibited.

Response

Channel Television ("Channel TV"), an ITV licence holder, who is responsible for the compliance of the programme on behalf of the ITV network (ITV), responded to Ofcom.

The broadcaster told Ofcom that no payment or other valuable consideration had been received by Channel TV or the production company for the inclusion of, or reference to any of the products within either of the programmes.

Channel TV said that the interviews were “entirely typical of the ‘celebrity spot’ on any magazine show in that the interviewees discussed career highlights, current ventures and ongoing projects”. It added that all celebrities are booked because “they, their lifestyle or achievements, are of interest to viewers and no guest is booked in to the *The Alan Titchmarsh Show* unless they genuinely warrant their appearance by virtue of their public profile”.

The broadcaster submitted that it retains full editorial control over the guests that are booked and that discussions are held with Channel TV’s compliance team as to “whether guests who do have a commercial venture to promote are likely to be suitable for the show, given the requirements of [Section] 10 of the Code”. It added that potential interviewees have in the past been rejected as they required assurances that their ventures “would be referred to in a specific, promotional, manner”.

Channel TV told Ofcom that it receives many queries from viewers as to where products worn, mentioned by, or associated with the guests may be acquired, which is why the references to the Harley Street Skin Care website and the reference to the availability of the Open Hearts jewellery range at H Samuels were included in these programmes.

23 March 2009

Channel TV said that the interview with Jane Seymour was live and covered subjects such as her acting career, her success in the USA and advice for newcomers to the industry, before the conversation turned to her role with CC. The broadcaster said that at the time, Ms Seymour was making a brief visit to the UK to promote her new book in CC stores and submitted that her description of her role for the company was “very brief and restrained to simply stating ‘I wear the clothes’”. It added that Ms Seymour made no comment on the design, value for money or price of the clothes, but talked about how she had liked the people she had worked with at CC.

With regard to Ms Seymour’s references to her jewellery collection, Channel TV said that “unprompted by Alan Titchmarsh, [she had] briefly mentioned that the self-designed necklace she was wearing had recently been licensed by H Samuels and was available in their shops. She did not refer to the fact that an entire range is available at H Samuels. Alan did not press or repeat this point [and] no price information was given”.

The broadcaster submitted that “these brief references to Jane Seymour’s commercial ventures were entirely tied into and justified by the editorial context in which they appeared. Channel TV added that there was no undue prominence for either CC or H Samuels and that it did not consider the “brief and editorially-relevant mentions” of either brand to be unduly promotional, rather that “they were entirely typical of the kind of straightforward factual mention appropriate in this kind of interview”.

26 March 2009

Channel TV told Ofcom that this programme was broadcast ‘as live’. It acknowledged that the set featured products from a skin care range with which Ms Beacham was connected. It added that the placement of the products on the table was approved by

the compliance team “as the labelling was discreet; the products were not displayed to advantage and they were seen in medium close up only once during the interview”. It added that neither Alan Titchmarsh nor Ms Beacham touched or displayed the products at any time and no price information was given. Channel TV added that although Alan Titchmarsh made “one very brief mention” of the manufacturer’s website, this was the only time at which any specific information as to the name of the brand was mentioned.

Channel TV submitted that Ms Beacham “has always been famous for her good looks and thus the editorial relevance of these brief and non-promotional mentions of her skin care venture is clear”. It stated that Ms Beacham discussed many topics before Alan Titchmarsh raised the subject of face creams and argued that “it is hard to see how light-hearted statements such as *‘it’s better really when you clean your teeth to shove on a bit of cream’* can be interpreted as unduly promotional for any specific product”. The broadcaster added that “the products were not afforded any visual prominence”, no price information was given and the name of the product range was mentioned only once by Alan Titchmarsh.

Decision

Ofcom noted the broadcaster’s assurances that neither it nor the production company had received payment, or other valuable consideration, for referring to any of the products referred to in either of the programmes and found no evidence that either of the broadcasts was in breach of Rule 10.5 which prohibits product placement.

With regards to the promotion of products and services in programmes, it is common for celebrity guests on chat shows and magazine-style programmes to refer to their latest venture. This is often an autobiography or an artistic endeavour, e.g. a film or play, and the reference is usually relatively brief. However, other products or services are also referred to. Accordingly, there is often sufficient editorial justification for the reference to avoid concerns arising under Section Ten of the Code. However, the more commercial the guest’s venture and the more prominent the references to it within a programme, the greater the risk that such references may appear to be, in effect, promotional selling messages in breach of Rule 10.3, or unduly prominent in breach of Rule 10.4, or both.

It is the broadcaster’s responsibility to ensure that any references to commercial products/services are appropriately limited so as not to become unduly prominent. Ofcom acknowledges that unexpected situations may arise in the case of a live broadcast.

23 March 2009

Ofcom noted the following references to CC, made during the interview:

AT: *“You’re beautifully clad as ever.”*

JS: *“Yes. CC.”*

AT: *“CC. Not 10CC.”*

JS: *“No, no, just CC. CC. I mean it’s so wonderful when you’re not in England very often but when you come back and, you know, from the whole window, everywhere you go has these most beautiful photographs that I feel like I have to live up to, you know, me and the CC shops.”*

AT: *"So it was Country Casuals."*

JS: *"Country Casuals."*

AT: *"It's now CC. So what's your role with CC?"*

JS: *"I wear the clothes [looks down at and touches her jacket to indicate that it is from CC] and I'm very happy to do it."*

AT: *"If Paul Smith's watching out there [winks at the camera]"*

JS: *"Actually they're fantastic people and also they put my book out there in the stores. I just went out to Bluewater yesterday and I met lots of people at CC. It was great fun. And I was signing my book and I signed lots more, so if anyone wants a signed book go to CC."*

Ofcom recognises this programme was a live broadcast. However, in our view, the broadcaster did not attempt to draw the conversation away from the subject of Ms Seymour's commercial venture as the face of CC, but in fact, he initiated the conversation by referring to his guest's clothes, *"You're beautifully clad as ever"*. Further he sought clarification from her about the brand's full name and asked her to explain her association with the CC brand. This had more in common with a paid for promotion spot than a chat show.

While the references to the availability of Ms Seymour's jewellery range at H Samuels were brief and, on balance, appropriately limited, Ofcom was concerned that there was insufficient editorial justification for the manner and frequency of the repeated references to the CC brand during the interview and, as such, the references were judged to be unduly prominent.

26 March 2009

Ofcom noted that the second half of this pre-recorded interview was concerned with Ms Beacham's youthful appearance and how she had been able to achieve this without resorting to surgery.

Ofcom was particularly concerned that the skin care products had clearly been set out on the table in front of the presenter and Ms Beacham in advance of the interview, evidencing that the inclusion of references to the products had clearly been planned.

Further, Ofcom noted that during the interview, the conversation about skin care was initiated by the interviewer, Alan Titchmarsh, rather than the guest:

AT: *"You're looking so tremendous, not just in your clothes but in your complexion and I notice ladies and gentlemen on the table here what I think in the trade they call unguents";*

to which Stephanie Beacham replied:

SB: *"Unguents. Yes. There comes a decision I think when you are at a certain stage and age. Is it the knife or are you going to do something else?!"*

After discussing the fact that Ms Beacham had not undergone surgery to maintain a youthful appearance, the conversation continued in a promotional manner:

SB: *“You need stuff that’s going to feed your skin. You need the tripeptides and anti-oxidants and vitamins.... You need something that’s going to just stop the clock right now and keep your skin plump and dewy and radiant and here’s the kit [nods towards the products on the table].”*

AT: *“Well it’s working for you, I mean it’s fab isn’t it.”*

SB: *“Well it actually does work. The other thing is sun damage is dreadful. It ruins our skin.”*

AT: *“And you’ve had enough time in LA to discover that.”*

SB: *“Twenty-five years.”*

AT: *“Harleystreetskincare.co.uk. So it’ll be on the website all the details.”*

The interview also covered the benefits of using cream on the skin rather than resorting to surgery, for example:

SB: *“It’s sort of sad and it’s a desperate chase isn’t it [surgery]. It’s better really when you clean your teeth at night to shove on a bit of cream and when you clean your teeth in the morning to do the same again.”*

AT: *“Shove your cream on and clean your teeth and she’s a good advert for it.”*

Ofcom noted Channel TV’s submission that Stephanie Beacham “has always been famous for her good looks and thus the editorial relevance of these brief and non-promotional mentions of her skin care venture is clear”. However, in view of the fact that no explanation was given during the interview that the products were Ms Beacham’s “skin care venture” (i.e. that she was involved in a commercial arrangement of some kind with the manufacturer of the products), Ofcom did not accept Channel TV’s argument that references to her “skin care venture” were “editorially relevant” or editorially justified.

Ofcom noted that the product labelling was not clearly visible during the shots of the products on the table and the manufacturer of the products was only mentioned once, however it was a matter of concern that the products were displayed on the table at all as part of the interview. Regardless of the level of detail visible, Ofcom did not consider that there was sufficient editorial justification for this.

Ofcom considered that the guest made several claims that the ingredients in the Harley Street Skin Care products would keep skin looking youthful such as: *“You need something that’s going to just stop the clock right now and keep your skin plump and dewy and radiant and here’s the kit”*. She then stated that the skin care range *“actually does work”*. In Ofcom’s view, these types of endorsements are comparable to the style and manner of those made about products being promoted in a teleshopping broadcast; this is emphasised by the fact that the inclusion of such claims in any broadcast advertisement for such products would require objective substantiation. Ofcom considered that there was insufficient editorial justification for such references during the programme.

Further, during the interview, the programme’s presenter directed viewers to the Harley Street Skin Care website: *“Harleystreetskincare.co.uk. So it’ll be on the*

website all the details". Ofcom considered that there was not sufficient editorial justification for this reference.

In Ofcom's view, taking account of the nature and type of the references, including the sort of claims normally associated with advertisements, and the lack of any sufficient explanation for their inclusion in the interview, the overall purpose of the references appeared to be promotional. Ofcom found that the combination of the appearance of the products on the table, the nature of the guest's claims about the efficacy and benefits of the products, and the reference to the manufacturer's website were unduly prominent and promotional, in breach of Rules 10.3 and 10.4 of the Code.

23 March 2009: Breach of Rule 10.4

26 March 2009: Breach of Rule 10.3 and 10.4

In Breach

The Paul O'Grady Show

Channel 4, 24 March 2009, 17:00

Introduction

During the opening section of his weekday chat show, the presenter mentioned that the members of the studio audience were: *"...very nice people ... but things are starting to sag on some of them..."*

He added: *"But help is supposedly at your hands – because for everybody in the audience we've been given this, and it's a free anti-aging serum called Ageless."*

A close-up shot was shown of the product being held up to the camera by the presenter, as he joked with the audience and continued: *"Seriously ... honestly, it's called Ageless – I feel like I'm on QVC here! – Ageless ... it reduces fine lines and wrinkles in five minutes – [to camera:] you haven't seen this lot! ... now there's one for every member of the audience ... you get one of these – Ageless – and I hope it works..."*

Having briefly continued with his typical light-hearted banter, the presenter told the members of the studio audience that they would each receive the product at the end of the show, emphasising once again the product name, *"...Ageless."*

A viewer claimed that this "extended segment ... [was] in contravention of the Code."

We asked Channel 4 for its comments with regard to the following Code Rules:

- 10.3 – Products and services must not be promoted in programmes;
- 10.4 – No undue prominence may be given in any programme to a product or service; and
- 10.5 – Product placement is prohibited.

Response

The broadcaster said: "There was no agreement of any kind between Ageless and Channel 4 or [the production company] about the product being featured or shown in the programme." It added that "the Producer decided as part of an on-going joke to exaggerate [the presenter's] age and that of [its] dedicated audience by giving them a pot of anti-aging serum", which suited the presenter, who it said regularly joked about his age and the age of the studio audience.

Channel 4 said that "the script was carefully drafted not to promote Ageless and only included one verbal reference to the product." It considered the reference to the product and its claims to be editorially justified, as they "contextualised the joke and played on the fact that whatever [the presenter] and the audience do they cannot cheat old age as it is an inevitable fact of life." Channel 4 said that it had planned references to "apparently", "supposedly" and "let's hope it works" to ensure that it was not seen as endorsing Ageless. The broadcaster also noted that the joke ended with the presenter revealing a large exaggerated container of generic (unbranded) anti-aging serum, which indicated how much assistance he would need to look young

again. The prop was styled in “typical comical fashion to avoid undue prominence to the Ageless brand...”

The broadcaster provided the wording of the intended script, from which it acknowledged that the presenter had deviated “in the sheer exuberance of the moment, and unfortunately on a live transmission ... for comedic purposes in the context of the on-going joke. It was never intended as a conscious name-check or endorsement of a commercial brand.”

Decision

Ofcom noted Channel 4’s assurance that the anti-aging serum had not been featured in the programme as part of a commercial agreement and therefore found no evidence that the broadcast was in breach of Rule 10.5 of the Code.

We also noted that the programme was transmitted live, and the presenter deviated from the intended script. Unfortunately, however, this resulted in Ageless being referred to on six occasions and without sufficient editorial justification. Ofcom found these references to be unduly prominent. The broadcast was therefore in breach of Rule 10.4 of the Code.

The comic effect of the presenter’s performance was clear. However, we noted the following:

- Six references to Ageless took place in a little over two minutes – as opposed to a single passing reference scripted in an intended segment of approximately 45 seconds;
- While one of the scripted lines was “apparently it reduces fine lines and wrinkles in five minutes”, the presenter, in fact, stated an advertising claim: “*it reduces fine lines and wrinkles in five minutes*”; and
- The product’s packaging was clearly visible throughout most of the segment, held by the presenter for around 50 seconds and shot in close-up.

Ofcom considered that the overall effect of the item was to promote and endorse this commercial product, irrespective of the intention of the broadcaster or the presenter. The cumulative effect of the manner and frequency of these repeated references, including an advertising claim, was that the product appeared to be promoted in the programme, in breach of Rule 10.3 of the Code.

Breach of Rules 10.3 and 10.4

In Breach

UEFA Champions League Live

ITV1, 14 April 2009, 19:30

Introduction

During the post-match analysis of this UEFA Champions League football match, a viewer was concerned that the presenter referred to a DVD being on general sale:

“Highlights tonight of this game and the Bayern/Barcelona match on ITV1 at 10:35. Following that, there’s another chance for you to see that acclaimed Clough documentary at 11:40. It’s also been released on DVD and is now on general sale as well.”

There was an accompanying full screen visual of the DVD cover and the text:

“Clough Tonight 11:40pm ITV1”.

Ofcom asked the broadcaster for its comments with regards to the following Code Rule:

- 10.3 – Products and services must not be promoted in programmes. This rule does not apply to programme-related material.

Programme-related material (“PRM”) is defined as products and services that are both directly derived from a specific programme and intended to allow listeners or viewers to benefit fully from, or to interact with, that programme.

Response

ITV Broadcasting Limited (“ITV Broadcasting”) is responsible for the compliance of the programme on behalf of the ITV network (ITV1).

ITV Broadcasting said that the Clough documentary referred to in the programme was an ITV Sport production. It submitted that the documentary about Brian Clough’s life and career, particularly the parts about his European Cup triumphs (i.e. the fact that he is the only manager to have won successive European Cup trophies), was of “significant interest and relevance to the viewers of this Champions League game”.

The ITV Sport production team therefore felt that it was appropriate towards the end of the Champions League coverage to remind viewers who may have missed the documentary when it was first broadcast that it was being repeated later that same evening. However, it considered that many viewers who would be interested in watching the programme would be unable to do so due to its late scheduling at 23:40, and therefore the producers felt it was editorially justified to also refer to the release of the programme on DVD. The broadcaster said that this information (i.e. *“It’s also been released on DVD and is now on general sale as well”*) was “very brief and general as to its availability”.

The broadcaster said that it recognised that the Clough DVD did not qualify as programme-related material in this context, because the content was not directly derived from the Champions League programme content. However, it believed the reference to the DVD would have been acceptable as a reference to programme-

related material had it followed immediately after the Clough documentary itself, broadcast at 23.40. Nevertheless, the broadcaster suggested that in the context of the Champions League post-match coverage, “as a short addition to the commonplace announcement of what was coming up on the channel later that evening, the reference [to the DVD] was sufficiently editorially relevant, brief and informational, rather than directly promotional, so as not to constitute a breach of Rule 10.3”.

ITV Broadcasting argued that given the relationship in subject matter between the Champions League and a documentary focussing on “a football legend intrinsically linked with European football”, it did not believe the reference to the DVD should be considered as a breach of the Code. However, it said that it did accept that “as a general rule references to DVD releases in programme time always require strong editorial justification, and that it had now given further guidance to the ITV Sport production team on the need for care when making any reference to the availability of such a retail product, particularly where it is not programme related material as such”.

Decision

Rule 10.3 prevents products and services from being promoted in programmes. The only exception to this is where promotions relate to programme-related material. Broadcasters must bear in mind that the ability to promote a product or service as PRM in, or around, programmes is permitted purely by way of exception to the fundamental broadcasting principle that advertising and programme content must be kept separate. For material to qualify as PRM, it must be both directly derived from a specific programme and allow viewers to benefit fully from, or interact with, that programme.

Ofcom does not accept that the relationship between the Champions League and an ITV Sport documentary focussing on an individual known for having been the only manager to have won successive European Cup trophies was sufficient editorial justification for referring to the ITV Sport DVD during this particular programme. As acknowledged by ITV Broadcasting, the DVD was not directly derived from this programme, nor did it allow viewers to benefit fully from this programme and as such could not be considered to be PRM. The reference to the DVD was therefore in breach of Rule 10.3.

Breach of Rule 10.3

In Breach

The MySpace Chart

MTV Two, February 2009, various dates and times

Introduction

The MySpace Chart features music videos from a chart compiled from viewer votes. The programme is sponsored by MySpace, a social networking website. Viewers can view videos on MTV Two's MySpace page or on the programme's own website, where they can vote for their favourite video.

Ofcom noted that throughout each hour long programme, the programme title, accompanied by the channel logo, remained on-screen constantly.

We sought MTV's comments on the references to MySpace under the following Code Rules:

- 9.4 – A sponsor must not influence the content and/or scheduling of a programme in such a way as to impair the responsibility and editorial independence of the broadcaster; and
- 9.5 – There must be no promotional reference to the sponsor, its name, trademark, image, activities, services or products ... Non-promotional references are permitted only where they are editorially justified and incidental.

Response

The broadcaster, MTV Networks Europe ("MTVNE"), advised that the programme was sponsored by Fox Interactive Media UK Limited (t/a MySpace UK). MTVNE provided Ofcom with a copy of the sponsorship contract.

MTVNE stated that the programme was scheduled exclusively by its scheduling department and the times of broadcast were consistent with the times an established chart had been broadcast on MTV Two before the sponsorship arrangement existed.

In relation to the on-screen programme title, MTVNE explained that all of its channels identify programmes via a digital on-screen graphic. The font, size and position on screen of this graphic are exactly the same for all channels. It was for this reason that the programme name appeared in the top right hand of the screen during the programme. MTVNE explained that it broadcasts many chart based programmes on its channels and it was important for it to use this navigation graphic to help viewers identify which chart they are watching. On this basis, the broadcaster considered the reference to the programme title throughout the programme was editorially justified.

MTVNE said that it believed the on-screen graphic was not promotional for MySpace: it did not incorporate the MySpace logo or corporate font. The broadcaster assured Ofcom that no discussions took place between itself and the sponsor regarding the size, font or positioning of the graphic. The on-air references to the programme title were not a contractual requirement of the sponsorship arrangement.

MTVNE advised Ofcom that, pending the outcome of the investigation, it had removed the graphic from screen.

Decision

We note MTVNE's assurance that the content and scheduling of the programme was not unduly influenced by the sponsorship arrangement: this was supported by the sponsorship contract submitted by the broadcaster. We therefore found the programme not in breach of Rule 9.4.

Regarding the references to the sponsor throughout the programme, it is acceptable for broadcasters to integrate a sponsor's name into a programme title as a way of identifying a sponsorship arrangement. However, broadcasters must take extra care, when using the sponsor's name in this way, to avoid giving undue prominence to the sponsor by referencing the programme name excessively during the programme. If references to the programme title occur in the programme, they should be editorially justified and incidental to ensure that the resulting sponsor references comply with the Code.

In this case, we noted that MTV uses continuous on-screen graphics to display programme titles in its other programmes to help viewers identify the programme they are watching. However, in Ofcom's view, the inclusion of a commercial reference (i.e. the name of a programme sponsor) within such a graphic changes the nature of this type of on-air reference, and creates the potential for undue prominence.

Ofcom did not therefore consider that the regular use of such graphics in other MTV programmes constituted sufficient editorial justification for the continuous display of the sponsor's name, contained in the on-screen graphic, throughout this programme. Ofcom found that this continuous reference to the sponsor was excessive, not incidental and not justified by the editorial requirements of the programme. It was therefore in breach of Rule 9.5 of the Code.

Breach of Rule 9.5

In Breach

Sponsorship of Dexter

FX, May 2009, various dates and times

Introduction

Dexter, a TV cop drama series, was sponsored on the television channel FX by the film *Angels & Demons*, released in cinemas in May 2009.

The sponsor credits shown before the start and after the end of the programmes were 15 seconds long and, other than two brief sequences of voice-over, contained only footage and audio from the film. The voice-overs were “*Tell the world the truth*” and “*Angels & Demons sponsors Dexter on FX HD and FX*”.

The internal ‘bumpers’ – those sponsor credits shown around the internal breaks in the programmes – were very brief, two or three seconds, and included only the second of the voice-overs. Both the longer and shorter credits also contained a caption with a website address: “www.angels-and-demons-may14.co.uk”.

Rule 9.13 of the Code requires that: “Sponsorship must be clearly separated from advertising. Sponsor credits must not contain advertising messages or calls to action. In particular, credits must not encourage the purchase or rental of the products or services of the sponsor or a third party”.

In light of this rule, a viewer queried the inclusion of the release date in the film’s web address within the sponsor credits.

Ofcom was also concerned about the general presentation of the longer credits: that they were essentially no different to promotional trailers for the film – in other words, that they closely resembled advertisements.

Ofcom requested FX’s comments under Rule 9.13. In particular, we sought the licensee’s comments on how it believed the content of the longer credits complied with the need for them to be “clearly separated from advertising” and how the use of the website address and its reference to the release date of the film complied with the need for the credits not to “contain advertising messages or calls to action” and “...not encourage the purchase or rental of the products or services of the sponsor or a third party”.

Response

FX accepted that it had “got the balance of the credits wrong” and that “undoubtedly these credits are in breach of Rule 9.13”. FX apologised for the breach.

Further, the licensee said that it was having the credits re-edited to reduce the film footage considerably and to have the release date removed from the website address contained in the caption. The new credits would replace the old ones immediately.

FX said that it had directed relevant staff to the findings and guidance note published by Ofcom in Bulletin 130, “...so they understand the importance of ensuring that in future sponsorship credits are compliant”. In addition, FX stated that it was reviewing

its internal systems for clearing sponsorship credits and had included an external compliance consultant in its process for assessing sponsorship credits before transmission.

Decision

Ofcom noted the licensee's unequivocal acceptance of the breach and acknowledged the very speedy and thorough way in which the matter had been handled.

The purpose of Rule 9.13 is to give effect to a requirement of a European Directive which states that:

"they [sponsored programmes] must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services." (Article 17(1)(c))

This means that sponsor credits on television should not resemble advertisements by, for example, employing advertising techniques such as product claims, availability statements (including outlets, release dates and the like), pricing information and so on. More broadly, as stated in Ofcom's published guidance to Rule 9.13, sponsor credits do not count towards the *amount* of advertising that is permissible and so should be readily distinguishable from advertisements.

In a guidance note on the application of Rule 9,13, published on 23 March 2009 in issue 130 of the Bulletin¹, we explained that when judging whether a television sponsorship credit is sufficiently distinct from advertising, Ofcom may take into account a number of factors. These include but are not limited to:

- What is the primary focus of the credits? Is the focus of the credits the sponsorship arrangement itself or the sponsor's product or service?
- What information about the sponsor's products/services is included in the credits? A brief description can help identify the sponsor. Detailed descriptions, references to positive attributes, or claims – particularly those that are capable of objective substantiation – about the sponsor's products/services (e.g. market leadership, health benefits, efficacy) are likely to result in credits breaching the Code.
- Do the credits contain content that is likely to encourage the viewer to contact the sponsor? Basic contact details (websites etc.) may be included but invitations to contact the sponsor or purchase goods/services are unacceptable.

It is important for TV broadcasters always to remember that the main purpose of a sponsor credit is to create an association between the sponsor and the sponsored programme that enables viewers to identify the sponsorship arrangement; it is not the role of sponsor credits to act as advertising vehicles for products and services. Licensees must therefore exercise care to ensure that the general character of sponsor credits does not resemble that of advertising.

Where, as here, the sponsoring product is itself an audiovisual work, extracts from it should be limited and subordinate to the purpose of sponsorship – creating an

¹ Issue 130 of the Bulletin is available at: http://www.ofcom.org.uk/tv/obb/prog_cb/obb130/

association between the sponsor and the sponsored programme. Website addresses are acceptable in sponsor credits but, as with product names, must not contain claims or other information characteristic of advertisements.

In Ofcom's view, both the general construction of the credits and the particular inclusion of the release date in the film's website address were in breach of Rule 9.13 because the overall impression given by the credits was of an advertising message.

Breach of Rule 9.13

In Breach

Maranam Muttuppulli Alla

Global Tamil Vision, 2 November 2008, 19:00

Vanakathukuriyavarkal

Global Tamil Vision, 27 November 2008, 17:10

Introduction

Global Tamil Vision (“GTV”) is a satellite channel broadcasting content to an ethnic Tamil audience. Ofcom received a complaint concerning a programme broadcast by GTV on 2 November 2008 called *Maranam Muttuppulli Alla*. The complainant felt that the programme glorified the terrorist activities of the Liberation Tigers of Tamil Eelam (“LTTE”) and certain of its members. During its investigations, Ofcom also considered a further programme broadcast by the channel on 27 November 2008 called *Vanakathukuriyavarkal*.

Ofcom commissioned independently-produced translations of both programmes (“the Programmes”), and noted various references to the activities and leaders of the LTTE, which is presently a proscribed terrorist organisation under the Terrorism Act 2000. This means that under current UK legislation, it is unlawful to be a member of the LTTE, to raise funds for it or to invite or encourage support for it.

In summary, Ofcom noted the Programmes consisted of the following content:

Maranam Muttuppulli Alla (“the 2 November Programme”)

The 2 November Programme was broadcast as a memorial programme on the anniversary of the death of the LTTE political leader, S.P.Tamilchelvan, and of five other members of the LTTE. It included various interviews, speeches and songs that commemorated the life of Mr Tamilchelvan.

Vanakathukuriyavarkal (“the 27 November Programme”)

The 27 November Programme was broadcast on Heroes Day¹, and consisted of a series of songs, speeches and poems which commemorated the actions of the LTTE and its leader, Velupillai Prabhakaran.

Ofcom considered whether the content of the Programmes could potentially be seen to glorify the activities of the LTTE, a proscribed terrorist organisation. Ofcom therefore wrote to GTV asking for its comments under the following Code Rule:

- 2.4 – Programmes must not include material (whether in individual programmes or in programmes taken together), which, taking into account the context, condones or glamorises violent, dangerous or seriously antisocial behaviour and is likely to encourage others to copy such behaviour.

Response

In its response, GTV said that it broadcasts predominantly to the Sri Lankan “Diaspora”, and made a number of points about the Programmes.

¹ Heroes Day is an annual commemoration by LTTE supporters to honour the deaths of members of the LTTE.

2 November Programme

The broadcaster said that this programme, commemorating Mr Thamichelvan's death, complied with the Code, and referred to the "feelings of utter dismay and shock expressed in many world's leaders' statements of hearing of Mr Thamichelvan's demise". GTV added that "all we attempted to do was pay tribute to a fondly remembered leader who dedicated his last five years to search for a politically negotiated settlement".

GTV said that for the majority of its target audience, Sri Lankan Tamils: "Mr Thamichelvan was the last hope of achieving a lasting, politically negotiated solution to the ethnic problems facing Sri Lanka". According to the broadcaster, Mr Thamichelvan was the head of the political wing of the LTTE, and that the Tamil community perceived him as a "messenger of peace" akin to "Gerry Adams (former political leader of the IRA)". Given this context, GTV decided to broadcast a programme commemorating the first anniversary of Mr Thamichelvan's death, something that it had not done "to remember other fallen cadres of the LTTE". GTV felt that it was necessary "to remind our viewers of his political activities so that someone else will be encouraged to take over and continue his peace building efforts". However, in outlining Mr Thamichelvan's activities, including as the Tamil chief negotiator in the peace summits, overseen by the Norwegian Government, GTV said the programme also mentioned five of his colleagues who died at the same time that he did.

GTV also explained the background to two of the statements featured in the programme, which Ofcom had highlighted. First:

"We vow to take revenge in future for the death of these six brave soldiers, by showing the different faces the Tamils hurt by the Sinhala domination."
(All of the programme extracts included in this Finding are transcripts of the original translations provided to Ofcom by an independent external translation company).

GTV said this statement was part of a poem used at Mr Thamichelvan's funeral, which says that Mr Thamichelvan and his six colleagues would not be forgotten "and the work they will continue and this is the best form of revenge Tamils hurt by the Sinhalese² can exact". Second:

"Never ever forget this. We have not buried our brother Tamilchelvan in the burial ground. We have buried him in our hearts and minds. We will rise! We will rise! Will rise as Tigers! Will become soldiers! Tamil Eelam will win!"

GTV said this statement was from a speech by a Tamil politician, Dr Seeman, speaking at Mr Tahmilchelvan's funeral, and was part of a section of the programme "in which we tried to show our viewers how the Tamils felt all over the world about the news of Thamichelvan's death". The broadcaster said that Dr Seeman's speech at Mr Thamichelvan's funeral had to be seen in the context of a speech given prior to his, which had referred to the "Chola Empire and its Tiger citizens"³, but had not been included in the 2 November Programme. Dr Seeman's comments therefore were referring to this previous, unbroadcast speech. GTV said it had not edited Dr Seeman's speech because "he did not refer to [the] LTTE or its soldiers".

² The majority ethnic group in Sri Lanka.

³ According to GTV, at Mr Thamichelvan's funeral, a speaker prior to Dr Seeman had referred to the Chola empire, that had previously existed in Southern India, and its "Tiger Citizens...[who had] centuries ago, again and again rose from many setbacks and created a parallel of [the] Diaspora Tamils' current mood to those of the Tiger citizenry of the then Chola Empire".

27 November Programme

GTV said that, having reviewed the programme, some of the content in the programme should not have been broadcast. In doing so, the broadcaster accepted that “we have inadvertently breached...Rule 2.4”. GTV added that having been contacted by Ofcom, it had “taken all necessary precautions so as not to make a similar mistake in future”.

Decision

Ofcom understands that some its licensees will be directing their services predominantly to the members of a single ethnic or cultural group. It is therefore inevitable and appropriate that the output of such channels will be dominated by issues that concern and are of interest to the members of the particular ethnic group. In this case, GTV specifically directs its service to members of the Tamil community living in the UK. It is therefore unsurprising that given the nature of the conflict between certain elements of the Tamil minority and the Sri Lankan Government, that a channel such as GTV might have touched upon points of view, including the LTTE's, arguing for an autonomous Tamil state within Sri Lanka.

The Code does not preclude broadcasters from discussing or covering the activities of proscribed terrorist organisations, such as the LTTE. Ofcom recognises that it would be an unacceptable restriction on a broadcaster's freedom of expression⁴ to curtail coverage of certain issues, including the activities of recognised terrorist organisations in any way. However, in broadcasting such content, broadcasters must be aware of the need to comply with the general law and the Code, and in particular Rule 2.4. The relevant test under Rule 2.4 is that content must not: firstly, taking into account the context, condone or otherwise glamorise violent, dangerous or seriously antisocial behaviour; and secondly, be likely to encourage others to copy such behaviour.

Ofcom considered each of the Programmes in turn.

2 November Programme

Ofcom noted that this programme, consisting mainly of interviews and telephone contributions, was a commemorative tribute to S.P. Thamilselvan, who headed the LTTE's political wing until his death in 2007. Much of the programme stressed Mr Thamilselvan's role in various attempts to broker peace between the LTTE and the Sri Lankan Government, and Ofcom noted that Mr Thamilselvan is revered by certain members of the Tamil community. Ofcom also noted GTV's submissions that one speech, by the Tamil politician Dr Seeman, should be seen in the context of references to a particular period in South Asian history.

However, Ofcom noted the following content was broadcast within the programme:

“Thamilselvan set foot on the path of liberation...he grew into a full-fledged soldier on whom courage and tactics were directly inducted by our leader.”

“We vow to take revenge in future for the death of these six brave soldiers, by showing the different faces the Tamils hurt by the Sinhala domination.”

“Then our great leader adopted the violent path of the struggle to wrest our rights that are now in the hands of the enemy.”

⁴ As enshrined in the European Convention on Human Rights.

“Struggle is inevitable. It is a protective endeavour without which one’s ethnicity will be destroyed, one’s family will be mutilated, one’s education will be spoiled, one’s mother will be killed, one’s sister will be raped.”

“We do not fear and hide, but destroy the enemy camp with tremendous strength.”

“I wish to request one and all of our people to do all within your capability to defeat the forces that are against this liberation struggle.”

Ofcom considered that these statements went beyond merely commemorative references to a departed political leader, and could reasonably be seen to glorify and support the activities of the LTTE. Further, the content could reasonably be construed as likely to encourage others to copy such behaviour and support the activities of the LTTE. Therefore, Ofcom concluded that this programme was in breach of Rule 2.4.

27 November Programme

Ofcom noted that this programme was broadcast on Heroes Day, an important day in the Tamil calendar. At the beginning of the programme, Ofcom noted the following was broadcast:

“Today is the day to remember those martyrs who lost their lives in battlefield, fighting with the treacherous army that steps to our soil.”

The programme then contained songs, poems and speeches, which included various references to the activities of the LTTE and its leader:

“Praise the great name of the Tigers”.

“This is the day, when once a year we announce to the world the courage and speed of the soldiers in saving the Tamil Eezham⁵. Even if we asked to go it alone, the soldier goes first as an example to others, he bathes in the blood and makes the sea of Eezham a graveyard – this is the day when we praise them.”

“Today is the day when we praise the valiant soldiers, let us praise them, we will worship them, and we will put flowers at their grave.”

“We will not rest until we get the Tamil Eezham. The birth of Tamil Eezham is assured. It will be under the leadership of Prabakharan.”

“I will cut the heads of those who attack the Tamil Eezham people without any kindness, those fools who attack the people.”

“We will harm with sharp sword the generation that made sound and came to fight for money, this is the truth I tell you.”

Ofcom recognises that songs and poetry have a long tradition of dealing with the full range of human experiences and emotions. Just because content, in lyrical form, may refer to acts of violence, does not mean that there has been a breach of the Code. For example, certain songs and poetry may contain references to political struggles such as fights for independence, and such content would need to be considered in such a context. In this case, however, Ofcom considered that the 27 November Programme contained various instances of commemorative material that

⁵ Also known as Tamil Eelam, which is the name given by some Tamil groups for a Tamil homeland.

supported and glorified the activities of the LTTE and its leader. Further, Ofcom considered that this material went further than merely commemorating the activities of Tamil cultural figures, but in several instances could reasonably be construed as likely to encourage others to copy such behaviour and support the activities of the LTTE. Given this, and the fact that GTV had expressly admitted a breach of the Code, Ofcom decided that this programme was in breach of Rule 2.4.

Ofcom considered the breach of these rules to be very serious. The right to broadcast comes with it responsibilities. It is important that broadcasters do not inappropriately use a licence to broadcast to, for instance, glorify violence. On this occasion Ofcom did not impose a statutory sanction. However, the broadcaster should be aware that further recurrence of such breaches could lead Ofcom to consider taking further regulatory action.

Breach of Rule 2.4

In Breach

Chat Café

LA Babes, 25 February 2009, 13:00

Introduction

Chat Café is a daytime chat programme broadcast without access restrictions. It is located in the 'adult' section of the Sky Electronic Programme Guide ("EPG") on the service *LA Babes* (Sky channel number 956). Viewers can call a premium rate telephone number and talk to an onscreen presenter. Viewers can see the female presenters engaged in conversation but cannot hear what is being said as music is played over the images. At certain intervals the presenters can switch on a microphone and speak directly to viewers to encourage them to call the premium rate telephony service ("PRS") number.

Ofcom received a complaint that material broadcast at lunchtime featured a presenter in a low cut top and mini skirt engaged in inappropriate activities for a daytime broadcast. These included: jiggling her breasts to the camera; shaking her bottom in front of the camera and lifting her skirt to reveal her buttocks; and opening her legs leaving the viewer with an impression that she was not wearing any underwear and simulating masturbation with a microphone.

Ofcom asked the licensee, Fierce Media, for comments under Rule 1.3 (children must be protected from unsuitable material by appropriate scheduling) and Rule 2.3 (broadcasters must ensure that material which may cause offence is justified by context).

Response

With reference to Rule 1.3 the licensee argued that this rule was not breached given that the material was scheduled in the 'adult' section of the EPG where viewers could expect to find material of a similar nature and even of a "more overtly sexual nature" at this time of day. Furthermore, any children who may have been accidentally exposed to this content would not, in the broadcaster's opinion, understand the meaning of the gestures or of the show in general. In terms of the content, the broadcaster stated that the presenter was dressed correctly at all times.

However, the presenter's simulated masturbation of the microphone and the occasional touching of her upper body – even though they were presented in a fun and playful, not sexually explicit way – were not in line with the broadcaster's own internal guidelines for the time of broadcast. Consequently the licensee had dismissed the producer and suspended the presenter with immediate effect.

Furthermore, Fierce Media also confirmed that the service *LA Babes* had been taken off-air for an indefinite period following this complaint.

Decision

Rule 1.3 makes clear that children should be protected from material which is unsuitable for them by appropriate scheduling. This is judged according to factors such as the nature of the content, the nature of the channel and the time of broadcast.

In this case the nature of the content included a presenter behaving in an overtly sexual manner and, by the broadcaster's own admission, had engaged in simulating masturbation with a microphone at the request of a caller. Whilst taking other telephone calls, the presenter also engaged in actions such as getting up from the bed and standing with her bottom to the camera; lifting her mini skirt to reveal her buttocks then stroking them suggestively; and lowering her top to reveal her cleavage and then jiggling her chest to the camera.

The licensee stated that the presenter was wearing knickers at all times. In Ofcom's opinion, however, the broadcast images gave the impression to the viewer that the presenter was wearing minimal, or no, underwear. This was apparent when she opened and closed her legs in front of the camera.

Given that these activities and images were not suitable for daytime broadcast, it was Ofcom's view that the positioning of this channel in the 'adult' section of the EPG was not sufficient to provide adequate protection to prevent children from accessing the content and this was a breach of Rule 1.3.

Furthermore, it was also Ofcom's view that the broadcast of this material would have exceeded the expectation of viewers watching television during the day and was therefore offensive. The Code does not simply prohibit the broadcast of potentially offensive material. Rather, Rule 2.3 means that such material may be broadcast, if its inclusion is justified by context so as to provide adequate protection for members of the public. In this case, Ofcom was of the opinion that the editorial content as set out above was not appropriate for the time of broadcast, and the type of service and positioning in the 'adult' section of the EPG did not provide adequate context to protect viewers from the offensive material.

Breach of Rules 1.3 and 2.3

In Breach

George Galloway

Talksport, 22 November 2008; 27, 29 December 2008; 2, 9 January 2009, 22:00

Introduction

George Galloway MP of the Respect Party presents a twice weekly evening phone-in programme on Talksport in which he debates a wide range of topical issues with listeners who phone in. The programme ("*George Galloway*") also features interviews with celebrities, politicians and media commentators. It varies in length but is normally between two and three hours in duration. The topics covered are often political in nature and, because of the programme's length an opportunity is afforded for detailed discussion of current events.

Ofcom received a total of 14 complaints in respect of the programmes referred to above. All of the programmes about which Ofcom received complaints featured, to differing degrees, heated debate between George Galloway, listeners and media commentators on the situation in the Gaza strip. Listeners also heard strongly held views forcefully put by many callers to the programmes. The subject was particularly emotive during the period when these programmes were broadcast because on 27 December 2008 Israel launched an offensive on the Gaza strip which it said was to stop Hamas from firing rockets into Israel. George Galloway has long been recognised as an outspoken critic of the Israeli government.

On 27 December 2008 George Galloway chose to deal extensively with the Gaza situation on his programme. He returned to the issue on various occasions in the days and weeks that followed, as the conflict in the region continued. He encouraged listeners to call in with their views and also interviewed various commentators on the subject. Ofcom received a number of complaints about the content of these programmes from listeners who believed that George Galloway was biased against Israel and did not allow callers holding an opposing view to his own an adequate opportunity to comment. One complaint related to George Galloway's perceived anti-Israeli bias for similar reasons on the broadcast of 22 November 2008. This was before the Israeli offensive of 27 December 2008.

Several listeners also objected to George Galloway's call, on a number of the programmes, for listeners to attend planned demonstrations against Israeli actions in London and elsewhere.

The recent Israeli presence in Gaza, and the pre-conflict situation in Gaza are matters of "major political controversy" under the Code and must be treated with "due impartiality". Ofcom therefore asked Talksport to comment on *George Galloway* in light of the relevant Code rules:

- Rule 5.11 – ... due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service (listed above) in each programme or in clearly linked and timely programmes.
- Rule 5.12 - In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in

clearly linked and timely programmes. Views and facts must not be misrepresented.

Response

Talksport pointed out that the Code makes clear that the approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience. It then addressed each of these factors in turn:

The nature of the subject

Talksport maintained that the Israel-Gaza problem crosses party lines in this country and is not a party political issue. It pointed out that the Israeli government's actions in December 2008/January 2009 were condemned by the majority of the international community and that the situation in Gaza deteriorated to such an extent that it was regarded as a humanitarian crisis. In its view the nature of this subject had a very real bearing on the approach to due impartiality in this case.

The type of programme and channel

Talksport pointed out that the station has a national reputation as one that employs highly opinionated presenters. It said the phone-in format employed on *George Galloway* is well-known to the general public, who enjoy hearing heated debate about topics that are the talking points of the day. Talksport emphasised that George Galloway himself is famous in Britain for being an outspoken politician who, since his arrival on Talksport, has built up a reputation as a hard-hitting broadcaster. He and the audience recognise that Talksport phone-ins are not overly formal discourses, as may sometimes be the case on more traditional radio stations. They rely more on a passionate exchange of views which is sometimes combative and often emotive.

The likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience

The broadcaster said that both the station and the presenter are extremely well-known quantities so that people who tune in know what to expect. It also said that George Galloway's views on the Middle East are equally well-known to regular listeners as well as non-listeners. In addition it was stressed that throughout his programmes, George Galloway encourages people with an alternative point of view to call. He prioritises such callers and terminates their calls only if he thinks they have made or are likely to make racist comments, defamatory comments or in his view are deliberately misinforming the listeners.

In summary therefore, Talksport argued that these factors should all be considered by Ofcom when reaching a decision on whether the approach to due impartiality on this occasion was appropriate.

The broadcaster then discussed how in its view the programmes met Code requirements. It said that central to the rules is the need for differing viewpoints to be aired and argued that far from opposing views being excluded on the programme, alternative views to the presenter's are given priority by both the presenter and his production staff. It then went on to illustrate how these alternative views were aired.

Talksport began by saying that on a matter of controversy like this, the fact that more callers take one view rather than another is nobody's fault. One view may be more popular, or listeners with a similar point of view to the presenter may be more numerous than those who oppose his view. It said that pro-Israeli callers were not

just taken to air, but were prioritised and more callers with this viewpoint were asked for by the presenter. It referred to the programme of 27 December 2008, which was taken up almost entirely with the situation in Gaza (the Israeli offensive having commenced on that day). It said that the fact that five callers who disagreed with George Galloway were heard on air proved that alternative views were not excluded. It said that the fact that there were fewer callers who disagreed with him than agreed with him was beyond its control and was, in the station's view, a fair representation of the general public's sentiments on this issue. Talksport also directed Ofcom to a morning programme three days later when George Galloway stood in for a colleague. It said that on this programme George Galloway took many contributions from callers with a pro Israeli viewpoint and was joined by a pro-Israeli journalist.

The station went on to give details of pro-Israeli guests on George Galloway during the timeframe of the complaints. It described how, in the programme of 22 November 2008, Lorna Fitzsimmons of the British Israeli Communications and Research Centre responded in a highly articulate way to comments made by a previous guest (the journalist Lauren Booth) who had described the unfolding of a humanitarian crisis in Gaza. The station pointed out that the appearance of a pro-Israeli guest had been signalled to listeners in advance by George Galloway, who explained that he had "*a strong point of view on this*", which was the same as Lauren Booth's and pointed out that another view was needed. When Lorna Fitzsimmons came to air, she contradicted George Galloway and was able to make her points without interruption for much of the interview. She criticised Booth for making comparisons between the Gaza crisis and concentration camps and told George Galloway that Israel unfairly gets all the blame for the humanitarian crisis which, she said, was not of its making. She went on to describe Hamas as brutal and described their "*terror*". Talksport maintained this was a clear and fair presentation of an alternative viewpoint on the programme. Other examples of alternative views on the Gaza conflict on *George Galloway* were: an extended interview on 30 December 2008 with a pro-Israeli journalist toward the end of the show which had been signalled to listeners on the previous day; a discussion on 2 January 2009 between George Galloway and a well known, pro-Israeli journalist; and the defence of the Israeli position by the pro-Israeli American Republican Samuel Joe Wurzelbacher on 9 January 2009.

Talksport also wished to highlight that, on 3 January 2009 when news broke that Israeli forces had occupied the Gaza Strip, in order to comply with the Code rules on due impartiality in news, Talksport's Programme Director replaced *George Galloway* with an enhanced news programme presented by the non-partisan presenter Ian Collins to reflect the fact that a rolling news event was being dealt with.

Talksport then provided details of what it said was a wide variety of viewpoints alternative to Galloway's on this issue on the station's output generally during the relevant timeframe. On 29 December 2009 for example the presenter Ian Collins discussed the situation in the Middle East from a non-partisan point of view, allowing all sides to have their say and putting forward the Israeli point of view. Similarly, on 30 December 2008, presenter Mike Graham defended the Israeli point of view and Ian Collins discussed the issue again, in a non-partisan way, later that evening from 10pm. Finally, on 14 January 2009, the broadly pro-Israeli presenter David Prever was joined by the pro-Israeli Lorna Fitzsimmons discussing what they described as the lack of news headlines on Gaza.

Talksport argued that these examples demonstrated that, in common with many other issues, George Galloway finds himself on the opposite side of the argument to most of his fellow presenters on Talksport. It also said that George Galloway's brand of socialist views is unique in the radio industry in this country. Consequently, argued

Talksport, his role as a presenter on the station is of itself a valuable contribution towards the Code's requirements for broadcasters to provide alternative voices and viewpoints.

Finally, in relation to the complaints concerning George Galloway's various requests to listeners to attend anti-Israeli protest demonstrations, Talksport said that George Galloway did invite listeners to take part and apart from that, said nothing other than for people to peacefully protest. Talksport pointed out that the demonstrations were not illegal, having been agreed with by the police and George Galloway said nothing that would encourage racial hatred or violence.

Decision

Under the Communications Act 2003, broadcasters are required to treat all major matters of political or industrial policy with due impartiality. However, Ofcom must also take into account the broadcaster's and listeners' right to freedom of expression, which includes the right to hold opinions and to receive and impart information and ideas without interference by public authority¹. The broadcaster's right to freedom of expression is not absolute. In carrying out its duties, Ofcom must balance the right to freedom of expression on one hand, with the need to preserve "due impartiality" on matters relating to political or industrial controversy or matters relating to current public policy. Therefore, whilst any Ofcom licensee should have the freedom to discuss any controversial subject or include particular points of view in its programming, in doing so broadcasters must always comply with the Code.

Ofcom recognises that Section Five of the Code, which sets out how due impartiality must be preserved, acts to limit, to some extent, freedom of expression. This is because its application necessarily requires broadcasters to ensure that neither side of a debate relating to matters of political or industrial controversy and matters relating to current public policy is unduly favoured.

All of the complaints Ofcom received about *George Galloway* concerned the presenter's handling on the programme of the situation in Gaza between November 2008 and January 2009. It was not disputed that this issue was a "matter of major political controversy" under the Code and that the rules in Section Five were applicable, in particular Rules 5.11 and 5.12 which require due impartiality to be observed on major matters. Ofcom noted that many complainants objected to the concept of the programme itself – a well known politician being permitted regularly to promote his views on a national radio programme. However the Code permits presenters to express their own views on controversial issues so long as alternative views are adequately represented and regular presenters (such as George Galloway) do not promote their views in a way that compromises due impartiality. The Code also requires presenter phone-ins, like this one, to encourage and not exclude alternative views. In Ofcom's view it is of paramount importance that broadcasters and presenters continue to explore controversial subject matter even when, as here, opinion becomes polarised.

The approach to due impartiality

In assessing whether due impartiality has been preserved the Code explains that the approach may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience. As was pointed out by Talksport, the station is known for its highly opinionated presenters, such as George

¹ As stated in Article 10 of the European Convention on Human Rights.

Galloway, who engage in heated debate with listeners. The profile of the Respect Party MP is also a relevant consideration when assessing whether the approach to due impartiality on these programmes was acceptable. He is recognised in this country for trenchant views on many issues and his sympathy for the Palestinian viewpoint in relation to the Middle East question is particularly well known. In the programme of 22 November 2008, George Galloway makes this clear when he says:

"I am not impartial on this subject, nor can I be..."

However, it is important that the subject matter itself is treated with due impartiality. Ofcom noted that the tension in Gaza at the time of these broadcasts was extremely high and had resulted in armed conflict by the time of the second programme under investigation (27 December 2009). This meant that the views of the presenter, the guests and the callers to the programmes could be expected to be outspoken, emotive and at times reproachful. Ofcom also noted Talksport's argument that, such was the strength of feeling about Israeli actions, the issue had effectively crossed party political lines. All of these considerations do not obviate the need for due impartiality however they demonstrate that the views espoused by George Galloway would not necessarily come as a surprise to listeners, familiar as they would be with his opinions and personality. Due impartiality does not require there to be an equal balance of views on the controversial subject matter being discussed. To secure compliance with the Code, what must be ensured is that firstly, there is a wide range of significant views and secondly, that these views are given due weight in each programme or in clearly linked and timely programmes (Rule 5.12).

Wide range of significant views

During the five programmes examined by Ofcom in this investigation there was a large volume of views expressed which were critical of Israeli government policy towards Gaza – in the programme of 22 November 2008 these views were critical of the Israeli blockade of Gaza then in place, and in the other programmes listeners criticised the Israeli military action in Gaza which had begun on 27 December 2008. On the programme of 22 November 2008 for example, guest Lauren Booth described the Israeli blockade of Gaza as:

"the most cruel siege in human history"

and on the same programme a caller remarked:

"I can't understand how they have the nerve to come on and defend Israel...they just tell lies."

Ofcom also noted that on the programme of 27 December 2008 calls which could be described as pro-Israeli were greatly outnumbered by calls which were critical of the Israeli position. Callers expressed anger and disgust at Israeli "aggression" and the attack which began that day was described as a "barbaric".

At the same time however Ofcom noted that in all programmes, George Galloway encouraged listeners with differing viewpoints to call in. He told listeners, for example on the programme of 2 January 2009 that:

"you're welcome whatever your point of view but you're especially welcome if you disagree with me..."

Bearing in mind the factors relating to the approach to due impartiality in this case described above, in Ofcom's view these differing views were brought to air with adequate frequency on all the programmes examined. On 27 December 2008 for example, one caller referred to Israel and asked:

"...do you not think a country has the right to defend itself when hundreds of rockets are coming over?"

Further, on 22 November 2008 there was a detailed interview with Lorna Fitzsimmons of the British Israeli Communications and Research Agency who responded articulately to many of the points raised earlier by George Galloway and Lauren Booth. She was also given the opportunity to defend the Israeli government. There were clearly other significant views expressed on the station throughout this period such as a journalist and the pro-Israeli Republican Samuel Joe Wurzelbacher. Other examples, as cited by Talksport, demonstrated that the station had achieved on air a range of significant views on this issue.

Due Weight

Ofcom accepts that as a way of encouraging debate and generating interest in a subject, broadcasters may legitimately be controversial and challenging, even to the extent of taking a position where they "may express their own views" (see Rule 5.9 of the Code). However, broadcasters need to be careful in ensuring that this approach does not impinge on the Code's requirement to give "due weight" to other significant views. In its consideration of the programmes Ofcom was at times concerned that George Galloway did not necessarily afford callers who disagreed with him an adequate opportunity to present their argument and at times appeared to cut callers off who disagreed with him. For example on the programme of 22 November 2008 during a discussion with one caller about the origins of the conflict, George Galloway indicated that if the caller was not prepared to accept that Israel was "*illegally occupying*" territory that did not belong to it, there was "*nothing further to talk about...*" before cutting the caller off. Although other callers were given an appropriate opportunity, broadcasters need to strike the right balance between being provocative and ensuring compliance with the Code.

It is important to note however that the Code requirement for due weight may be met "within each programme or (Ofcom's emphasis) in clearly linked and timely programmes". In this case, while the views of some callers may not have been afforded due weight in specific programmes, it was Ofcom's view that overall, on the service, due weight was achieved through firstly the detailed interviews on *George Galloway* with recognisable commentators such as Lorna Fitzsimmons and *The Times* journalist Oliver Kamm who defended the Israeli government position. It was also met by programmes such as the edition of *George Galloway* of 30 December 2008, to which Ofcom was directed by Talksport. The programme began with George Galloway making a specific call for listeners who disagreed with him to call in. He said:

"...everyone knows where I'm coming from on this subject...but that doesn't mean I want to hog the microphone. On the contrary, I want an argument with you. So, please, if you have a different perspective from me, please call..."

George Galloway also signalled that a pro-Israeli journalist would be joining him at a certain point in the programme. Ofcom noted that when the sequence on Gaza began, three callers with a pro-Israeli perspective were brought to air in succession.

Finally Talksport directed us to material across the service, in the days and weeks in which the conflict continued in which alternative views were extensively canvassed. As a result Ofcom concluded that the due weight requirement of Rule 5.12 was met.

Calls to join demonstrations

A number of complainants highlighted George Galloway's support for and encouragement to listeners to attend demonstrations against Israeli actions planned for London and elsewhere. At various points the presenter said:

"...everyone of us has a duty. I will myself at 2 o'clock tomorrow afternoon be in the demonstration outside the Israeli embassy at Kensington Church Street, Kensington High Street in London at 2 o'clock tomorrow."

"...go to the 'Stop The War' coalition website, you'll get details of the local Stop The War organisation in the North-East and they definitely should be doing something."

"Well you can join me at 2 o'clock tomorrow afternoon outside the Israeli embassy in Kensington Church Street in London, for what I think is going to be a very big demonstration."

"I hope everyone who's in Scotland can reach George Square [Glasgow], is there at half four tomorrow afternoon."

"We'll be out at...[details of addresses and times of the demonstrations in London, Edinburgh, and Glasgow]... Stand up, stand up against the great crime that took place in Gaza today!"

We accept, as Talksport argues, that the presenter did not in any way encourage or incite hatred or violence.

However, in Ofcom's view, at these junctures the programme turned from debating points of views and opinions into active campaigning on a major matter of political controversy. The broadcaster was actively encouraging listeners to participate in a political activity with details of the events, addresses and times. These calls to action did not come from an interviewee (who was for instance a campaign organiser on the demonstration itself) but from the presenter himself. At this point, we consider, the broadcaster crossed the line from legitimate and provocative debate with adequate alternative views to one who was calling listeners to action. By actively becoming involved in one side of a campaign on a matter of political or industrial controversy this element of the programme failed to comply with the due impartiality requirements which are set out in legislation and in Ofcom's Code.

Conclusion

Overall, for the reasons outlined in this decision, Ofcom concluded that there was an appropriately wide range of significant views aired on the station and on *George Galloway* during the period to which these complaints related. On balance Ofcom concluded that these views were also afforded due weight, particularly for example on the programmes of 22 November 2008 and 30 December 2008.

However, in encouraging listeners to attend demonstrations with details of dates, times and locations, the programme move away from legitimate debate and started to campaign on a major matter of controversy resulting in a breach of Rule 5.11.

Not in breach of Rule 5.12

In breach of Rule 5.11 (in respect of the calls to join demonstrations)

In Breach

Virgin Media Advertisement

Sci-Fi Channel, 31 January 2009, 15:00

Introduction

The Advertising Standards Authority (“ASA”) received a complaint from a viewer about the sound levels of a Virgin advertisement broadcast on the Sci-Fi channel, which appeared to be much higher in volume than the advertisements scheduled adjacent to it. When the ASA tried to acquire a recording of the material the broadcaster stated that it did not have a recording of the broadcast featuring the spot advertising insert.

The ASA referred the complaint to Ofcom because the failure of a broadcaster to retain and supply a recording of its output is a breach of the broadcaster’s licence.

Ofcom requested comments from the broadcaster under its Licence Condition 11 which requires broadcasters to retain recordings of their output for 60 days after transmission, and to provide Ofcom with any such material upon request.

Response

The broadcaster explained that the Virgin advertisement was inserted by Virgin Media into the Sci-Fi Channel broadcast feed after it had left the Sci-Fi channel’s play-out centre, for the benefit of Virgin’s own cable subscribers.

The Sci-Fi Channel argued that it had received contractual assurances from Virgin Media that its insertions into the broadcast feed would be fully compliant with regulatory requirements. However, the Sci-Fi Channel had not established its own technical facility to ensure the recording of the modified broadcast would be retained.

Virgin Media had now ceased inserting these spot advertisements and the Sci-Fi Channel would not recommence the scheduling of such advertisements without transmission recording facilities being in place.

The broadcaster fully accepted that as the licence holder it was obliged to keep and retain a recording of all material broadcast for a period of 60 days and apologised for the failure to retain a recording. Furthermore, it stated that it had reviewed procedures firstly, to ensure compliance with BCAP sound levels requirements, and secondly, to ensure the retention of recordings of all broadcast output – including advertisements which are inserted into the channel feed by third party affiliates.

Decision

All cable and satellite licensees are required to make and retain, or arrange for, the retention of a recording in sound and vision of every programme included in the Licensed Service for a period of 60 days. This recording must be available to Ofcom, as it was broadcast and of a quality as seen or heard by the viewer, whatever television platform it was transmitted on.

Ofcom noted the broadcaster’s apology and its explanation that it had retained recordings of the broadcast feed but that a third party, that is Virgin Media, had

inserted their advertisement over the play-out centre feed for the benefit of cable subscribers. It is however a requirement on the *licensee* to retain recordings of all of the versions of the content broadcast on whatever platform, including any content that has been modified, not on any third party affiliate who inserts content onto the original feed. All licensees therefore need to be satisfied that where this situation might occur suitable facilities or arrangements are in place to ensure recordings are made and retained.

As the Sci-Fi Channel has accepted that they did not have a technical facility in place, to ensure that a recording of the modified broadcast, the broadcaster has breached one of its licence conditions. This is a serious and significant breach of the Sci-Fi Channel licence and will be held on record.

Breach of Licence Condition 11

Not in Breach

Jeni Barnett

LBC 97.3 FM, 7 January 2009, 14:00

Introduction

LBC 97.3 FM (“LBC”) is a local speech based commercial radio service which broadcasts across Greater London. Ofcom received 190 complaints regarding a discussion about a parent’s right to not give their child the Measles, Mumps and Rubella (“MMR”) vaccination, on the weekday afternoon phone-in discussion programme presented by Jeni Barnett.

The complainants expressed concern about the way in which Jeni Barnett presented and handled the phone-in discussion on this topic. In their view the programme gave such an unbalanced, inaccurate and irresponsible portrayal of the dangers of the triple MMR vaccine that it could have caused considerable anxiety to parents. This in their view could reduce the take up of the vaccination resulting in a considerable threat to public health.

Ofcom asked LBC to comment with reference to the following Code Rules:

- 2.2 – factual programmes or items or portrayals of factual matters must not materially mislead the audience; and
- 5.13 – local radio services must not give undue prominence to the views and opinions of particular persons or bodies on matters of political or industrial controversy and matters relating to current public policy in all the programmes included in any service taken as a whole.

Ofcom was of the view that the MMR vaccination could be considered a matter relating to current public policy given that it is part of the Government recommended childhood vaccination schedule.

Response

LBC responded that the debate on the right to choose the MMR vaccination was based upon presenter opinion, as was much of LBC’s output. Indeed, the focus of this discussion was based on Jeni Barnett’s own personal experience as a mother - who had chosen not to give her daughter the triple MMR vaccine – and the right for her to make this choice for her child without being criticised for it.

From the outset of the programme, the broadcaster argued that Jeni Barnett made clear that she was not an expert herself and that this programme was focused on the notion of informed parental choice, not about whether immunisation was good or bad. Furthermore, the presenter had invited experts, as well as parents who had refused the vaccination, to call in and had advised against scaremongering. In conclusion, they argued that the programme did not “stray into the bounds of providing factual information that mislead listeners” and did not breach Rule 2.2.

With reference to Rule 5.13, the broadcaster stated that given the nature of LBC’s output, the vast majority of its content would in some way be related to government policy and therefore fell within the bounds of “current public policy”. In their view

however, the Code provided scope for presenters to express their own opinions thereby stimulating debate, provided that a fair opportunity for comment was offered. The phone-in format of the programme afforded this facility.

In this particular programme Jeni Barnett received six callers to the programme, four of whom presented opposing views to her. Indeed, the second caller actually pointed out that he was a regular listener and that every medical expert he had heard on LBC discussing the issue of MMR had said it was “*a good thing*” and the evidence against it had been refuted.

Overall these points demonstrated that the broadcaster had not only provided balance in this broadcast but also across its output. Given that Rule 5.13 defined undue prominence as a “significant imbalance of views” the broadcaster stated that this programme did not reach this level of imbalance and was therefore not in breach of this rule.

Decision

The Communications Act 2003 places a statutory duty on Ofcom to ensure that broadcasters apply generally accepted standards so that the public is adequately protected from harmful material. In applying this rule Ofcom must ensure an appropriate level of freedom of expression as set out in Article 10 of the European Convention on Human Rights. This is in terms of both the broadcaster’s right to impart information and ideas and the audience’s right to receive them.

Ofcom must therefore seek an appropriate balance between ensuring members of the public are protected from material which may be considered harmful on the one hand and the broadcaster’s right to freedom of expression on the other.

As the complainants expressed concern, that the programme misleadingly suggested that the MMR vaccine was dangerous, thereby suggesting to parents that immunisation was not recommended nor a necessity, we firstly considered the programme with specific reference to Rule 2.2. This rule relates to protecting the public from material which may be harmful, by requiring the broadcaster to ensure that the portrayal of factual matters does not materially mislead the audience.

Rule 2.2

With reference to this rule Ofcom considered if the programme had given the overall impression to listeners that the MMR vaccine was dangerous and unnecessary and whether material harm might have been caused to the public as a result.

Ofcom acknowledges that the focus of the debate was intended to be about a parent’s right to choose, based upon an informed decision, whether to have their child immunised. The presenter set out this argument clearly at the outset of the programme, recounting her personal experience when she chose not to immunise her daughter and with comments such as:

“...if as a human being you decide you do not want to give your child a vaccination, you should in a democracy, have the right to say no.”

Furthermore, Jeni Barnett restated this argument several times during the course of the hour long programme with statements such as:

“I want you to tell me why you think we have to have this measles jab..”

"It's not my job to say to people 'don't do it' it's not my job to do any of that. But you're allowed to have your say."

"You've got to make an informed decision – your children will not be the same as anyone else's."

As Jeni Barnett had clearly set out her personal position at the start of the programme it was not unexpected that she would endorse the statements and motives of two mothers who had also elected not to immunise some, or all, of their children. Consequently the callers did make a number of unchallenged statements that suggested the MMR vaccination and immunisations in general were simply not necessary and could be dangerous to a child's health.

For example, the first caller made the comments:

"It must be wrong to be putting toxins and poisonous material into a young baby's body...live viruses that are cured in monkey's kidneys. How can that be the right thing to do?"

And:

"I just think vaccination is a total abuse of the immune system."

The other caller said:

"he [her son]...had the MMR, and then when he was three he was diagnosed with autism...my paediatrician was quite sure that it was the cause of the autism."

And:

"I would never recommend having my children vaccinated...all my children who have never been vaccinated have been very very healthy."

Also Jeni Barnett did not question the text messages and emails she received during the programme which put forward a similar anti-immunisation or MMR position, such as:

"...as well as not being a hundred per cent effective, they also contain cancer causing agents."

"...gave my son MMR and then watched him shut down for a week as autism took hold...I live with guilt."

"It's all Government spin children don't need the triple jab."

In considering Rule 2.2, however, our decision was not based on whether the presenter should have challenged the callers or whether she should have exercised more caution in reading out texts and emails. Rather, it was based on whether, taken as a whole, the content of the programme would have left listeners with the overall impression that the MMR jab was dangerous thereby influencing parents not to immunise their children.

Ofcom is of the view that, on balance, the programme did include sufficient and important opposing arguments to inform listeners of the case for immunisation and so

served to dispel concerns about the dangers of the vaccine and ensure overall that the information was not materially misleading or harmful.

Indeed four of the six callers given air-time during the hour long programme presented an opposing view to Jeni Barnett. Importantly, two of these four callers were health professionals, a GP and a nurse, who drew upon their experience of working closely with young children and the Government recommended immunisation schedule. The doctor in particular was given a considerable amount of air time, largely uninterrupted by the presenter, to explain the rationale for the MMR immunisation programme and the reasons why it was important to eradicate measles:

“All you need to do is meet one family whose normal child - they took the decision not to vaccinate their child - and they got measles and they got a devastating complication such as inflammation of the brain...or they died, and your opinion changes.”

“Measles is the one that can really does kill...it’s just because the numbers in Western Europe and the States and Australia are lower that we don’t see this so often.”

In addition the nurse criticised Jeni Barnett several times for being *“irresponsible”* and made comments such as:

“You should think about what you are doing on this programme. You are doing a lot of damage.”

She also presented the rationale for a national immunisation schedule:

“If you deny immunisation then you are denying health to your child and other children.”

Another caller reprimanded Jeni Barnett for reading out an anonymous email saying that vaccines contained *“cancer causing agents”* (see above) because it would *“scare new mothers”* and it was irresponsible to read out such a statement without the name of the person who had sent in the email. A further caller stated that all the medical experts he had heard on LBC previously had rejected the arguments against the MMR vaccine.

Further, on at least two occasions Jeni Barnett herself looked to redress the balance by commenting:

“...there isn’t a definitive answer. There is no absolute answer” and *“as a parent you have to make a decision based on your own family history”*.

Broadcasters must exercise extreme caution when dealing with issues of public health where misinformation or misleading impression could cause actual or potential damage. It is extremely important that while broadcasters exercise their freedom of expression, they must ensure that any potentially harmful material is fully put in context. Broadcaster understandably wish to reflect discussions and debates that are taking place across the country, but in doing so, in areas of public health, they must not ignore the prevailing medical advice. In particular, while maintaining the right to freedom of expression, broadcasters need to be responsible and be aware of giving air to unfounded or unscientific views on matters of public health which may carry some weight.

At times, it appeared that during this broadcast the presenter relied upon her anecdotal experience and was not adequately briefed on the wider public health issues and prevailing medical advice which this debate would undoubtedly also touch upon. For example, at times the schedule of other childhood immunisations were confused with the MMR triple vaccine schedule, and no reference at all was made to any current research contesting a link between autism and the MMR vaccine yet several anecdotal references were made supporting a link. Whilst this did not mean that the programme overall was materially misleading, and was therefore not in breach of Rule 2.2, in Ofcom's opinion that it would have been preferable for the programme to have made some significant points clearer to listeners.

In conclusion, however, Ofcom is of the view that on balance there were sufficient opposing arguments and challenges from contributors, including health professionals, to present the case for immunisation and that listeners would not have been materially misled by this broadcast. Therefore, Rule 2.2 was not breached.

Rule 5.13

Rule 5.13 states that: "Broadcasters should not give undue prominence to the views and opinions of particular persons or bodies on matters of political or industrial controversy and matters relating to current public policy in all the programmes included in any service taken as a whole."

Some complainants expressed concern that the way in which Jeni Barnett presented the discussion was not balanced and resulted in undue prominence of the anti-MMR position. We assessed these concerns with reference to Rule 5.13.

Rule 5.13 prohibits undue prominence being given to particular views on matters relating to current public policy on a local radio service such as LBC in the context of its output overall. Given that the very nature of speech based local radio services is to debate matters of interest to listeners within a certain locale, which inevitably may relate to current public policy, this requirement for impartiality for the local radio broadcaster is slightly different to that applied to broadcasters with national coverage.

Firstly, legislation in this area, which is therefore reflected in the rules in the Code, requires local radio stations to ensure that no *undue prominence* is given to views, on controversial matters. This is a separate and different concept to the requirement of due impartiality. Secondly, as Rule 5.13 makes clear, for this rule to be breached the broadcaster would have to demonstrate a "*significant* [Ofcom's emphasis] imbalance of views aired" across "*all* [Ofcom's emphasis] programming on a service dealing with the same or related issue within an appropriate period."

In contrast, the rule of due impartiality for national radio broadcasters must be achieved within a programme or more than one programme of the same series only.

As set out above when considering Rule 2.2, Ofcom was of the opinion that the programme itself provided a balance of views which were both in support of, and also opposed to, the MMR vaccine and the immunisation schedule for children. Therefore Ofcom considered that across the programme there was not a significant imbalance of the views aired.

In conclusion, it is Ofcom's view that the programme itself provided enough views to ensure that the programme provided balance overall and, therefore, no undue prominence and no breach of Rule 5.13.

Ofcom recognises that it is important for broadcasters to bring discussions about medical matters to an audience, and, that broadcasters should have the editorial freedom to present such matters as they wish provided that they comply with the Code. However, it is Ofcom's view that broadcasters should exercise caution when dealing with medical matters where the issues are as controversial and scientifically based as the MMR vaccination. Whilst the broadcaster stated that the focus of this programme was about parental choice, not whether the MMR immunisation was good or bad, it was inevitable that such a discussion would evaluate the merits of immunisation or otherwise the issue of choice would not be relevant at all. Where such arguments are based on an understanding of the science and medicine, broadcasters should be aware of the potential dangers of causing harm.

It is also Ofcom's view that the notion of avoiding undue prominence may include the presenter, as appropriate, paying due respect to callers putting forward a view with which he or she disagrees. For example, in this case the contributions of the two mothers who had not immunised their children were positively endorsed and appreciated by the presenter with comments such as "*This is fascinating*" and "*Fantastic...I know I shouldn't be biased...*" In comparison, Jeni Barnett's treatment of the nurse who criticised her handling of the topic was at times dismissive and impatient. In the context of Rule 5.13 therefore, broadcasters are advised to ensure that overall the tone towards, and treatment of, callers does not leave listeners with the impression that one particular view on a matter of political controversy or a matter relating to current public policy, is being given undue prominence.

Not in Breach of Rules 2.2 and 5.13

Not In Breach

Dispatches: The Trouble With Boris

Channel 4, 30 March 2009, 20:00

Introduction

This edition of the *Dispatches* investigative current affairs programme examined Boris Johnson's record since becoming Mayor of London in May 2008 and questioned his performance during his first year in office. It referred to the Mayor's policies on issues such as transport and the environment and questioned whether the Mayor had a coherent plan for London. The programme also looked at various high level resignations by senior members of the Mayor's team and questioned the Mayor's relationship with certain business figures, including the owners of *The Telegraph* newspaper for which the Mayor writes a weekly column. The programme included the views of a number of contributors and also included extracts from interviews with Boris Johnson and speeches made by him.

Ofcom received 18 complaints about the programme. Viewers considered that the programme made allegations about Boris Johnson which were unfair and that it was not presented with due impartiality.

In relation to fairness, Ofcom can only consider and adjudicate on complaints of unfairness when they have been brought by the "person affected" (or someone on their behalf).. Ofcom has received no complaint from Boris Johnson (or from anyone authorised by him).

In relation to the concerns about impartiality, there is a requirement for broadcasters to maintain 'due impartiality' when dealing with matters of political or industrial controversy or relating to current public policy. Ofcom considered that this edition of *Dispatches* did, on several occasions deal with matters of political controversy and/or matters relating to current public policy. For example, there was discussion of London's transport policy, including reference to the Congestion Charging Zone. The programme also included sequences on Olympic funding, London's Low Emission Zone, Housing Policy, Planning Policy, the management of the Metropolitan Police and the proposed expansion of Heathrow.

Therefore, in relation to these controversial matters, Channel 4 was required to ensure that they were treated with due impartiality in accordance with Section Five of the Code. In particular:

- Rule 5.5, which states that "...due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved..."; and
- Rule 5.9, which states that "...presenters and reporters...may express their own views on matters of political or industrial controversy or matters relating to current public policy. However, alternative viewpoints must be adequately represented either in the programme, or in a series of programmes taken as a whole..."

Decision

In considering whether a programme such as *Dispatches: The Trouble With Boris* breaches the Code, Ofcom must exercise its duties in a way which is compatible with Article 10 of the European Convention of Human Rights. This protects the right to freedom of expression. This right encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority. Applied to broadcasting, Article 10 therefore

protects the broadcaster's right to transmit material as well as the audience's right to receive it, as long as the broadcaster ensures compliance with the Rules of the Code as well as the law.

In addition, when reaching its decision in this case, Ofcom bore in mind that investigative journalism plays an essential role in public service broadcasting and is in the public interest. It is of paramount importance that broadcasters such as Channel 4 continue to explore controversial subject matter even where the broadcast of such material polarises opinion and results in complaints to Ofcom. In making investigative programmes, broadcasters must take care however to ensure that the material broadcast is in accordance with the Code. For instance matters of political controversy and matters of current public policy must be treated with due impartiality. The Code explains that "due" is an important qualification to the concept of impartiality. While impartiality itself means not favouring one side over another, "due" means adequate or appropriate to the subject and nature of the programme. The result is that an equal division of time does not have to be given to every view, nor does every argument have to be represented.

Having considered the programme's treatment of those matters to which the requirement of due impartiality applied, Ofcom concluded that overall due impartiality was maintained. There were a number of reasons for this.

The programme began with footage of Boris Johnson addressing a crowd shortly after becoming mayor. He says:

"...that's my pledge to London folks, a safer, greener, fairer city..."

The presenter then makes the editorial thrust of the programme clear with the following:

"...he's funny, charming and unconventional but, with the nation's capital in the grip of a financial crisis, has Mayor Boris got the vision to bring London forward?"

While the programme certainly goes on to level criticisms at Boris Johnson, the alternative viewpoints required by the Code were also apparent. Within the opening five minutes of the programme there is an interview with Mr Johnson in which he outlines what he hopes to achieve by the end of his first term in office. In respect of the other controversial issues discussed in the programme, the views of the Mayor are also demonstrated.

These views are set out by means of footage from Boris Johnson's speeches both before and after his election and by extracts of his appearances at Mayor's Question Time at the London Assembly. At times too, the presenter explains the Mayor's position. For example, we are told that the Mayor is scrapping the Western extension to the London Congestion Charge Zone. On the one hand the presenter notes this will result in 30,000 more cars entering the area but he then goes on to explain that the Mayor is adopting this policy in order to "help traders and small business" and goes on to state that the Mayor "is committed to cutting carbon emissions in other ways".

Viewers were also informed that the Mayor is suspending the latest phase in the Low Emission Zone. Although one interviewee tells the presenter that such a zone is the best policy for tackling air pollution from vehicles, the viewer is then informed by the presenter that the Mayor's reason for this suspension is because of the Low Emission Zone's "detrimental impact on small businesses", and the presenter adds that the Mayor has a range of other strategies "to improve London's air, including opposing the expansion of Heathrow".

Footage is also shown of the Mayor defending his housing policy. The programme explains that this policy has seen the Mayor accused of moulding his housing strategy for political advantage. The Mayor however is seen telling the Assembly that his team has been *“extremely successful in our negotiations with boroughs across London in producing a fantastic commitment to affordable housing in incredibly difficult circumstances”*. The presenter also states *“Boris told us at no time was consideration given to the political leadership of a borough”* (in the context of the Mayor’s housing policy).

In conclusion, Ofcom found that the nature of this programme was clearly signalled by its title, *“The Trouble With Boris”* and there is no doubt that it included a number of critical observations about Boris Johnson’s performance as Mayor of London and his policies. However, to comply with the Code’s requirement of “due impartiality,” in making these observations the programme makers were not obliged to present every facet of every argument. In the circumstances of this programme in Ofcom’s opinion sufficient “alternative views” were presented in such a way that the programme was not in breach of the Code.

Not in Breach of Rules 5.5 and 5.9

Fairness and Privacy Cases

Partly Upheld

Complaint by Ms Judith Isherwood on behalf of the Wales Millennium Centre

Waterfront, ITV1 Wales, 1 November 2007

Summary: Ofcom has upheld parts of this complaint of unfair treatment made by the Wales Millennium Centre.

On 1 November 2007, ITV1 Wales broadcast an edition of *Waterfront*, current affairs and politics based programme.

This edition included a report on the Wales Millennium Centre (“the WMC”) asking for increased public funds from the Welsh Assembly.

The report made comparisons between it and the South Bank Centre (“the SBC”) in London. The report included an interview with Ms Trish Law, a member of the Welsh Assembly, in which she made criticisms of the lack of commercial activity in the WMC, and contrasted the WMC unfavourably with the SBC. The report referred to the recent redevelopment of the SBC, and said that the SBC had developed retail units to reduce its reliance on the public purse.

The WMC complained that comparisons made between it and the SBC were unfair, and that its statement for broadcast had been unfairly edited.

In summary, Ofcom found the following:

- It was unfair to criticise the WMC for failing to develop commercial outlets without mentioning that the SBC had received a significant public subsidy to develop this area. It was unfair for the presenter to say that it was “possible to run a venue (the SBC) more efficiently so that you don’t need taxpayers money” without mentioning this was made possible because of the extra subsidy. However, as the focus of the programme was about the potential commercial development of the WMC in the light of its bid for increased public funds, it was not unfair to omit the other facts that the WMC had referred to in the complaint.
- The WMC’s statement for broadcast was represented fairly in the programme in that it was edited to reflect the WMC’s response to the key criticism the programme made concerning the commercial exploitation of facilities within the centre.

Introduction

On 1 November 2007, ITV1 Wales broadcast an edition of *Waterfront*, a current affairs and politics based programme, which included a report on the Wales Millennium Centre (“the WMC”) and its request for increased public funding from the Welsh Assembly.

The report made comparisons between the WMC and the South Bank Centre (“SBC”) in London and included interview footage of Ms Trish Law, a member of the Welsh Assembly, in which she criticised the lack of commercial activity in the WMC and contrasted it unfavourably with the SBC. The report also referred to the recent redevelopment of the SBC and its retail units in order to reduce the SBC’s reliance on the public funding.

The report was followed by a studio interview between the programme's presenter, Ms Mai Davies, and the former Lord Mayor of Cardiff, Mr Russell Goodway. During this interview, the WMC was discussed and the presenter said:

"Most people up and down Wales...are going to go: look at that, it [money for a project like the WMC] all goes to Cardiff and when it goes wrong we have to bail everything out".

The presenter also stated:

"a lot of people will look at this Centre here...and think, do you know what, that's taxpayer's money and it's not working".

Ms Judith Isherwood, the Chief Executive of the WMC, complained to Ofcom on behalf of the Centre that it had been treated unfairly in the broadcast of the programme in that unfair comparisons had been made between it and the SBC, and that its statement intended for broadcast on the programme had been edited unfairly.

Ofcom's Executive Fairness Group ("the EFG") originally considered, and provisionally adjudicated on, this complaint and found that there was no unfair treatment in the broadcast of the programme.

Ms Isherwood on behalf of the WMC requested a review of the provisional finding on the ground that it was flawed.

Ofcom's Fairness Committee ("the Committee"), its most senior decision making body with regard to fairness and privacy complaints, met to consider afresh the WMC's complaint of unfair treatment.

The Complaint

Ms Isherwood's case made on behalf of the WMC

In summary, Ms Isherwood complained on behalf of the WMC that it was treated unfairly in the programme as broadcast in that:

- a) The programme made unfair comparisons between the WMC and the SBC.

Ms Isherwood indicated that the programme failed to present various facts which were available in the public domain. These facts were as follows:

- i) The SBC's level of revenue subsidy is in excess of 50% of its annual turnover compared to the WMC's, which represents 6% of its annual turnover.
- ii) The redevelopment of the SBC was largely paid for from the public purse.
- iii) The SBC receives nearly £19 million per annum of taxpayers' money.

- b) The programme unfairly edited the WMC's response to the allegations made about it in the programme. For example, the programme omitted the following points:

- i) London has a population of 7.4 million, Cardiff some 310,000. Additionally, 20 million people live within a 90 minute drive of central London. The population of Wales as a whole is only 3 million.

In addition, many of the communities within an hour's drive of the WMC have one of the lowest levels of gross domestic product in Europe. By comparison, the South East of England is the EU's third largest economy.

- ii) Commercial activity accounts for a greater proportion of the WMC's turnover than public subsidy.
- iii) The SBC receives nearly £19 million as an annual subsidy.

ITV Broadcasting's case

- a) In summary ITV Broadcasting Limited ("ITV Broadcasting") responded to the complaint as the holder of the relevant Channel 3 licence that the programme made unfair comparisons between the WMC and the SBC as follows:

ITV Broadcasting said that the comparison between the WMC and the SBC in the programme was fair. The comparison that was made was in relation to the level of "buzz" at the respective centres created from the commercial opportunities, largely in the form of retail outlets, related to their central purpose, namely artistic activity.

ITV Broadcasting said that the comparison was made at a time when the WMC was seeking an enormous increase in its public funding and in that context the programme asked the wider question of whether or not the WMC should do more in commercial terms to reduce its reliance on public funding.

ITV Broadcasting said that, in its view, the respective levels of funding of the WMC and the SBC was something entirely irrelevant to the question of whether the WMC could or should do more to encourage commercial activity. ITV Broadcasting explained that to have included in the programme the respective levels of subsidy at the two venues in the manner suggested, might have been misleading. It argued that including the fact that the SBC received a public subsidy 25 times the level of the WMC did not reflect other ways of extrapolating the figures, for example, that relative to the population served, the WMC was receiving a subsidy broadly equivalent to that of the SBC.

- b) In summary, ITV Broadcasting responded to the complaint that the WMC's statement had been edited unfairly as follows:

ITV Broadcasting said that the central question the programme raised was whether or not the WMC could do more to encourage certain commercial activities.

ITV Broadcasting said that the only part of the WMC's statement relevant to this exploration was included in the programme:

"Pre-budget, staff at the WMC are declining interviews, but insist they do exploit every commercial opportunity right down to the use of the inscription on the front. South Bank, they say, benefits from being in an established tourist location, whilst the Bay is still developing. So is that enough for a case?"

Ms Isherwood's additional comments made on behalf of the WMC

Ms Isherwood on behalf of the WMC requested a review of Ofcom's Provisional Decision.

In summary, Ms Isherwood said that:

- a) The Provisional Decision failed to address adequately its complaint about the following statement made by the programme presenter:

“But we saw from Nick’s report earlier when we went to the South Bank that it is possible to run a venue more efficiently and that you don’t need taxpayer’s money”.

Ms Isherwood said that the presenter’s statement both omitted and misrepresented material facts in a way which was unfair to the WMC as detailed in its complaint. Ms Isherwood said that the statement would have conveyed to viewers the impression that the SBC was not in receipt of taxpayers’ money, which was clearly untrue, as was the suggestion that the SBC was run more efficiently than the WMC. The broadcast of these untrue statements of fact was unfair.

Ms Isherwood also said that the Provisional Decision failed to have regard to the complaint that the retail units at the SBC were developed with public funding and that this material fact should have been reflected in the programme. ITV’s view was that the respective levels of funding were irrelevant to the story. However, as the WMC had only received 6% of the SBC’s level of funding, it did not have the resources to develop commercial ventures in the same way as the SBC and consequently it was not in a position to generate the “buzz” that the programme said was lacking at the WMC. It was unfair for the programme not to have included this fact. Ms Isherwood said that Ofcom failed to give due weight to this material fact being omitted from the programme and did not adequately address the WMC’s complaint on this point.

Ms Isherwood argued that the requirement under Practice 7.9 to ensure that material facts have not been presented in a way that is unfair to an organisation was not adequately satisfied just by giving the organisation an opportunity to contribute. The omission of publicly available information - which disproved the presenter’s statement as to dependency on taxpayer’s money and the SBC being run more efficiently than the WMC - resulted in unfairness. Ms Isherwood said that it was insufficient for ITV to rely on the WMC’s statement to counter argue the comments made in the programme when the material facts in the public domain (as outlined above) should have been included.

- b) Ofcom’s Provisional Decision noted that the WMC was given an opportunity to respond to ITV’s criticism regarding the lack of commercial exploitation at the WMC, and that this was fairly summarised in the programme. However, in editing the statement provided by the WMC, the programme omitted to state that the SBC received a subsidy of nearly £19 million which clearly contradicted the presenter’s statement that taxpayer’s money was not needed to run a venue such as the SBC. The omission of this part of the WMC’s statement was unfair and Ofcom’s Provisional Decision did not provide adequate reasoning as to why it decided it was not unfair.

ITV Broadcasting’s additional comments

In summary, ITV Broadcasting commented on Ms Isherwood’s request on behalf of the WMC for a review of Ofcom’s Provisional Decision as follows:

- a) ITV Broadcasting said its original response dealt with this element of the complaint. It stated that the comparison being made in the programme was the level of activity or “buzz” in relation to potential commercial exploitation at the SBC as opposed to the WMC. This was still ITV Broadcasting’s position. The programme was not obliged as a matter of fairness to rehearse the complainant’s partial interpretation of the respective subsidies given to the WMC and the SBC.

ITV Broadcasting also said that the specific comment relied on by the complainant in the review request was misquoted. The actual comment made by the presenter was:

*“But we saw from Nick Speed’s report earlier when he went to the South Bank it is possible to actually run a venue more efficiently **so** (misquoted as **and**) that you don’t need taxpayers money”.*

ITV Broadcasting said that this comment, in the context of the programme as a whole, clearly reflected the central comparison being made in the programme, namely that the SBC had been more efficient than the WMC in creating “buzz” by exploiting commercial opportunities. On the basis of all the information provided in the programme, ITV Broadcasting said that the viewer could not have been left with an unfair impression that the SBC was not in receipt of taxpayer’s money. The report stated explicitly that the SBC’s “facelift” was “aimed at reducing its dependence on the public purse” therefore making it clear that the SBC had been, and still was, in receipt of public monies. It also suggested that the way it was reducing its dependence on public monies was by exploiting its commercial potential efficiently with retail activities. ITV Broadcasting said that it did not therefore consider that this particular comment by the presenter would have affected the viewers understanding of the comparison of the SBC and the WMC in a way that was unfair.

With regard to the complaint that it was unfair for the programme to criticise the WMC for failing to develop commercial outlets without it pointing out that it had received insufficient public subsidy to invest in such ventures, whereas the SBC had received significant public funds to enable it to do so, ITV Broadcasting said that the WMC’s statement did not include this information. Therefore, the programme could not be criticised for unfairly omitting a point that was not made by the WMC at the time. ITV Broadcasting said that the programme makers edited and reflected fairly the relevant points in the statement provided by the WMC and that there was no unfairness to the WMC in this respect.

- b) ITV Broadcasting said that it maintained that the relevant part of the statement was reflected in the programme as the part that was included was related to the central question of the report, namely, whether WMC could do more to encourage commercial activities. The statement was not therefore edited unfairly.

Decision

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

Where there appears to have been unfairness in the making of the programme, this may only result in a finding of unfairness if Ofcom finds that it has resulted in unfairness to the complainant in the programme as broadcast.

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

The complaint made by Ms Isherwood on behalf of the WMC was first considered by Ofcom’s Executive Fairness Group. It was then referred to the Fairness Committee for

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

In the circumstances of this case, the Committee found the following:

- a) The Committee first considered the complaint that the WMC was treated unfairly in the programme in that it was compared unfavourably and unfairly to the SBC and that various facts in the public domain were omitted.

In considering this part of the complaint, the Committee took into account Practice 7.9 of the Code, which states that before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation; and, anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute.

The Committee also took into account Practice 7.11 of the Code, which states that if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

The Committee noted that a number of comparisons were made in the programme between the WMC and the SBC. For example, the programme's reporter stated that:

"...from cash strapped Millennium Centre, to flourishing South Bank Centre, fresh from a facelift aimed at reducing its dependency on the public purse".

It also noted that when Ms Law, went to the SBC to see how it compared to the WMC she said:

"Well straight away there's a buzz, you know, which was lacking in the Millennium Centre. This is a place where people come to socialise as well as to have a coffee and a sandwich. You know. There's plenty going on, you could feel it straight away."

She also said:

"Well we've got here a DVD shop, suitable for all ages. Everybody loves music. You've got a fantastic bookshop equipped with probably the bestsellers to whatever book you need. We just don't have that in Cardiff Bay. That's just two examples."

The Committee further noted that the programme's presenter said in her interview with Mr Goodway:

"But we saw from Nick's report earlier when we went to the South Bank it is possible to run a venue more efficiently so that you don't need taxpayers' money."

The Committee first considered the nature of the programme. The programme compared the WMC with another centre for the performing arts, namely, the SBC, a centre which the programme makers argued was taking steps to reduce its reliance on public funding. In a programme in which an organisation is the subject of discussion, it is reasonable for a broadcaster to reflect a variety of viewpoints including views critical of that organisation, provided that the broadcaster ensures that this does not result in unfairness. The Committee noted that the comments as detailed above were made in the

context of a programme reporting on the WMC's request for increased funding from the Welsh Assembly.

Ms Isherwood complained on behalf of the WMC that the comment by the programme's presenter was of particular significance in causing unfairness to it in the programme. The Committee considered that her statement was a key point that had the potential to shape viewers' impressions of what was being discussed in the context of the whole programme. It noted that the quote about not needing taxpayers' money appeared to have been misquoted in the submissions, with the word "and" appearing in place of the word "so". The Committee considered whether this was material to the substance of the submissions that had been made. However, in the Committee's view, the substantive issues remained unaltered.

The Committee then considered the complainant's assertion that without significant public funding the SBC would have been unlikely to be in a position to enable it to flourish in its current commercial capacity. The Committee took note that the programme presenter's comment could be interpreted as implying that the SBC had received or was receiving less public money than the WMC. This suggested that if an organisation operated under the model of the SBC that organisation did not need taxpayer's money to fund it. The Committee took the view that this was clearly not the case. It was clear that the reason why the SBC was able to benefit so significantly from exploiting commercial opportunities was because it had received a significant public subsidy over and above its usual subsidy. The omission of this material fact invalidated the comparison being made between the two centres since in the Committee's view the presenter's comment was likely to have given viewers the impression that the SBC had used its usual funding to develop ways of reducing its dependency "on taxpayers' money" and therefore was run more efficiently than the WMC. However, unlike the SBC, the WMC had not received additional funding that allowed it to exploit any commercial opportunities in quite the same way. The Committee concluded that the failure to explain this key difference amounted to the programme making an unfair comparison between the WMC and the SBC. In this respect, the Committee considered that the WMC was treated unfairly in the programme as broadcast.

The Committee then considered whether, in the context of the programme overall, the WMC was compared unfavourably with the SBC. In particular, the Committee considered whether the programme resulted in unfairness as a result of not referring to the other facts that had been detailed in the complaint and which the WMC said were in the public domain.

The Committee noted that during the programme Ms Law stated:

"This Millenium centre really needs to now start acting as a business. I'm looking at it this morning. It's 11.50am and I notice that one of the cafes has just put its shutters up to open. Coming in there was about half a dozen people buying a coffee. There's a little gift shop here. There's something to the back of me where people can sit down, and basically that's all that's here. Surely there's scope here to fill this place up with money making ideas, not only for the artists that you come to see in the night....I'm going next week on a fact finding mission to London to see how they're successful in running their business in similar circumstances."

It also took note of the commentary later in the programme that referred to the commercial activity of the SBC. It stated:

"They've always made the most of their location here.....but in recent years the emphasis has been on exploiting the commercial potential of this site too – and over

the last five years, rental incomes have gone from half a million to £8 million. And that's largely down to the new river facing retail units selling products likely to appeal to culture vultures. They're designed to lure the passing trade and then turn them into the audience for a show sometime".

In the studio interview between the programme's presenter and Mr Goodway, the Committee noted that no reference was made to any of the facts that Ms Isherwood complained had been omitted from the programme. However, the Committee considered that it was not necessary for the programme to provide all these facts, given the subject of the discussion and that the figures could be interpreted in various ways. As the programme focused on the potential for commercial activity, there had been the opportunity during the studio interview to have referred to the extra funding given to the SBC to develop its commercial activities. The Committee considered that this was a relevant factor. The Committee also noted that Ms Law's statement that she was on a "fact finding" mission to see how a business was run successfully "in similar circumstances" was also not challenged. In the Committee's view, whilst some similarities did exist between the two arts venues, the business similarities were different, not least because of the extra subsidy the SBC had received that the WMC had not.

The Committee then considered whether or not it was sufficient for the WMC to have been given an opportunity to respond by way of statement only. It appeared to the Committee from the evidence before it that the WMC had chosen to respond in this particular way. In the circumstances, therefore, and in view of the context and subject of the programme, the Committee considered that the WMC had been given an adequate opportunity to respond.

Taking into account all the circumstances discussed above, the fact that the SBC had received an additional public subsidy that enabled it to develop its commercial activity was a material factor in comparing the SBC's commercial success to the WMC. The Committee found that the failure to refer to this in the comparison that was made between the WMC and the SBC caused unfairness to the WMC in the programme as broadcast. However, given the subject of the programme as a whole, it was not unfair to have excluded the further information in the public domain about levels of subsidy and other facts referred to in the complaint. The Committee has therefore upheld head a) ii) of this head of complaint only.

- b) The Committee next turned to consider the complaint that the WMC was treated unfairly in *Waterfront* because its statement for broadcast was unfairly edited.

In considering this part of the complaint, the Committee took account of Practice 7.6 which states that, "when a programme is edited, contributions should be represented fairly" and the Committee also took account of Practice 7.11 detailed above at head a).

Taking the programme as a whole, the Committee considered that the unfavourable comparisons made in the programme (and discussed at head a) of this decision, above) amounted to an allegation that the WMC was not exploiting commercial facilities within the Centre and comparisons were made with the SBC to illustrate this.

The Committee noted that the WMC had been provided with an opportunity to respond to this allegation and had provided ITV Wales with a statement for broadcast on 13 October 2007, two weeks before the broadcast of the edition that is the subject of this complaint. This statement expressed that:

"WMC has achieved considerable success in its first three years of operation, and this should not be underestimated. Over 1.5 million visitors have been through its

doors – half the population of Wales – and ticket sales have now exceeded £21 million.

Wales Millennium Centre actively pursues commercial exploitation of the centre. It is an integral part of its business. Even the inscription on the front of the building is exploited. Commercial activity actually accounts for a greater proportion of the Centre's turnover than public subsidy.

However to compare Wales Millennium Centre to the Southbank in commercial terms is hardly relevant.

The Southbank Centre has been open for 56 years –Wales Millennium Centre a mere three years. They also receive an annual public subsidy of nearly £19 million...

The Southbank Centre stands between two of London's international landmarks, Tate Modern and the London Eye, making retail exploitation far greater...

London has a population of 7.4 million – Cardiff some 310,000. Additionally, 20 million people live within a 90 minute drive of central London. The population of Wales as a whole is only 3 million and many of the communities within an hour's drive of Wales Millennium Centre have one of the lowest levels of GDP in Europe. By comparison, the South East of England is the EU's third largest regional economy.

London also attracts 150 million tourism trips annually. The Southbank is heavily promoted as part of the capital's cultural offer by Visit London, and Visit Britain. A sophisticated public transport system and 21st century infrastructure and signage serves the Southbank."

The Committee then turned to the broadcast version of the WMC's statement in *Waterfront* which said:

"Pre-budget, staff at the WMC are declining interviews but insist they do exploit every commercial opportunity right down to the use of the inscription on the front. South Bank, they say, benefits from being in an established tourist location whilst the Bay is still developing. So is that enough for a case?"

In considering whether the WMC's statement was edited fairly the Committee noted that programme makers can quite legitimately select or edit material provided by way of written statement for inclusion in a programme. This is an editorial decision for the programme maker. However, programme makers must take care to ensure that where it is appropriate to represent the views of a person or an organisation, it is done in a fair manner that represents their contribution. The Committee noted that the WMC did not mention in their statement that significant funding was invested in the SBC to develop its commercial activity.

Given that the subject of the programme was a commercial focus, it was the Committee's view that the programme makers fairly reflected the WMC's response to the key allegation the programme made concerning potential commercial exploitation of facilities in the centre, namely that it insisted it was exploiting *"every commercial opportunity right down to the use of the inscription on the front"*.

In these circumstances, the Committee did not find any unfairness to the WMC in the editing of its statement, and the Committee has accordingly not upheld this part of the WMC's complaint.

Accordingly, the Committee has upheld part of Ms Isherwood's complaint of unfair treatment made on behalf of the WMC (at head a) ii)), The broadcaster was found in breach of Rule 7.1 of the Code.

Not Upheld

Complaint by the Wales Millennium Centre

Wales Tonight, ITV1 Wales, 2 November 2007

Summary: Ofcom has not upheld this complaint of unfair treatment made by the Wales Millennium Centre.

On 2 November 2007, ITV1 Wales broadcast an edition of *Wales Tonight*, an evening news programme.

This edition included a report on the Wales Millennium Centre (“WMC”) asking for increased public funds from the Welsh Assembly.

The report made comparisons between it and the South Bank Centre (“SBC”) in London. The report included an interview with Ms Trish Law, a member of the Welsh Assembly, in which she made criticisms of commercial activity in the WMC and contrasted the WMC with the SBC. The report referred to the recent redevelopment of the SBC, and said that the SBC had developed retail units to reduce its reliance on the public purse.

The WMC complained about comparisons made between it and the SBC, and complained that its statement for broadcast had been unfairly edited.

In summary, Ofcom found the following:

- In Ofcom’s view, there was no unfairness to the WMC arising from the comparisons made in the programme between the WMC and the SBC and, in particular, material facts had not been presented disregarded or omitted in a way that was unfair to the WMC and the WMC had been provided with an appropriate opportunity to respond to criticisms of it.
- In Ofcom’s view, the WMC’s statement for broadcast was represented fairly in the programme in that it fairly reflected the WMC’s response to the key criticism the programme made concerning the commercial exploitation of facilities within the centre.

Introduction

On 2 November 2007, ITV1 Wales broadcast an edition of *Wales Tonight*, an evening news programme.

This edition included a report on the Wales Millennium Centre (“WMC”) asking for increased public funds from the Welsh Assembly.

The report made comparisons between it and the South Bank Centre (“SBC”) in London. The report included an interview with Ms Trish Law, a member of the Welsh Assembly, in which she made criticisms of commercial activity in the WMC, and contrasted the WMC with the SBC. The report referred to the recent redevelopment of the SBC, and said that the SBC had developed retail units to reduce the SBC’s reliance on the public purse.

The WMC complained to Ofcom that it was treated unfairly in the programme as broadcast.

The Complaint

The Wales Millennium Centre's case

In summary, the WMC complained that it was treated unfairly in the programme as broadcast in that:

- a) It was compared unfavourably and unfairly with the SBC.

By way of background, the WMC stated that the interviewee and the ITV1 Wales news reporter, Mr Speed, made unfavourable comparisons between the WMC and the SBC on the basis of the WMC's lack of commercial exploitation of the venue.

- b) The programme makers unfairly edited the WMC's statement for broadcast.

The WMC complained that pertinent arguments regarding why the comparison between it and the SBC was unfair, which were set out in the WMC's statement, had been omitted from the report and that the substance of the WMC's statement had been unfairly summarised. The WMC alleged that, as a result of these omissions, it was compared unfavourably and unfairly to the SBC.

The WMC said the pertinent arguments which were omitted were that:

- (i) Commercial activity accounts for a greater proportion of the WMC's turnover than public subsidy.
- (ii) The SBC receives an annual public subsidy of nearly £19 million.
- (iii) The SBC has been established for many years longer than the WMC and its location is such that it can access a significantly larger population and tourist numbers than the WMC can.

ITV Broadcasting's case

In summary ITV Broadcasting Limited ("ITV Broadcasting") responded to the complaint, as the holder of the relevant Channel 3 Licence, in the following way.

- a) As regards the complaint that the WMC was treated unfairly in the programme as broadcast because it was compared unfavourably and unfairly to the SBC, ITV Broadcasting said that the comparison between the WMC and the SBC was fair. The comparison that was made was in relation to the level of "buzz" at the respective centres. This level of "buzz" was largely created from the commercial opportunities of the retail outlets related to the respective centres' artistic activities.

The comparison was made at a time when the WMC was seeking an enormous increase in its public funding and in that context the programme asked the wider question of whether or not the WMC should do more in commercial terms to reduce its reliance on the public purse.

ITV Broadcasting said that, in its view, the respective levels of funding of the WMC and the SBC was something entirely irrelevant to the question of whether the WMC could or should do more to encourage commercial activity.

ITV Broadcasting concluded that the comparisons made in the programme between the

two organisations were perfectly fair.

- b) As regards the complaint that the WMC was treated unfairly in the programme as broadcast because the programme makers had unfairly edited the WMC's statement for broadcast, ITV Broadcasting said that the report in *Wales Tonight* had fairly reflected the gist of those parts of the WMC's comments that were relevant to the matters being considered, namely, whether or not the WMC was doing enough to exploit commercial opportunities.

The reporter had said:

"The WMC isn't doing interviews pre-budget, but insist they do exploit every commercial opportunity, right down to the iconic entrance. On Monday we'll find out whether the Assembly agrees".

Decision

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

Where there appears to have been unfairness in the making of the programme, this may only result in a finding of unfairness if Ofcom finds that it has resulted in unfairness to the complainant in the programme as broadcast.

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

The Wales Millennium Centre's complaint was considered by Ofcom's Executive Fairness Group. In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording and transcript of the programme as broadcast and the parties' written submissions.

- a) Ofcom first considered the WMC's complaint that it was treated unfairly in *Wales Tonight* in that it was compared unfavourably and unfairly to the SBC.

In considering this part of the complaint, Ofcom took account of Practice 7.9 of the Code, which states that:

"Before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation; and, anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute."

Ofcom also took account of Practice 7.11 of the Code, which states that:

"If a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond."

Ofcom noted that a number of comparisons were made in the programme between the WMC and the SBC. For example the programme's reporter Nick Speed said in the report:

"...from cash strapped Millennium Centre, to flourishing South Bank Centre, fresh from a face lift aimed at reducing its dependency on the public purse."

Ofcom also noted that Welsh Assembly Member Ms Trish Law made comparisons when she said of the SBC:

"Well straight away there's a buzz [at the SBC] which was lacking in the Millennium Centre. This is a place where people come to socialise as well as to have a coffee and a sandwich. You know, its, and there's plenty going on, you could feel it straight away."

She also said:

"Well we've got here [in the SBC] a DVD shop, suitable for all ages. Everybody loves music. You've got a fantastic bookshop equipped with probably the bestsellers to whatever book you need. We just don't have that in Cardiff Bay. That's just two examples."

Ofcom noted that these comparisons were made in the context of a programme reporting on the WMC's request for increased funding from the Welsh Assembly. Ofcom also noted that the broadcaster compared the WMC with another centre for the performing arts, namely the SBC, a centre which the programme makers argued was taking steps to reduce its reliance on the public purse while the WMC was seeking public funding increases. Ofcom considers that in a programme in which an organization is the subject of discussion, it is reasonable for the broadcaster to reflect a variety of viewpoints including views critical of that organization, provided that the broadcaster ensures that this does not result in unfairness.

Overall Ofcom considered that the WMC was clearly compared unfavourably with the SBC. However in deciding whether this resulted in any unfairness to the WMC, Ofcom also took account of the fact that the WMC had been provided with an opportunity to respond to the criticism made by the broadcaster regarding the exploitation of commercial opportunities at the WMC (this is dealt with in detail at head b) below). Furthermore the WMC's response was fairly represented in the programme as broadcast (again detailed below at head b)). In Ofcom's view the broadcaster took reasonable steps (given the findings at head b)) to satisfy themselves that material facts had not been presented, disregarded or omitted in a way that was unfair to the WMC.

Ofcom therefore found that, taking into account the circumstances discussed below at head b), no unfairness to the WMC resulted from the programme making unfavourable comparisons with the SBC.

- b) Ofcom next turned to consider the complaint that the WMC was treated unfairly in *Wales Tonight* because its statement for broadcast was unfairly edited.

In considering this part of the WMC's complaint, Ofcom took account of Practice 7.6 which states that, "when a programme is edited, contributions should be represented fairly" and Ofcom also took account of Practice 7.11 detailed above at head a).

Taking the programme as a whole, Ofcom considered that the unfavourable comparisons made in the programme (and discussed at head a) of this decision, above)

amounted to an allegation that the WMC was not exploiting commercial facilities within the Centre and comparisons were made with the SBC to illustrate this.

Ofcom noted that the WMC had been provided with an opportunity to respond to this allegation and had provided ITV Wales with a statement for broadcast on 13 October 2007, two weeks before the broadcast of the edition that is the subject of this complaint. This statement explained that:

“WMC has achieved considerable success in its first three years of operation, and this should not be underestimated. Over 1.5 million visitors have been through its doors – half the population of Wales – and ticket sales have now exceeded £21 million.

Wales Millennium Centre **actively** pursues commercial exploitation of the centre. It is an integral part of its business. Even the inscription on the front of the building is exploited. **Commercial activity actually accounts for a greater proportion of the Centre’s turnover than public subsidy.**

However to compare Wales Millennium Centre to the Southbank in commercial terms is hardly relevant.

The Southbank Centre has been open for 56 years – Wales Millennium Centre a mere three years. They also receive an annual public subsidy of nearly £19 million...

The Southbank Centre stands between two of London’s international landmarks, Tate Modern and the London Eye, making retail exploitation far greater...

London has a population of 7.4 million – Cardiff some 310,000. Additionally, 20 million people live within a 90 minute drive of central London. The population of Wales as a whole is only 3 million and many of the communities within an hour’s drive of Wales Millennium Centre have one of the lowest levels of GDP in Europe. By comparison, the South East of England is the EU’s third largest regional economy.

London also attracts 150 million tourism trips annually. The Southbank is heavily promoted as part of the capital’s cultural offer by Visit London, and Visit Britain. A sophisticated public transport system and 21st century infrastructure and signage serve the Southbank.”

(Complainant’s emphases).

Ofcom then turned to the broadcast version of the WMC’s statement in *Wales Tonight*, which said:

“The WMC isn’t doing interviews pre-budget, but insist they do exploit every commercial opportunity right down to the iconic entrance. On Monday we’ll find out whether the Assembly agrees. Nick Speed, Wales Tonight, in Cardiff Bay.”

In considering whether the WMC’s statement was edited fairly Ofcom noted that programme makers can quite legitimately select or edit material provided by way of written statement for inclusion in a programme. This is an editorial decision for the programme maker. However, programme makers must take care to ensure that where it is appropriate to represent the views of a person or an organisation, it is done in a fair manner that represents their contribution.

In Ofcom's view, ITV Wales fairly reflected the WMC's response to the key allegation the news report made concerning commercial exploitation of facilities in the centre, namely that it insisted it was exploiting "*every commercial opportunity right down to the iconic entrance*".

In these circumstances, Ofcom did not find any unfairness to the WMC in the editing of its statement, and Ofcom has accordingly not upheld this part of the WMC's complaint.

Accordingly Ofcom has not upheld the Wales Millennium Centre's complaint of unfair treatment.

Not Upheld

Complaint by Mr Matthew Chiappa

Police Camera Action, ITV1, 21 July 2008

Summary: Ofcom has not upheld this complaint of unfair treatment and unwarranted infringement of privacy made by Mr Matthew Chiappa.

This special edition of *Police Camera Action* examined ultimate boy racers, described as a “tribe of dangerous young male drivers who have taken the thrills of the race track onto the public highways”. One aspect of boy racers’ behaviour examined by the programme was the way in which they modify their cars with tinted windows, under-car lighting and noisy exhausts. Two seconds of footage of Mr Chiappa’s car was broadcast on two occasions in the programme to illustrate typical modifications made by boy racers to their cars. Mr Chiappa, a professional motor sport driver, complained that he was unfairly portrayed as a boy racer and that his privacy was unwarrantably infringed by the filming and broadcast of the footage without his consent.

In summary Ofcom found that the programme did not portray Mr Chiappa as a boy racer and that Mr Chiappa did not have a legitimate expectation of privacy in relation to the filming or broadcast of footage of his car and registration plate. The filming had taken place at a public driving demonstration and did not contain anything of a private or sensitive nature. Therefore his privacy was not unwarrantably infringed in the making or the broadcast of the programme.

Introduction

On 21 July 2008 ITV broadcast an edition of the factual series *Police Camera Action*. This was a special edition on “*Ultimate Boy Racers*” which showed police footage of dangerous driving and was introduced in the following way:

“...Tonight in this special programme, the drivers with the worst reputation and the biggest death toll. It’s the ultimate boy racers on Police Camera Action!”

In the programme, the presenter said:

“To get inside the mind of a boy racer, you’ve got to go out here in the wild. It’s out here that the human brain evolved over 10 million years and most of those natural instincts are still there. Like male lions, men needed to hunt to survive. They enjoyed the thrill of the chase and taking risks to put themselves ahead of the competition. Just like peacocks, men needed to show off their prowess in order to stand out from the competition and attract a female to mate with. Boy racers do the same...”

The programme then showed a short montage of edited clips of cars. One of the clips was of the rear of a sports car as it pulled away at speed. The registration plate was visible very briefly. During this montage the presenter stated:

“...by modifying their cars...”

“...and show off with displays of their driving.”

Later in the programme, the presenter described the types of modifications boy racers made to their cars. He said favourites included “*highly tinted windows*”, “*lowered suspension*” and “*under-car lighting*”. The presenter also referred to “*noisy exhausts*”.

The programme then showed the same brief clip of the rear of a sports car.

Ofcom received a complaint from Mr Matthew Chiappa, the owner of the sports car shown. Mr Chiappa complained that he was treated unfairly in the programme as broadcast and his privacy was unwarrantably infringed in the making and the broadcast of the programme.

The Complaint

Mr Chiappa’s case

In summary, Mr Chiappa complained that he was treated unfairly in the programme, in that:

- a) The programme unfairly portrayed Mr Chiappa as a “boy racer” (i.e. a dangerous young man in a car). The programme failed to explain that his driving was safe or explain that he was driving in controlled conditions at the time.

In summary, Mr Chiappa complained that his privacy was unwarrantably infringed in the making of the programme, in that:

- b) The programme maker filmed his car and registration plate without his consent.

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

- c) The programme maker broadcast his car and his registration plate on national television without his consent.

By way of background to the complaint, Mr Chiappa said that at the time of the filming he was driving on private land and in controlled conditions. He was driving at a “drifting” demonstration and giving passenger rides to paying customers at the Santa Pod raceway on 9 March 2008. Mr Chiappa said that drifting was an up-and-coming motor sport that originated in Japan and arrived in the UK in 2005 and that the sport took place on a proper race track and in controlled conditions.

ITV’s case

- a) In summary, ITV responded to Mr Chiappa’s complaint of unfairness as follows:

ITV said that the programme explored the dangers of boy racers on the streets of the UK and the harm they can do to themselves and others.

ITV denied that the programme failed to explain that Mr Chiappa’s track driving was safe and in controlled conditions.

ITV said that from the start and at several points within the programme a distinction was clearly drawn between boy racers driving dangerously and illegally on public roads, and safe and controlled driving on race tracks and in designated areas.

By way of example, ITV said that:

- the presenter made it clear that the term “boy racer” applied to the “*tribe of dangerous young drivers who have taken the thrills of the race track on to the public highways*”;
- in reference to the car he is driving on a track, the presenter made the following point: “*the speed and exhilaration is fantastic and under these tight track conditions it is pretty safe, but it can be a different story when boy racers spill out on to the road*”; and
- over footage of cars competing on a track, the presenter again made the distinction between professional drivers on a track and the boy racers who aspire to be like them, saying “*from the way they drive, this is the image many boy racers have of their own driving, impressing the crowds out on the racetrack. The image the rest of us see is very different*”.

ITV said that on each occasion it was made clear to viewers that the boy racers shown terrorising the public roads have nothing in common with the professional drivers featured in controlled circumstances. In short, the programme made it clear that the boy racer menace was on the streets, not on the track.

ITV pointed out that Mr Chiappa’s car was featured very briefly on two occasions. On both occasions ITV considered it was clear that Mr Chiappa’s car was at a professional event and not out on the public highway, which was the programme’s definition of a boy racer.

ITV said that Mr Chiappa’s number plate was visible for less than a second on each occasion and while he was able to identify it himself, ITV considered it was highly unlikely that a member of the public would have been able to read the number plate in the time that it was visible. Even if they had been able to do so, ITV considered that the only way they would have been able to identify the car, as Mr Chiappa’s, would be if they already knew that Mr Chiappa was a professional drift driver and were familiar with the details of his car and number plate. ITV said that if a viewer already knew Mr Chiappa and his car, it was highly likely they would also know that he was a professional driver driving in a safe environment and therefore not a boy racer.

ITV made clear that it did not intend to suggest that Mr Chiappa was a boy racer. ITV explained that images of his car were used very briefly on two occasions but there was no suggestion that Mr Chiappa was a street boy racer or that he was involved in any dangerous or illegal activity. Furthermore, ITV said it was clear that his car was not an ordinary street vehicle. On both occasions when his car was briefly featured, ITV considered it was clear that it was in a safe controlled driving area rather than on the public highway.

Given the brevity of the two shots of Mr Chiappa’s car and the context of the programme they appeared in, ITV believed it was highly unlikely that viewers’ opinions of Mr Chiappa would have been adversely affected by what they saw, whether they knew him or not.

b) and c)

In summary, ITV responded to Mr Chiappa’s complaints of unwarranted infringement of privacy in the making and broadcast of the programme as follows:

ITV did not believe that Mr Chiappa’s privacy was infringed either in the making or the broadcast of the programme.

ITV said that for Mr Chiappa's privacy to be infringed he would have to be able to show that he had a reasonable expectation of privacy in competing at an event that was open to the public.

ITV did not believe that Mr Chiappa had a legitimate expectation of privacy in competing at such an event. While the event may have been held on private land, it was open to members of the public. Furthermore, ITV pointed out that Mr Chiappa's role at the event – performing in front of and being paid to give rides to members of the public – was clearly a public-facing role.

ITV said that the programme's producers filmed at the event with the permission of the event organisers and the location owner.

Finally, ITV said that the information given about Mr Chiappa and his car was already in the public domain, being featured in a number of popular YouTube postings.

In these circumstances, ITV did not believe that Mr Chiappa had a reasonable expectation of privacy either in the making or the broadcast of the programme, especially as he was never identified as the driver of the car and his car and number plate were only shown very briefly. As such, ITV did not believe that Mr Chiappa's consent was required before filming his car and broadcasting the two brief images of it.

Decision

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

Where there appears to have been unfairness in the making of the programme, this will only result in a finding of unfairness if Ofcom finds that it has resulted in unfairness to the complainant in the programme as broadcast.

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

Mr Chiappa's complaint was considered by Ofcom's Executive Fairness Group. In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties and a recording and transcript of the programme as broadcast.

- a) Ofcom first considered the complaint that Mr Chiappa was unfairly portrayed as a "boy racer" (i.e. a dangerous young man in a car).

Ofcom had particular regard to whether the programme maker's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals, as set out in Rule 7.1 of the Ofcom Broadcasting Code ("the Code"), and whether it had taken reasonable care to satisfy itself that material facts had not been presented, disregarded or omitted in a way that was unfair to an individual or organisation (as outlined in Practice 7.9 of the Code).

Ofcom noted that Mr Chiappa was not named in the programme and did not appear in it, only his car and registration plate were broadcast. In the circumstances, in Ofcom's view, Mr Chiappa could only have been labelled a boy racer if, from the two brief clips included in the programme, viewers recognised the car as Mr Chiappa's. Ofcom was satisfied that people who knew Mr Chiappa's car so well that they recognised it from two two-second clips, would also know that Mr Chiappa was a professional driver and not a boy racer as defined by the programme.

In any event, while Ofcom noted that brief footage of Mr Chiappa's car was used to illustrate some of the modifications that boy racers make to their cars, it also noted that throughout the programme an inferred and explicit distinction was made between boy racers and professional, responsible drivers. This was made in commentary that compared and contrasted the differences between such drivers and also visually through the quality and type of footage of each. The boy racers were often shown at night and through CCTV, police car or helicopter footage, whereas the professional drivers were featured in higher quality daytime recordings. From the footage of Mr Chiappa's car which appeared in the programme, it was clear to Ofcom that this was not a car driven illegally on the streets and filmed by CCTV cameras or similar, it was a car filmed at a racetrack and driven in controlled conditions and was the sort of car that the boy racers dangerously seek to emulate on the public streets.

In the circumstances, Ofcom found that the programme as broadcast did not portray Mr Chiappa as a boy racer and did not result in unfairness to him.

b) and c)

Ofcom next considered Mr Chiappa's complaints that his privacy was unwarrantably infringed in the making and broadcast of the programme because his car and registration plate were filmed by the programme maker without his consent and the programme as broadcast included footage of the same.

In Ofcom's view, the line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. In considering complaints about the unwarranted infringement of privacy both in relation to the making and the broadcast of the programme, Ofcom must consider two distinct questions: First, has there been an infringement of privacy? Secondly, if so, was it warranted?

In considering whether or not there had been an infringement of privacy, Ofcom was first required to consider whether Mr Chiappa had a legitimate expectation of privacy in relation to the filming and broadcast of the footage.

Ofcom considered the meaning of legitimate expectation of privacy with reference to the definition set out in the Code which states:

"Legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and whether the individual concerned is already in the public eye. There may be circumstances where people can reasonably expect privacy even in a public place. Some activities and conditions may be of such a private nature that filming or recording, even in a public place, could involve an infringement of privacy. People under investigation or in the public eye, and their immediate family and friends, retain the right to a private life, although private behaviour can raise issues of legitimate public interest."

Ofcom noted that:

- the filming of Mr Chiappa's car and registration plate took place at a "drifting" demonstration at the Santa Pod raceway where Mr Chiappa was giving passenger rides to paying customers in front of an audience;
- Mr Chiappa did not appear in the programme, only very brief footage of his car and registration plate did; and
- Mr Chiappa's car has appeared in "drifting" broadcasts on Sky Sports and YouTube and so was already in the public domain.

In all the circumstances, Ofcom considered that neither Mr Chiappa's activities whilst being filmed, nor the images themselves (i.e. brief footage of a car and registration plate) were of a sensitive or private nature. As referred to above, the shots of car and registration plate were so brief as to be unidentifiable to all but those who knew Mr Chiappa well and in any event, he was not portrayed as taking part in an illegal activity.

As a result, Ofcom considered that Mr Chiappa had no legitimate expectation of privacy in relation to his car and registration plate and that Mr Chiappa's privacy was not infringed in the making of the programme or in the programme as broadcast.

Having concluded that there was no infringement of privacy in the making or broadcast of the programme, it was unnecessary for Ofcom to go on to consider whether any infringement was warranted.

Accordingly Ofcom has not upheld Mr Chiappa's complaint of unfair treatment in the programme as broadcast or his complaints of unwarranted infringement of privacy in the making and the broadcast of the programme.

Not Upheld

Complaint by Mr Casey Bowen on his own behalf and on behalf of Mr Martin Bowen (deceased)

ITV News at Ten, ITV1, 6 August 2008

Summary: Ofcom has not upheld this complaint of unfair treatment and unwarranted infringement of privacy made by Mr Casey Bowen.

On 6 August 2008, *ITV News at Ten* included a report on the conviction of several members of a family, the Johnsons, and their associates for a number of high value burglaries of stately homes. Extracts from a previously broadcast documentary were included as background to the news report. These extracts included footage of Mr Martin Bowen.

Casey Bowen complained that he and his father, Martin Bowen, had been treated unfairly in the programme and that their privacy had been unwarrantably infringed in the broadcast of it.

In summary Ofcom found:

- The programme did not give viewers the impression that Martin Bowen had been involved in the crimes that the Johnson family and their associates had been convicted of. Ofcom found that any impression that the programme gave that Martin Bowen was at one time associated with the Johnson family, was fair. Martin Bowen at one time lived with the Johnson family and took part in a documentary about their lives and would have given consent at the time for his participation.
- The privacy of Casey Bowen and Martin Bowen was not unwarrantably infringed in the programme as broadcast as the image of Martin Bowen included in the programme would only have identified him to those who knew him well.

Introduction

On 6 August 2008 ITV broadcast an edition of its news programme, *ITV News at Ten*, which featured a news report on the conviction of five members of a criminal gang including four members of the same family (the Johnson family), for conspiracy to commit burglary. The report gave an account of the activities of the gang which had targeted stately homes in Western and Central England.

The report showed archive footage of the Johnson family from an earlier BBC documentary, *Country Strife - Summer with the Johnsons* which was broadcast in 2005. The footage was introduced by Neil Connery, the reporter, in the following way:

“Meet the Johnsons, a travelling family at play in their own TV documentary...”

During this commentary, a man demolishing shelving inside a caravan was shown, identified by the complainant as his late father Martin Bowen.

The report showed a CCTV police video and the reporter continued:

“But this is some of them at work, caught on CCTV breaking into the former home of James Bond creator, Ian Fleming. In just ten minutes they stole antiques worth three quarters of a million pounds.”

Ofcom received a complaint from Casey Bowen, who complained that he and his late father, Martin Bowen, who died three years ago, were treated unfairly in the programme and their privacy was unwarrantably infringed in both the making and the broadcast of the programme.

The Complaint

In summary, Casey Bowen complained that he and his late father Martin Bowen, were treated unfairly in the programme, in that:

- a) Martin Bowen was unfairly portrayed as a member of the Johnson family. The programme included footage of Martin Bowen inside a caravan, when showing the documentary footage of the Johnsons. Although he was not named, he was, as a result of his inclusion, portrayed as a member of the Johnson family. The voiceover described the Johnsons throughout when footage of Martin Bowen was included in the programme.
- b) Martin Bowen was unfairly portrayed as being implicated in the recent and widely reported criminal offences of the Johnson family. However, Martin Bowen was not involved in those offences and had, in fact, been deceased for three years.

In summary, Casey Bowen complained that his privacy and that of his father was unwarrantably infringed in the broadcast of the programme, in that:

- c) The programme included footage of Martin Bowen when showing footage of the Johnson family. This was an unwarranted infringement of the privacy of Casey Bowen and Martin Bowen.

ITV's response

In summary, ITV and ITV News sincerely regretted any distress caused to Mr Casey Bowen by the inclusion of footage of his deceased father in the news report. However, given the incidental nature of the footage in the context of the report as a whole, it did not believe that this constituted unfairness to Casey Bowen or to Martin Bowen nor did it constitute an unwarranted infringement of their privacy.

In relation to the complaint of unfair treatment of Casey Bowen and Martin Bowen (deceased) ITV responded as follows:

Martin Bowen

- a & b) The footage was very brief and Martin Bowen's face was not shown and he was not named. The news report by contrast clearly showed the actual defendants who had been convicted and Martin Bowen was not one of these. No viewer could have reasonably concluded that Martin Bowen was involved in the court case. It maintained that even those who knew him may not have recognised him given the brevity of the footage and that his face was not shown. Furthermore, that those who knew him would be likely to know that he was deceased and therefore could not be one of the gang featured in the news report. Those that might remember the original BBC programme could have recognised the footage of him, but again ITV said that the news report made clear that he was not among the men convicted.

The footage of Martin Bowen was incidental to the news report as sometimes happens in other news reports. Therefore ITV suggested that there was no "portrayal" of him as such. The shots were not lingering or identifiable and were peripheral to the main thrust

of the report. Martin Bowen was not unfairly portrayed as being a member of the Johnson family or implicated in the criminal offences being reported on in the broadcast.

Casey Bowen

Mr Casey Bowen was not featured or referred to in the report in any way or a participant in the programme and was not the subject of the alleged unfair treatment. There was nothing in the programme which could be said to constitute unfair treatment of the complainant.

In relation to the complaint of infringement of privacy of Casey Bowen and Martin Bowen (deceased) ITV said:

Martin Bowen

- c) The report briefly showed footage of Martin Bowen smashing shelves in a caravan. However, it did not name him, show his face or otherwise identify him. As Martin Bowen would have known he was being filmed for the original BBC documentary and gave his permission in that respect, there was nothing inherently private about the actions of Martin Bowen in the footage broadcast by ITV news. This was not a “private” situation or one in which he would have had a reasonable expectation of privacy.

Casey Bowen

ITV accepted that Casey Bowen may have been upset by seeing the footage of his deceased father in the context of the news report. However it did not agree that the inclusion of the footage was an unwarranted infringement of his privacy as the footage did not identify his father or refer to his family or his relationship to the complainant. It was footage that had been broadcast previously and did not disclose any inherently private information about Martin Bowen or the complainant. It did not portray Martin Bowen as a member of the Johnson gang or as being involved in the court case. The inclusion of the brief and unidentified footage of Martin Bowen did not constitute an unwarranted infringement of the privacy of the complainant, Casey Bowen.

Decision

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

Where there appears to have been unfairness in the making of the programme, this will only result in a finding of unfairness, if Ofcom finds that it has resulted in unfairness to the complainant in the programme as broadcast.

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

Mr Casey Bowen’s complaint was considered by Ofcom’s Executive Fairness Group (“Ofcom”). In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording and transcript of the programmes as broadcast and the parties’ written submissions.

- a & b) Ofcom first considered the complaint that Casey Bowen and his late father, Martin Bowen, were treated unfairly in the programme, in that Martin Bowen was portrayed as a member of the Johnson family and as being implicated in the criminal offences of that family.

In considering these heads of complaint Ofcom took account of Practice 7.8 of the Code which states that broadcasters should ensure that the re-use of material originally filmed or recorded for one purpose and then used in a programme for another purpose, or used in a later or different programme, does not create unfairness. This applies both to material obtained from others and the broadcaster's own material.

Ofcom first considered the complaint of unfairness in respect of Martin Bowen.

Ofcom noted that the report focused on the sentencing of five men. The programme featured clear police photos of each of the men convicted of the crimes. In Ofcom's opinion, viewers would have been left in no doubt as to who had been convicted. Given the programme's clear information, Ofcom found that viewers were not left with the unfair impression that Martin Bowen had been one of the five men involved in the crimes: Mr Bowen was neither named nor prominently featured in the broadcast and it was clear that he was not one of the five men convicted.

Ofcom next considered whether the programme makers had unfairly associated Martin Bowen with the Johnson family, by including footage of him in the programme as broadcast.

Ofcom noted that the footage of Martin Bowen was taken from a BBC documentary *Country Strife – Summer with the Johnsons*. In Ofcom's view the image of Martin Bowen was of an incidental nature, very brief and not the focus of the report (which as referred to above, was the sentencing of five individuals). Ofcom also noted that consent would have been obtained for Martin Bowen to take part in the documentary (who was living with the Johnson family at the time). The footage from the documentary that was included in the news report was clearly labelled as such.

In Ofcom's view, any association drawn between Martin Bowen and the Johnson family as a result of the broadcast of extracts from the documentary would not have resulted in unfairness to Martin Bowen. This was because Martin Bowen was at one time closely associated with the Johnson family and appropriate consent would have been obtained from him for this association to be documented and broadcast in *Country Strife – Summer with the Johnsons*. The re-broadcast of extracts from this documentary was not unfair to the Martin Bowen as they were presented in the appropriate context and did not misrepresent his then association with the Johnson family. In the circumstances, Ofcom found no unfairness to Martin Bowen.

Having found no unfairness to Martin Bowen, Ofcom found there were no grounds to uphold Casey Bowen's complaint of unfair treatment.

- c) Ofcom next considered Casey Bowen's complaint that his privacy and that of his late father, Martin Bowen, was unwarrantably infringed in the broadcast of the programme in that footage of Martin Bowen was included when showing footage of the Johnson family.

In Ofcom's view, the line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. In considering complaints about the unwarranted infringement of privacy both in relation to the making and the broadcast of the programme, Ofcom must consider two distinct questions: First, has there been an

infringement of privacy? Secondly, if so, was it warranted? This is in accordance with Rule 8.1 of Ofcom's Broadcasting Code ("the Code") which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes, must be warranted. Ofcom also took into account Practice 8.3 which states that broadcasters should ensure that re-use of material does not create an unwarranted infringement of privacy.

Ofcom first considered whether Martin Bowen had a legitimate expectation of privacy in relation to the image of him being re-broadcast in the context of a news report that used previously recorded footage to illustrate its message. Ofcom considers that re-use of material, particularly in connection with a deceased person, should be carefully considered before it is re-broadcast. It notes also that consent is normally required from next-of-kin to broadcast images of the deceased, unless it is warranted to do so.

In considering whether Martin Bowen had a legitimate expectation of privacy Ofcom also took into account the fact that Martin Bowen would have given informed consent for him to be included in the original documentary. Ofcom also noted that the footage included in the news report was used in the same context as in the original programme, namely background footage in a programme looking at the criminal activities of the Johnson family. Ofcom considered that the brief image of Martin Bowen was of an incidental nature to the news of the conviction of members of the Johnson family. Furthermore, in Ofcom's view, Martin Bowen was not identifiable to anyone other than those who knew him already and knew that he was deceased and not involved in the criminal activity of the Johnsons.

In these circumstances, Ofcom found that Martin Bowen had no legitimate expectation of privacy in relation to broadcast of the image of him contained within the news report. Having found no legitimate expectation of privacy, Ofcom found that Martin Bowen's privacy was not infringed in the broadcast of the programme. It was therefore not necessary for Ofcom to go on to consider whether any infringement was warranted.

In relation to Casey Bowen's complaint of unwarranted infringement of his own privacy as a result of broadcast of the image of his father in the news report about the conviction of members of the Johnson family, Ofcom considered whether Casey Bowen had a legitimate expectation of privacy. Ofcom acknowledged that that it may have been upsetting for Casey Bowen to see an image of his late father re-broadcast in the news report.

However, in Ofcom's view, any expectation of privacy Casey Bowen had in relation to the inclusion of footage of his father was diminished by the fact that Martin Bowen would have consented to his inclusion in the documentary; that the footage was used in the same context as in the original programme, that the footage of Martin Bowen was incidental and that he would not have been identifiable other than to those who knew him already.

In these circumstances, Ofcom found that Casey Bowen had no legitimate expectation of privacy in relation to broadcast of the image of his father contained within the news report. Having found no legitimate expectation of privacy, Ofcom found that Casey Bowen's privacy was not infringed in the broadcast of the programme. It was therefore not necessary for Ofcom to go on to consider whether any infringement was warranted.

Accordingly Ofcom has not upheld Casey Bowen's complaint on behalf of himself and his late father, Martin Bowen, of unfair treatment and unwarranted infringement of privacy in the broadcast of the programme.

Not Upheld

Complaint by Mr Casey Bowen on his own behalf and on behalf of Mr Martin Bowen (deceased)

BBC News at One, BBC News at Six, BBC News at Ten, BBC1, 6 August 2008

Summary: Ofcom has not upheld this complaint of unfair treatment and unwarranted infringement of privacy made by Mr Casey Bowen.

On 6 August 2008, BBC news programmes included a report on the conviction of several members of a family, the Johnsons, and their associates for a number of high value burglaries of stately homes. Extracts from a previously broadcast documentary were included as background to the news reports. These extracts included footage of Mr Martin Bowen.

Casey Bowen complained that he and his father, Martin Bowen, had been treated unfairly in the programmes and that their privacy had been unwarrantably infringed in the broadcasts.

In summary Ofcom found:

- The programme did not give viewers the impression that Martin Bowen had been involved in the crimes that the Johnson family and their associates had been convicted of. Ofcom found that any impression that the programme gave that Martin Bowen was at one time associated with the Johnson family, was fair. Martin Bowen at one time lived with the Johnson family and took part in a documentary about their lives and gave informed consent at the time for his participation.
- The privacy of Casey Bowen and Martin Bowen was not unwarrantably infringed in the programmes as broadcast as the images of Martin Bowen included in the programmes would only have identified him to those who knew him well.

Introduction

On 6 August 2008, *BBC News at One* featured a news report on the conviction of five members of a criminal gang including four members of the same family (the Johnson family), for conspiracy to commit burglary. The report gave an account of the activities of the gang which had targeted stately homes in Western and Central England.

The report showed archive footage of the Johnson family from a BBC documentary, *“Country Strife – Summer with the Johnsons”*, which was broadcast in 2005. The footage was introduced in the news reports as follows:

Reporter: *“The Johnsons, a notorious law breaking gypsy family, their antics caught on camera for a BBC documentary three years ago. In the film, they admit to a criminal lifestyle and reveal a hatred of the establishment...”*

During this commentary, a man was shown demolishing shelving inside a caravan. The same man was also shown walking past a bonfire and, later on, standing near it.

The man was identified by the complainant, Casey Bowen, as his late father, Martin Bowen.

On the same day, a different version of the report was broadcast on *BBC News at Six* and *BBC News at Ten*. The footage of Martin Bowen demolishing shelving inside a caravan was not included in these programmes, however, footage of him walking past a bonfire and standing near it was shown and the footage was introduced in the report as follows:

Reporter: *“The Johnsons, their antics caught on camera for a BBC documentary three years ago. In the film, they admit to a criminal lifestyle and reveal a hatred of the establishment...”*

Casey Bowen complained to Ofcom that he and Martin Bowen, who died three years ago, were treated unfairly in the programmes and their privacy was unwarrantably infringed in the broadcast of the programmes.

The Complaint

In summary, Casey Bowen complained that he and Martin Bowen were treated unfairly in the programmes, in that:

- a) Martin Bowen was unfairly portrayed as a member of the Johnson family. The programmes included footage of Martin Bowen, when showing the documentary footage of the Johnsons. Although Martin Bowen was not named, the voiceover described the Johnsons throughout when footage of Martin Bowen was being shown.
- b) Martin Bowen was unfairly portrayed as being implicated in the recent and widely reported criminal offences of the Johnson family. However, Martin Bowen was not involved in those offences and had, in fact, been deceased for three years.

In summary, Casey Bowen complained that his privacy and that of his father was unwarrantably infringed in the broadcast of the programmes, in that:

- c) The programmes included footage of Martin Bowen when showing footage of the Johnson family. This was an unwarranted infringement of the privacy of Casey Bowen and Martin Bowen.

The BBC's response

By way of background the BBC explained that a package had been prepared by BBC News for use in March 2008 when the final decision on a complex series of trials of the Johnsons was expected. However, the trial continued for several months longer than expected and in the intervening period the reporter who had compiled the report learned that Martin Bowen had passed away. The reporter therefore removed the three brief and fleeting instances where Martin Bowen was shown in the report. Despite taking steps to remove the footage of Martin Bowen, the BBC maintained that the complainant would not have been recognisable in these shots other than to those who knew him well.

When the trial concluded unexpectedly early in August 2008 the reporter was abroad and in his absence his re-edited package could not be found. When a replacement tape was ordered the earlier version, containing images of Mr Bowen, was delivered in error and this was broadcast. When the reporter learned on the day the trial ended

that the story had run, he sent instructions that the footage of Martin Bowen be removed. However, his instructions were not fully understood and two shots still remained and went out in the two later news bulletins.

The BBC responded to the complaint that Martin Bowen and Casey Bowen were treated unfairly in the broadcasts as follows:

- a) As regards the complaint that Martin Bowen was unfairly portrayed as a member of the Johnson family, the BBC said that the images of him were extremely fleeting and one was shot from some considerable distance. In the circumstances the BBC argued that Martin Bowen would not have been recognisable in the shots other than to people such as his own family who knew him well and who were already aware of the relationship that existed between him and the Johnsons. In those circumstances the BBC said that no unfairness could be attached to the use of the pictures. In any event the BBC said Martin Bowen had consented to being filmed for inclusion in the original documentary and must have been aware of the focus of that programme. After his death Martin Bowen's wife had consented for his image to be used in the original documentary, after she had seen it. The BBC said this consent from his closest surviving relative disposed of any argument that suggested it was unfair to associate Martin Bowen with the Johnsons.
- b) In response to the complaint that Martin Bowen was unfairly implicated in the criminal offences of the Johnston family, the BBC said that he was not implicated in the activities of the Johnson family by the inclusion of his images in the report. The BBC said the members of the Johnson family and their associates who were convicted were clearly identified in the news reports with both their names and photographs being used. Martin Bowen was not identified by name and was hardly recognisable in the report and would only have been so to those who already knew him and knew of his association with the Johnsons. The BBC said that, even if he were recognisable, he had given his consent and later his wife had given her consent for footage of him to be used in a documentary they were both aware of centred on the criminal activity of the Johnsons.

The BBC responded to the complaint that Casey Bowen's privacy and that of his father was unwarrantably infringed in the broadcast of the programmes as follows:

- c) As stated previously Martin Bowen's consent was given to appear in the original documentary and that of his wife was given after he passed away. In these circumstances, the BBC said that it could not have amounted to an infringement of his privacy as the footage was used in precisely the same context as it was originally filmed for, that is, the criminality of the Johnson family. Again, the BBC said Martin Bowen was only recognisable to those who already knew him and of his association with the Johnsons.

With regard to Casey Bowen the BBC put forward the view that adult children of a deceased parent would have a significantly lower expectation of privacy than the parents of a young child, especially in this case, in the absence of any mention of the circumstances of their bereavement. Neither the fact nor the circumstances of Martin Bowen's death were mentioned in the broadcast material, so it argued there was no sense in which unsuspecting relatives were suddenly confronted with the details of the tragedy.

Within the material broadcast, Martin Bowen was only recognisable to those who already knew him and knew of his association with the Johnsons. He wasn't

named or identified in any other way. This it believed disposed of any residual possibility that the privacy of Casey Bowen may have been infringed by virtue of the material being transmitted.

Decision

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

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

Casey Bowen's complaint was considered by Ofcom's Executive Fairness Group. In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording and transcript of the programmes as broadcast and the parties' written submissions.

a & b) Ofcom first considered the complaint that Casey Bowen and Martin Bowen were treated unfairly in the programmes, in that Martin Bowen was portrayed as a member of the Johnson family and as being implicated in the criminal offences of that family.

In considering these heads of complaint Ofcom took account of Practice 7.8 of the Code which states that broadcasters should ensure that the re-use of material originally filmed or recorded for one purpose and then used in a programme for another purpose, or used in a later or different programme, does not create unfairness. This applies both to material obtained from others and the broadcaster's own material.

Ofcom noted that the reports focused on the sentencing of five men. The programme featured clear police photos of each of the men convicted of the crimes and all were named. In Ofcom's opinion, viewers would have been left in no doubt as to who had been convicted. Given the programme's clear information, Ofcom found that viewers would not have been left with the impression that Martin Bowen had been one of the five men involved in the crimes: Mr Bowen was neither named nor prominently featured in the broadcast and it was clear that he was not one of the five men convicted.

Ofcom next considered whether the programme makers had unfairly associated Martin Bowen with the Johnson family, by including footage of him in the programmes as broadcast.

Ofcom noted that the following footage of Martin Bowen was included in the programmes:

- *News at One*
This broadcast included a brief rear view image of Martin Bowen dismantling shelving inside a caravan; and two brief shots of him taken in the distance, one walking past a bonfire and a shot of him through the smoke of that fire.

- *News at Six and News at Ten*
This broadcast only included the two brief shots of Martin Bowen taken in the distance, one walking past a bonfire and a shot of him through the smoke of that fire.

Ofcom noted that the footage of Martin Bowen was taken from the documentary *Country Strife – Summer with the Johnsons*. In Ofcom's view the images of Martin Bowen were of an incidental nature, very brief and not the focus of the reports (which as referred to above, was the sentencing of five individuals). Ofcom also noted that Martin Bowen had willingly participated in the making of the documentary (and was living with the Johnson family at the time) and that after his death his wife had consented to his contribution being included in the final documentary. The footage from the documentary that was included in the news reports was clearly labelled as such both on screen and also in the commentary.

In Ofcom's view, any association drawn between Martin Bowen and the Johnson family as a result of the broadcast of extracts from the documentary would not have resulted in unfairness to Martin Bowen. This was because Martin Bowen was at one time closely associated with the Johnson family and appropriate consent had been obtained from both him and his wife for this association to be documented and broadcast in *Country Strife – Summer with the Johnsons*. The re-broadcast of extracts from this documentary was not unfair to Martin Bowen as they were presented in the appropriate context and did not misrepresent his association with the Johnson family. In the circumstances, Ofcom found no unfairness to Martin Bowen.

Having found no unfairness to Martin Bowen, Ofcom found there were no grounds to uphold Casey Bowen's complaint of unfair treatment.

- c) Ofcom next considered Casey Bowen's complaint that his privacy and that of his late father, Martin Bowen, was unwarrantably infringed in the broadcast of the programmes in that footage of Martin Bowen was included when showing footage of the Johnson family.

In Ofcom's view, the line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. In considering complaints about the unwarranted infringement of privacy both in relation to the making and the broadcast of the programme, Ofcom must consider two distinct questions: First, has there been an infringement of privacy? Secondly, if so, was it warranted? This is in accordance with Rule 8.1 of Ofcom's Broadcasting Code "the Code" which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes, must be warranted. Ofcom also took into account Practice 8.3 which states that broadcasters should ensure that re-use of material does not create an unwarranted infringement of privacy.

Ofcom first considered whether Martin Bowen had a legitimate expectation of privacy in relation to the images of him being re-broadcast in the context of a news report that used previously recorded footage to illustrate its message. Ofcom considers that re-use of material, particularly in connection with a deceased person, should be carefully considered before it is re-broadcast. It notes also that consent is normally required from next-of-kin to broadcast images of the deceased, unless it is warranted to do so.

Ofcom noted that the BBC used the incorrect footage in their news reports, having replaced the previously edited version with a copy that had not been edited. Notwithstanding this error, in considering whether Martin Bowen had a legitimate expectation of privacy Ofcom also took into account the fact that Martin Bowen gave informed consent for footage of him to be included in the original documentary and that after his death his wife gave her informed consent for him to be included. Ofcom also noted that the footage included in the news report was used in the same context as in the original programme, namely background footage in a programme looking at the criminal activities of the Johnson family. Ofcom considered that the brief images of Martin Bowen were of an incidental nature to the news of the convictions of members of the Johnson family. Furthermore, in Ofcom's view, Martin Bowen was not identifiable to anyone other than those who knew him already and knew that he was not involved in the criminal activity of the Johnsons.

In these circumstances, Ofcom found that Martin Bowen had no legitimate expectation of privacy in relation to broadcast of the images of him contained within the news reports. Having found no legitimate expectation of privacy, Ofcom found that Martin Bowen's privacy was not infringed in the broadcast of the programme. It was therefore not necessary for Ofcom to go on to consider whether any infringement was warranted.

In relation to Casey Bowen's complaint of unwarranted infringement of his own privacy as a result of broadcast of images of his father in news reports about the conviction of members of the Johnson family, Ofcom considered whether Casey Bowen had a legitimate expectation of privacy. Again Ofcom acknowledged that the BBC broadcast the incorrect footage in error and that it may have been upsetting for Casey Bowen to see images of his late father re-broadcast in the news reports.

However, in Ofcom's view, any expectation of privacy Casey Bowen had in relation to the inclusion of footage of his father was diminished by the fact that both Martin Bowen and his wife consented to his inclusion in the documentary; that the footage was used in the same context as in the original programme; that the footage of Martin Bowen was incidental and that he would not have been identifiable other than to those who knew him already.

In these circumstances, Ofcom found that Casey Bowen had no legitimate expectation of privacy in relation to broadcast of the images of his father contained within the news reports. Having found no legitimate expectation of privacy, Ofcom found that Casey Bowen's privacy was not infringed in the broadcast of the programme. It was therefore not necessary for Ofcom to go on to consider whether any infringement was warranted.

Accordingly Ofcom has not upheld Casey Bowen's complaint on behalf of himself and his late father, Martin Bowen, of unfair treatment and unwarranted infringement of privacy in the broadcast of the programmes.

Other Programmes Not in Breach/Resolved

Up to 16 June 2009

Programme	Transmission Date	Channel	Category	Number of Complaints
5 Live Breakfast	09/06/2009	BBC Radio 5 Live	Generally Accepted Standards	1
8 Out of 10 Cats	07/06/2009	C4	Generally Accepted Standards	1
Afternoon Live With Kay Burley	03/06/2009	Sky News	Generally Accepted Standards	1
America, Empire of Liberty: Defended to Death	05/06/2009	BBC Radio 4	Generally Accepted Standards	1
An Inconvenient Truth	04/04/2009	C4	Due Impartiality/Bias	1
Beat the Bailiff	22/05/2009	Sky Three	Inaccuracy/Misleading	1
Beat the Star	31/05/2009	ITV1	Crime (incite/encourage)	1
Benidorm Special	31/05/2009	ITV1	Religious Offence	1
Big Brother (trailer)	09/06/2009	C4	Sex/Nudity	1
Big Brother 10	05/06/2009	C4	Offensive Language	1
Big Brother 10	06/06/2009	C4	Generally Accepted Standards	11
Big Brother 10	07/06/2009	C4	Generally Accepted Standards	2
Big Brother 10	08/06/2009	C4	Generally Accepted Standards	1
Big Brother 10	09/06/2009	C4	Generally Accepted Standards	1
Big Brother 10	11/06/2009	C4	Generally Accepted Standards	1
Big Brother Launch Show	04/06/2009	C4	Generally Accepted Standards	9
Big Brother Live	05/06/2009	E4	Generally Accepted Standards	1
Big Brother Live	09/06/2009	C4	Generally Accepted Standards	1
Big Brother: A Decade in the Headlines	31/05/2009	C4	Generally Accepted Standards	2
Big Brother: Around the World	26/05/2009	E4	Generally Accepted Standards	1
Big Brother's Big Mouth	04/06/2009	E4	Generally Accepted Standards	1
Big Brother's Big Mouth (trailer)	04/06/2009	E4	Generally Accepted Standards	1
Big Brother's Big Quiz	03/06/2009	C4	Generally Accepted Standards	1
Big Brother Live	11/06/2009	C4	Generally Accepted Standards	1
Blood, Sweat and Takeaways	19/05/2009	BBC Three	Violence	1
Born Survivor: Bear Grylls	13/06/2009	C4	Animal Welfare	1
Bremner, Bird and Fortune	07/06/2009	C4	Offensive Language	4
Britain's Got More Talent	26/05/2009	ITV2	Substance Abuse	1
Britain's Got Talent	24/05/2009	ITV1	Generally Accepted Standards	20
Britain's Got Talent	24/05/2009	ITV1	Use of Premium Rate Numbers	12
Britain's Got Talent	28/05/2009	ITV1	Use of Premium Rate Numbers	1
Britain's Got Talent	n/a	ITV1	Commercial References	1
Britain's Got Talent - The Final	30/05/2009	ITV1	Use of Premium Rate Numbers	20
Britain's Got Talent (trailer)	01/06/2009	ITV1	Sex/Nudity	1
Celebrity Wife Swap	07/06/2009	C4	Offensive Language	3

Celebrity Wife Swap	08/06/2009	C4	Generally Accepted Standards	1
Celebrity Wife Swap (trailer)	02/06/2009	C4	Generally Accepted Standards	5
Channel 4 News	08/06/2009	C4	Due Impartiality/Bias	9
Channel 4 News (trailer)	11/06/2009	C4	Offensive Language	1
Coach Trip	04/06/2009	C4	Generally Accepted Standards	1
Coach Trip	08/06/2009	C4	Generally Accepted Standards	1
Come Dine With Me	27/05/2009	C4	Generally Accepted Standards	3
Cops With Cameras	03/06/2009	ITV1	Offensive Language	1
Coronation Street	10/06/2009	ITV1	Generally Accepted Standards	4
Crown Bingo sponsorship of ITV3 daytime	04/06/2009	ITV3	Dangerous Behaviour	1
Dating The Enemy	03/06/2009	ITV1	Generally Accepted Standards	1
D-Day 65: The Veterans Return	06/06/2009	BBC1	Generally Accepted Standards	1
Deal or No Deal	09/06/2009	C4	Generally Accepted Standards	1
Dispatches: Pakistan's Taliban Generation	16/03/2009	C4	Religious Offence	1
Divided	03/06/2009	ITV1	Amount of Advertising	1
Doctors	04/06/2009	BBC1	Generally Accepted Standards	1
Domino's sponsorship of Britain's Got Talent	n/a	ITV1	Generally Accepted Standards	1
Eastenders	01/06/2009	BBC1	Generally Accepted Standards	1
Eastenders	07/06/2009	BBC1	Generally Accepted Standards	1
Eastenders	08/06/2009	BBC1	Generally Accepted Standards	1
Ed, Edd 'n' Eddy	11/06/2009	Cartoon Network	Generally Accepted Standards	1
Embarrassing Bodies	27/05/2009	C4	Sex/Nudity	3
Eminem - "3 AM"	27/05/2009	MTV Base	Other	1
Emmerdale	05/06/2009	ITV1	Animal Welfare	1
Emmerdale	n/a	ITV1	Generally Accepted Standards	2
EPG Guide	29/05/2009	Television X	Sex/Nudity	1
EPG Guide	02/06/2009	Television X	Sex/Nudity	1
European Elections 09	07/06/2009	BBC2	Generally Accepted Standards	3
Exposed	24/02/2009	Fiver	Sex/Nudity	1
Exposed	27/02/2009	Fiver	Sex/Nudity	1
Falfield Scouts	06/05/2009	Thornbury FM	Generally Accepted Standards	1
Five News	27/05/2009	Five	Violence	1
Geoff Lloyd's Hometown Show	03/06/2009	Absolute Radio	Sex/Nudity	1
GMTV	02/06/2009	ITV1	Generally Accepted Standards	1
GMTV	10/06/2009	ITV1	Generally Accepted Standards	4
Grand Designs	05/06/2009	More4	Offensive Language	1
Harper Collins sponsorship of CSI	10/06/2009	Living	Crime (incite/encourage)	1
Have I Got News For You	05/06/2009	BBC1	Generally Accepted Standards	1
Heart Breakfast with Rob and Chrissie	01/06/2009	Heart 102.4	Generally Accepted Standards	1

Hollyoaks	01/06/2009	C4	Offensive Language	1
Ishq	30/05/2009	Zee Cinema	Violence	1
ITV News	04/06/2009	ITV1	Generally Accepted Standards	1
ITV News	08/06/2009	ITV1	Generally Accepted Standards	1
ITV News	10/06/2009	ITV1	Other	1
Jeremy Vine	02/06/2009	BBC Radio 2	Generally Accepted Standards	1
Jeremy Vine	02/06/2009	BBC Radio 2	Generally Accepted Standards	1
Labour Party Election Broadcast	02/06/2009	BBC1	Elections/Referendums	1
Ladette to Lady	02/06/2009	ITV1	Generally Accepted Standards	11
Ladette to Lady	09/06/2009	ITV1	Animal Welfare	7
Lifeproof TV	15/06/2009	C4	Sex/Nudity	1
Live FA Cup Final	30/05/2009	ITV1	Unconscious influence/hypnosis/subliminal	1
Loose Women	n/a	ITV1	Generally Accepted Standards	1
Make My Body Younger	03/06/2009	BBC Three	Substance Abuse	1
Mary, Queen of Charity Shops	02/06/2009	BBC2	Generally Accepted Standards	2
Mary, Queen of Charity Shops	09/06/2009	BBC2	Generally Accepted Standards	2
Milly Molly	11/06/2009	Tiny Pop	Generally Accepted Standards	1
Monty Halls' Great Escape	04/04/2009	BBC2	Violence	2
My Monkey Baby	02/06/2009	C4	Animal Welfare	4
News at Ten	26/05/2009	ITV1	Generally Accepted Standards	5
News at Ten	29/05/2009	ITV1	Due Impartiality/Bias	1
News at Ten	08/06/2009	ITV1	Due Impartiality/Bias	1
Newsround	08/06/2009	BBC1	Dangerous Behaviour	1
Nick Ferrari	22/05/2009	LBC 97.3 FM	Inaccuracy/Misleading	1
Nightwatch With Steve Scott	30/05/2009	ITV1	Generally Accepted Standards	1
On The Fiddle?	28/05/2009	BBC1	Offensive Language	5
Passport Patrol	28/05/2009	Living	Offensive Language	1
Question Time	23/04/2009	BBC1	Generally Accepted Standards	18
Quiz Call	23/05/2009	Five	Competitions	1
Quiz Call	06/06/2009	Five	Competitions	1
Quiz Call	n/a	Five	Competitions	1
Robin Hood	06/06/2009	BBC1	Violence	1
Room 101	04/06/2009	BBC2	Generally Accepted Standards	1
Room For Improvement	25/05/2009	More4	Generally Accepted Standards	1
RSPCA: On The Frontline	10/06/2009	Five	Violence	1
Runaway	25/05/2009	CBBC	Dangerous Behaviour	1
Salem's Lot	12/04/2009	Zone Horror	Violence	1
Sarah Kennedy's Dawn Patrol	26/05/2009	BBC Radio 2	Generally Accepted Standards	1
Sky News	07/05/2009	Sky News	Crime (incite/encourage)	1
Sky News	31/05/2009	Sky News	Inaccuracy/Misleading	1
Sky News	04/06/2009	Sky News	Elections/Referendums	1

Sky News	09/06/2009	Sky News	Inaccuracy/Misleading	1
Sportsound	16/05/2009	BBC Radio Scotland	Generally Accepted Standards	1
Springwatch	03/06/2009	BBC2	Generally Accepted Standards	1
Springwatch	10/06/2009	BBC2	Religious Offence	1
Steve Allen	01/06/2009	LBC 97.3FM	Generally Accepted Standards	1
Stuart McGinley in the Afternoon	27/04/2009	loW Radio	Offensive Language	1
Sunday Night Show with Iain Lee	12/04/2009	Absolute Radio	Generally Accepted Standards	1
The 40-Year-Old Virgin	31/05/2009	STV	Offensive Language	1
The Apprentice	07/06/2009	BBC1	Generally Accepted Standards	1
The Chris Moyles Show	09/06/2009	BBC Radio 1	Generally Accepted Standards	1
The Chris Moyles Show	04/06/2009	BBC Radio 1	Generally Accepted Standards	1
The Chris Moyles Show	10/06/2009	BBC Radio 1	Generally Accepted Standards	1
The Hills (trailer)	31/05/2009	TMF	Offensive Language	1
The Inbetweeners	02/04/2009	E4	Animal Welfare	1
The Inbetweeners	04/06/2009	E4	Offensive Language	1
The Jeremy Kyle Show	09/06/2009	ITV1	Generally Accepted Standards	1
The Jeremy Kyle Show	10/06/2009	ITV1	Crime (incite/encourage)	3
The Jeremy Kyle Show / Trisha Goddard	03/06/2009	ITV1 / Five	Inaccuracy/Misleading	1
The Museum of Curiosity	31/05/2009	BBC Radio 4	Sex/Nudity	1
The Omid Djalili Show	25/05/2009	BBC1	Generally Accepted Standards	1
The Politics Show	22/03/2009	BBC1	Generally Accepted Standards	1
The Simpsons	03/06/2009	C4	Offensive Language	8
The Simpsons	08/06/2009	C4	Animal Welfare	1
The Spartans	03/06/2009	C4	Sex/Nudity	1
The Versus Chart: US vs UK Top 20	31/05/2009	4Music	Offensive Language	1
The Wright Stuff	29/05/2009	Five	Inaccuracy/Misleading	5
The Wright Stuff	08/06/2009	Five	Generally Accepted Standards	1
This Morning	05/06/2009	ITV1	Generally Accepted Standards	1
This Morning	08/06/2009	ITV1	Due Impartiality/Bias	1
This Morning Competition	13/05/2009	GMTV	Competitions	1
TNT Show	11/06/2009	C4	Generally Accepted Standards	1
Tonight	05/06/2009	ITV1	Due Impartiality/Bias	1
Totally Saturday	06/06/2009	BBC1	Generally Accepted Standards	1
Wake Up to Wogan	12/06/2009	BBC Radio 2	Generally Accepted Standards	1
Weakest Link	11/06/2009	BBC1	Generally Accepted Standards	1
Wordplay	09/06/2009	Five	Competitions	1
World in Focus	16/04/2009	Genesis TV	Other	1