

Ofcom Broadcast Bulletin

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Please note there are no Fairness and Privacy adjudications in this issue of the Bulletin.

Introduction

Ofcom's Broadcasting Code ("the Code") 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/>

The Rules on the Amount and Distribution of Advertising (RADA) apply to advertising issues within Ofcom's remit from 25 July 2005. The Rules can be found at <http://www.ofcom.org.uk/tv/ifi/codes/advertising/#content>

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. Some of the language used in Ofcom Broadcast Bulletins may therefore cause offence.

Standards cases

Notice of Sanction

LWT (Holdings) Limited

Ant & Dec's Saturday Night Takeaway, ITV1, January 2003 to October 2006

On 8 May 2008, Ofcom published its decision to impose a statutory sanction on LWT (Holdings) Limited for breaches of Rule 2.11 (competitions should be conducted fairly) of the Code; and Rule 8.2(b) (use of premium rate telephone services in programmes) of the ITC Code 2002 (which was in force until 24 July 2005).

Ofcom has found that these Rules were breached in the conduct of three viewer competitions (*Jiggy Bank*, *Grab the Ads* and *Win the Ads*), as follows:

***Jiggy Bank* (September to October 2006)**

- 1) The geographical locations at which the competition was to be conducted were all pre-selected, but viewers were not informed of this;
- 2) The winners of the competition were selected on the basis of their suitability to be on screen, which overrode requirements for random selection; and
- 3) On one occasion, a finalist (who went on to win) was pre-selected by the production team and, on another occasion, a winner was pre-selected by the production team, which overrode requirements for random selection.

***Grab the Ads* (January 2003 to October 2006)**

- 1) Competition finalists were routinely selected before lines closed;
- 2) A method of selecting finalists was used that resulted in those viewers who called to enter the competition later in the programme having a statistically lesser chance of being selected to be on the shortlist of finalists than those who called to enter earlier in the programme;
- 3) Competition finalists were selected on the basis of their suitability to be heard on screen, which overrode requirements for random selection; and
- 4) The geographical location of competition entrants was taken into account in the finalist selection process, which overrode requirements for random selection.

***Win the Ads* (January 2003 to October 2006)**

- 1) Members of the *Ant & Dec's Saturday Night Takeaway* studio audience were selected from the entrants to this competition on the basis of their suitability to be on screen, which overrode requirements for random selection.

For the reasons set out in the adjudication, Ofcom imposed a financial penalty of £3,000,000 on LWT (Holdings) Limited and directed it to broadcast a statement of Ofcom's findings in a form to be determined by Ofcom on two specified occasions.

The full adjudication is available at:

http://www.ofcom.org.uk/tv/obb/ocsc_adjud/lwt.pdf

LWT (Holdings) Limited

Ant & Dec's Gameshow Marathon, ITV1, 17 September to 29 October 2005

On 8 May 2008, Ofcom published its decision to impose a statutory sanction on LWT (Holdings) Limited for breaches of Rule 2.11 (competitions should be conducted fairly) of the Code.

Ofcom has found that this Rule was breached due to the following conduct:

- 1) The winners of a viewer competition, *Prize Mountain*, were selected on the basis of their suitability to be on screen, which overrode requirements for random selection; and
- 2) A lack of clarity as to whether text message entrants to the *Prize Mountain* competition were taken into account.

For the reasons set out in the adjudication, Ofcom imposed a financial penalty of £1,200,000 on LWT (Holdings) Limited and directed it to broadcast a statement of Ofcom's findings in a form to be determined by Ofcom on two specified occasions.

The full adjudication is available at:

http://www.ofcom.org.uk/tv/obb/ocsc_adjud/lwt2.pdf

Granada Television Limited

Soapstar Superstar, ITV1, 5 to 13 January 2007

On 8 May 2008, Ofcom published its decision to impose a statutory sanction on Granada Television Limited for breaches of Rule 2.2 (portrayals of factual matters must not materially mislead the audience) of the Code.

Ofcom has found that this Rule was breached due to the following conduct:

- 1) The early finalising of the live programme viewer vote on 5 January 2007; and
- 2) The overriding of viewers' song choice votes on an estimated eight occasions during the January 2007 series.

For the reasons set out in the adjudication, Ofcom imposed a financial penalty of £1,200,000 on Granada Television Limited and directed it to broadcast a statement of its findings in a form to be determined by Ofcom on two specified occasions.

The full adjudication is available at:

http://www.ofcom.org.uk/tv/obb/ocsc_adjud/granada.pdf

ITV2 Limited

Various programmes, ITV2+1, 12 December 2006 to 24 October 2007

On 8 May 2008, Ofcom published its decision to impose a statutory sanction on ITV2 Limited for breaches of Rules 2.11 (competitions must be conducted fairly) and 2.2 (portrayals of factual matters must not materially mislead the audience) of the Code, which came into effect on 25 July 2005.

Ofcom has found that these Rules were breached due to the following conduct:

- 1) The failure to apply “lines closed” captioning to or to ensure it appeared on repeat broadcasts of viewer interactive quiz show programmes on ITV2+1; and
- 2) The failure to apply “lines closed” captioning to repeat broadcasts of an interactive dating programme on ITV2+1.

For the reasons set out in the adjudication, Ofcom imposed a financial penalty of £275,000 on ITV2 Limited.

The full adjudication is available at:

http://www.ofcom.org.uk/tv/obb/ocsc_adjud/itv2.pdf

Additional PRS Issues

Various regional programmes

ITV1, various dates between 1 April 2005 and 31 March 2007

Introduction

On 18 October 2007, ITV plc published a summary of the findings of an investigation it had commissioned from independent auditors Deloitte into the use of premium rate services (“PRS”) in ITV programmes. This report covered Deloitte’s key findings on networked ITV programmes. However, no reference was made to ITV’s regional programming, despite Ofcom being aware that PRS were used in ITV’s regional programming, and that a number of allegations and/or potential issues had been raised about the use of PRS in this programming.

Ofcom therefore wrote to ITV plc to establish whether the allegations and/or potential issues concerning ITV’s regional programming had also been investigated by Deloitte. Ofcom met with Deloitte and ITV plc to gain a fuller understanding of the scope of Deloitte’s investigation. Ofcom was informed that the allegations and potential issues relating to regional programming had not been investigated by Deloitte for the following reasons: ITV had ceased operating PRS in regional programming and had no intention of using it again in this programming; PRS in regional programmes had attracted low transaction numbers and revenues; and the divergent geographical locations of the production teams that had conducted PRS in regional programming, combined with the lack of any centralised record keeping, meant that including these issues in Deloitte’s investigation would have been disproportionately time consuming and might have led to a delay in investigating the other issues.

Therefore Ofcom requested further information and details on the allegations and/or potential issues relating to regional programming. In summary, these allegations and/or potential issues included the following types of conduct:

- Selecting competition winners from only telephone entries or text message (“SMS”) entries on different days;
- Selecting competition winners from only telephone entries or SMS entries, depending on which entry method had attracted the most entries;
- Flipping a coin to determine whether to select competition winners from telephone entries or SMS entries;
- Selecting and contacting another “winner” if the first “winner” was not contactable;
- Excluding entrants who had previously won competitions from winning consecutive competitions; and
- Seeking to ensure a “geographical spread” of winners across a geographical region.

Ofcom asked ITV plc to comment (on behalf of ITV Central Limited, Granada Television Limited, Carlton Television Limited, LWT (Holdings) Limited, ITV Meridian Limited, Tyne Tees Television Limited, ITV Wales & West Group Limited and Yorkshire Television Limited) with regard to Rule 2.11 (“Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known”) and Rule 10.10 of the Code (“Any use of premium rate

numbers must comply with the Code of Practice issued by... ICSTIS (now re-named PhonepayPlus)").

Response

ITV plc said that it had only been able to obtain a small amount of relevant data as a result of the divergent geographical locations of the production teams that had conducted PRS in its regional programming. Further, it said that it had been hampered by the fact that there was no centralised record-keeping function during this period.

ITV plc stated that the large majority of the allegations or potential issues that had been raised were unsubstantiated. It said they stemmed from the recollections of regional controllers and production staff that winner selection for some PRS competitions had been carried out inconsistently. ITV plc said that it did not consider that the mere fact that different mechanisms might have been used to select winners itself meant that the conduct of those competitions breached the Code.

Finally, ITV plc asked Ofcom to note that it had ceased to operate PRS in its regional programming and had no intention of doing so again.

Conclusion

Broadcasters must take particular care to ensure that their competitions are conducted fairly and in accordance with their terms and conditions.

It appears that some of the alleged practices (if confirmed) in ITV regional programming may have been contrary to the broadcaster's own terms and conditions. They may well have also fallen below the standards that would constitute best practice when conducting viewer competitions. Further, the alleged practices summarised above are likely to have breached the Code which requires competitions to be conducted fairly.

While Ofcom notes that these allegations have not been substantiated and there were procedures in place on a regional basis for the 11 different licensees, we remain concerned by ITV plc's inability to provide Ofcom with sufficient data and evidence to fully substantiate these cases. It is also a matter of significant concern to Ofcom that this lack of evidence and information appears to indicate an absence of robust systems in place in the operation of PRS in these programmes. ITV plc appeared to have introduced the use of PRS in ITV regional programming with little or no assessment of the associated risks and with inadequate levels of supervision. It was apparent that there was a lack of proper regard either for basic measures that would ensure fairness or for the potential for significant financial detriment to the viewers who entered the affected competitions.

Nevertheless, Ofcom notes that the majority of the allegations and/or potential issues relate to instances where the relevant production teams took decisions in the interests of trying to ensure that the conduct of a competition appeared fair.

Given the above circumstances and, in particular, given the wide-ranging issues relating to the conduct of various broadcast competitions raised in these cases, Ofcom will be issuing further guidance on Rule 2.11 of the Code.

In Breach

ITV Playalong

ITV Play, 16 November 2006, 04:00

The Mint

ITV Play & ITV1, 7 December 2006, 00:00

Glitterball

ITV Play & ITV1, 6 March 2007, 02:00

Introduction

ITV Play was a digital television programme service largely dedicated to the provision of Call TV quiz programmes. In addition, parts of its programming was occasionally simulcast on ITV1. ITV Play ceased broadcasting on 23 December 2007. Prior to its closure, Ofcom received complaints in relation to competitions broadcast in the following three programmes:

ITV Playalong, 16 November 2006

In a fully automated competition called *Buzzwords*, viewers were shown nine letters and invited to enter the competition by texting a premium rate number with words which could be made out of those nine letters. Points were awarded for each correctly spelled word and additional points were awarded for longer words or a particular word. The prize was entry to a game called Bonus Ball Bonanza.

Before the game started, a recorded voiceover stated: *"The person with the most points at the end of the game wins the prize"*. A message was shown on screen stating: *"HI-SCORERS are entered FREE into the £2,000 Jackpot Bonus Ball Bonanza!"* After the game had started the following message appeared on screen: *"Win £100 or £200 in Bonus Ball Bonanza. Just get a top score!"*

Ofcom received a complaint from a viewer whose name had been displayed on screen as the winner of *Buzzwords*. When the complainant contacted ITV Play to find out why he had not won a prize he was told that as a high scorer he had been entered free into the jackpot bonus ball bonanza which he had not won.

The Mint, 7 December 2006

The live programme featured a word-search game called *Find the Animal*. Viewers were shown a square grid containing sixteen letters and asked to call a premium rate number to identify an animal from the letters provided. There were a number of possible answers but one (GECKO) had been pre-determined as the winning answer. By the end of the competition no-one had correctly identified the chosen answer. The presenter opened an envelope revealing the winning answer as TUNA.

Three viewers questioned the validity of the answer TUNA as the grid did not contain the letter U.

Glitterball, 6 March 2007

The live programme featured a game called *Glitterword*. The word ENCHANTED was displayed on screen and viewers were invited to call a premium rate number for the

chance to identify one of eleven pre-determined words which could be made from the letters. Each letter could only be used once. A caller who successfully reached the studio guessed the word "HATCHED" which was heard as "HATCH", after which the presenter revealed "HATCH" as a winning answer.

A viewer complained to Ofcom that it was not possible to make the words HATCH or HATCHED from ENCHANTED using the letters only once as there was only one H available to use.

ITV plc was asked to comment in respect of all three of these programmes with regard to Rule 2.11 of the Code which requires that "Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known."

Response

ITV Playalong

ITV plc responded that the programme used pre-recorded voice-overs which are broadcast on air by a computerised system. The announcement at the beginning of the programme ("*the person with the most points at the end of the game wins the prize*") had been included in error and had been used once in the introduction to every Buzzwords game. ITV plc accepted that the voice-over was ambiguous but said that it was accompanied and followed by a significant number of statements made in voice-over and captions which made the nature of the prize clear. However, ITV plc accepted that as an early entrant to the competition, the complainant may have understandably been confused between attaining a leader board position on the initial Buzzwords game and winning a prize subsequently on Bonus Ball Bonanza.

The broadcaster believed that someone in the complainant's position would have been given this one "ambiguous" message at the outset followed by almost 70 correct explanations as the game progressed. It also noted that this was the only complaint which had been received in respect of this game and that the complainant had played twice previously and had won entry to the Bonus Ball game on both occasions. It therefore maintained that overall the competition was run fairly and the prize was described accurately.

The Mint

ITV plc responded that there was no unfairness in the way the competition was conducted but that a regrettable error at the end of the programme gave the impression that the competition was unfair. The presenter had mistakenly been given an answer envelope with an incorrect answer inside. Near the end of the programme the decision was taken to end the competition and the presenter had announced in good faith that the winning word was TUNA. The production team realised the error but as the programme was very close to ending, judged there was insufficient time to correct the error with certainty and clarity.

The producer had the correct answer (GECKO) from the outset and was listening for it throughout the game. No caller who had got through to the studio had given the correct answer. ITV plc did not consider that the competition had been conducted unfairly but an apology and explanation was broadcast at the beginning of the following edition of the programme.

Glitterball

ITV plc said that a pool of potential answers for this game was chosen by an ITV viewers' panel. Words from this pool were then selected by the producers for use in the game, and these words were checked and approved for use by the ITV Play commissioning team. Despite these successive checks, the fact that the word HATCH could not be derived from the letters in ENCHANTED went unnoticed. ITV plc assumed that this was due to a series of human errors.

It said that because the game was closing the error was not noticed immediately by any of the gallery team or the presenters. Once the error came to light, ITV Play contacted the majority of entrants and offered them the choice of a refund (at £1 rather than the original cost of the call which was 75p) or an equivalent donation to charity. It was not possible to contact all entrants since some callers had withheld their telephone numbers.

ITV plc said that the error was clearly regrettable and apologised for any inconvenience or concern it had caused. However, it did not believe that the incident led to any material unfairness because there were an additional eight words that remained valid as winning answers.

Decision

Ofcom noted that ITV Play had ceased broadcasting on 23 December 2007. However, its investigation concluded the following:

ITV Playalong

Ofcom reviewed a recording of the programme and concluded that the rules linking the Buzzwords and Bonus Ball Bonanza games were not clearly explained in the voice-over at the beginning of Buzzwords. The ambiguity of the prize description at the beginning of the programme was considered particularly problematic as this was when viewers were most likely to decide whether to enter.

Whilst Ofcom noted that it received just one complaint regarding this competition it did not consider that this necessarily reflected the level of potential confusion likely to have occurred due to the ambiguity of the opening statement by the presenter. In conclusion, the prize available for the winner of the Buzzwords competition was not described accurately and the programme was therefore in breach of Rule 2.11 of the Code.

The Mint

Ofcom accepted that the wrong answer had been broadcast as a result of human error and noted that ITV had broadcast an apology and explanation. However, it considered that the presence of an incorrect answer in the envelope which was given to the presenter was indicative of an unacceptable breakdown in the key procedures necessary to ensure that competitions are conducted fairly. This is particularly important where callers are paying to enter.

Ofcom noted the assurance from the broadcaster that it would have been possible for an entrant with the correct answer to win the competition. However, it is a basic principle of conducting a competition fairly that viewers are told the correct answer when a competition has finished. This avoids potential financial detriment to viewers should a similar competition be run in the future. ITV broadcast an incorrect answer

and failed to correct it immediately. This competition was therefore conducted unfairly and in breach of Rule 2.11 of the Code.

Glitterball

Given the evidence before Ofcom, we accepted ITV plc's assurances that there was no deliberate attempt to disadvantage contestants. It also welcomed the steps that it had taken to refund entrants and/or make an equivalent donation to charity.

Both HATCH and HATCHED were clearly wrong answers and Ofcom was concerned that the system of checking valid answers had broken down to the extent that none of the three checks in place picked up the errors. The number of answers that remain available at any point of a competition is a factor that viewers will consider when deciding whether to pay to enter the competition. The fact that there were only ten correct answers available rather than eleven meant that contestants had less chance of their answer being one of the pre-determined correct answers than they had been led to believe. Irrespective of whether any material unfairness occurred as a result, the competition was conducted unfairly in breach of Rule 2.11 of Code.

ITV Playalong, 16 November 2007, Breach of Rule 2.11

The Mint, 7 December 2006, Breach of Rule 2.11

Glitterball, 6 March 2007, Breach of Rule 2.11

I'm a Celebrity...Get Me Out of Here!

ITV1 (LWT (Holdings) Limited), 30 November 2006, 20:00 and 22:00

Introduction

I'm a Celebrity...Get Me Out of Here! is presented by Ant (Anthony McPartlin) and Dec (Declan Donnelly) and features ten celebrity contestants who live in a jungle camp in Australia and carry out a number of tasks and trials. Viewers are invited to vote by premium rate telephone services ("PRS") to determine which celebrity contestants are evicted from the jungle and, ultimately, who is crowned "King" or "Queen" of the jungle. The sixth series was broadcast on consecutive nights for three weeks in November 2006.

Ofcom launched an investigation following the publication by ITV plc of the results of its investigations into the use of PRS in its programming. These included a statement that on 30 November 2006, the vote aggregation application operated by Eckoh Technologies Limited ("Eckoh") for *I'm A Celebrity... Get Me Out of Here!* had been automatically closed three and a half minutes early. Due to this technical error, telephone and text ("SMS") votes cast by viewers during this three and a half minute period had been charged for at the time, but not counted.

The information published by ITV plc stated that around seven per cent of the total votes were affected, but that these votes would not have altered the overall result. Ofcom asked ITV plc for relevant data and other evidence to demonstrate this.

The programme is produced by ITV Productions, but compliance of the programme is the responsibility of LWT (Holdings) Ltd. ITV plc was also asked to comment, on behalf of LWT (Holdings) Limited. The relevant Code Rule is Rule 2.2 which states that "Factual programmes or items or portrayals of factual matters must not materially mislead the audience".

Response

ITV plc said that as soon as it was alerted to the matter, it had promptly referred it for investigation. The results of the investigation showed that approximately seven per cent of the total telephone and SMS votes had been excluded from the vote on 30 November 2006. It had not been possible to establish whether any red button votes were excluded from the vote, but, if they had been, it was unlikely that they would have altered the result of the vote.

ITV plc explained that at the time this particular episode was broadcast, the computer programme used to count the votes should have been operated as follows:

- (i) The production team was in the 'gallery' in Australia and the operator of the vote counting programme was situated in the UK. The production team could log in to the vote counting programme to access the same information as its operator in the UK. Communication between the team and the operator was carried out through an open telephone line.
- (ii) To prepare the vote counting application during pre-production, a 'start time' and a 'stop time' for the vote had to be entered by the Eckoh operator. The planned running order for the programme was used to generate these

estimated times. The vote's 'stop time' could be overridden manually by the operator.

- (iii) As this was a live programme, its running order was always subject to change. Therefore, the actual closure of the vote would normally have been made manually by the Eckoh operator in the UK, following a verbal direction from the production team in Australia.

It was planned that on 30 November 2006, the vote would close at 22:10:00. However, on this occasion, the running order of the programme had slipped. The vote's 'stop time' should have been manually overridden by the Eckoh operator so that voting closed at 22:13:15. ITV plc had not been able to determine why neither the operator or the production team had not noticed that the planned time had not been overridden manually.

ITV plc stated that in respect of 20,072 affected votes, it would make potential reimbursements totalling £11,960, with any sum not claimed being donated to charity. ITV plc had also implemented various changes to its processes and procedures aimed at preventing any recurrence of these or similar issues. However, it stated that it did not believe that the early closure of the vote constituted a breach of Rule 2.2 as there was no impact on the outcome of the vote and viewers were not misled as to the result.

Decision

Ofcom acknowledges that, in this case, the early closure of the vote was unintentional and occurred due to human error by the Eckoh operator. Further, the production team had not noticed that the planned 'stop time' of the vote had not been overridden manually. Ofcom also notes that the outcome of the vote was not affected.

However, those viewers who paid to vote by PRS during the final three and a half minutes of the vote did so on the understanding that their votes would be fairly and equally considered. At least 20,072 votes were made in the final three and a half minutes (ITV plc has been unable to identify whether any red button votes were excluded, so the number of excluded votes may have been greater). Harm, in terms of financial loss, was caused to those viewers who voted in the final three and a half minutes and, in this regard, Ofcom notes and welcomes the reimbursement programme implemented by ITV plc.

Broadcasters must take particular care when using PRS in programmes that involve audience votes to ensure that the vote is conducted properly and that the audience is informed when the vote has been closed.

Despite the fact that in this instance the 20,072 affected votes did not impact on the final result, it was nevertheless the case that the broadcaster's failure to inform viewers that voting lines had closed meant that the audience was materially misled as to their ability to cast votes and potentially influence, collectively, the outcome of the vote. LWT (Holdings) Limited therefore breached Rule 2.2 of the Code.

Ofcom expects all broadcasters to exercise particular caution in all aspects of the use of PRS in their programmes. In the absence of this, Ofcom will view breaches of Rule 2.2 very seriously and will consider further regulatory action.

Breach of Rule 2.2

People's Court

ITV1, 17 March 2008, 02:45

Introduction

People's Court is a live programme presented by Carol Smilie featuring members of the public wanting to resolve minor domestic disputes with their friends and/or families before a real judge. Viewers at home take the part of the jury and are given the opportunity to vote on the outcome of the cases by telephone and SMS (text message), using a premium rate service ("PRS"). The original series was commissioned by ITV in 2005. It was recently repeated by ITV1 overnight.

Ofcom received a complaint from a viewer who said that he had sent a text to the programme and called the premium rate number that was promoted but received a message stating that lines were closed.

ITV plc was asked to respond with regard to Rule 2.2 ("Factual programmes or items or portrayals of factual matters must not materially mislead the audience").

Response

ITV plc stated that it had carried out extensive inquiries within ITV Broadcasting and STV, the original producer and broadcaster of the series. It confirmed that, regrettably, it had failed to make clear to the audience that the programme in question was a repeat and that lines were therefore closed. It stated that this failure occurred in relation to one episode of the series, as a result of three human errors and/or process failures.

It said that at the time of the series original broadcast (live on ITV1, and later repeated on ITV2), steps were taken to prevent viewers from attempting to interact by PRS in the repeat transmissions. In particular 'straps' or captions were inserted into the programme, obscuring the PRS numbers, and informing viewers that the interactive service was no longer available. This involved an ITV transmission centre recording the original broadcast and ensuring that relevant straps were inserted into that recording, producing a "safe" version to be used for the repeat broadcast. Such "safe" versions were produced for the entire series of *People's Court*, lodged in an ITV library and successfully used for the ITV2 broadcasts.

However, ITV plc stated that in this instance, the procedure failed in the following ways:

- 1) In January 2008, when it was decided to repeat the series again on ITV, it was discovered that that the "safe" version of this episode had been lost.
- 2) In addition, this repeat had been designated for visual signing and a back-up tape of the "safe" version was to be sent to ITV's visual signing team in Newcastle for processing. However, a clean copy of the original programme was supplied.
- 3) The visual signing team correctly flagged by email to a wide group of colleagues that they were about to sign an un-strapped tape which would nevertheless be labelled as a "safe version". At this point, no-one took responsibility for preventing this "unsafe" version from entering the library system.

ITV plc said that approximately 50 viewers had responded to the calls to action in the repeat programme, but that the situation was quickly identified after transmission. Full refunds were offered to all the affected viewers. ITV plc also stated that it would like to apologise to any viewers inconvenienced by this failure, but submitted that in the light of its swift reparation, no harm was actually caused.

ITV plc also described the remedial steps it had taken to guard against any recurrence. These included: discussions with producers to emphasise the need to ensure that “unsafe” tapes are not supplied; a renewed emphasis to staff in the supply chain on the need to quarantine any tape identified as “unsafe”; and to escalate the issue well in advance of transmission. It also said that within ITV Compliance, the importance of pre-repeat reviews had been underscored. It therefore believed that all reasonable steps had been taken to review and tighten its systems.

Decision

In this programme, viewers were encouraged to send a text using a premium rate SMS number to express their comments on the cases being heard. In addition, because the premise of the programme was that viewers were the jury, they were also encouraged to vote on the outcome, using a PRS telephone and text number. Each PRS entry to the programme cost 25p. Three cases were heard in the programme, so the frequency of the verbal and visual calls to action to comment and/or vote were numerous.

Ofcom found that because ITV plc had failed to inform viewers that this was a repeat transmission, viewers were misled into believing that they could interact with this programme by paying to text their comments on the cases being heard and by paying to vote for the outcome, if they called or sent a text to the PRS numbers that were displayed on screen and promoted by verbal calls to action. In fact, viewers who took up these invitations had no chance of participating as the programme had been transmitted live some years ago. Material harm in terms of financial loss was therefore caused to about 50 viewers, even though ITV plc subsequently refunded this.

Whilst Ofcom welcomes the remedial steps taken by ITV plc, it nonetheless considers that the systems in place should have been robust enough to ensure this did not occur. On 18 October 2007, ITV plc published the findings of the review by independent auditors Deloitte of its interactive/PRS services. In these, ITV plc stated that “the review identified key areas of failure in the way in which ITV integrated PRS into its programming [including] lack of agreed and consistently applied procedures, controls and ways of working between the many parties involved in the process”. In addition, it continued that “ITV’s compliance resources are being strengthened with the addition of a dedicated interactive governance team to ensure maintenance of industry leading standards and the probity of all interactive services across ITV”.

Ofcom was therefore concerned at this further lapse in ITV plc’s compliance procedures. ITV plc must ensure a more vigorous oversight of the compliance of its programmes between its various arms of production, distribution and scheduling to ensure that viewers are not at any time misled or harmed financially as a result of its failures.

Breach of Rule 2.2

Not in Breach

The X Factor

ITV1, 17 December 2005, 25 November 2006, 2 & 16 December 2006

Introduction

The X Factor is a talent show for singers broadcast on ITV1. It is conducted annually with the winner gaining a record contract. Once auditions have taken place around the country, each Saturday evening there is a live programme, during which each contestant performs. Viewers are invited to vote by premium rate services ("PRS") for the contestant they prefer and one or two contestants are eliminated each week. About an hour after the first programme, the live results programme is broadcast, during which voting lines are closed.

For the first weeks of the competition (until only four contestants remain in the competition), the two contestants who receive the fewest viewer votes are named and have to perform again in a 'sing-off'. The three judges then decide who, of those two acts, will be eliminated. When only four contestants remain in the competition, the way contestants are eliminated is changed. During these final three programmes of the series, viewers' votes alone determine who remains in the competition and who is eliminated.

ITV Network commissions the series from the independent production company FremantleMedia/talkbackThames ("talkbackThames"). Under the ITV networking arrangements, the production company is entitled to select a Channel 3 licensee to comply the production. In this case, talkbackThames selected Channel Television ("Channel TV") to comply *The X Factor*.

On 22 October 2007, following its own investigations into PRS in ITV Network programming, ITV plc disclosed the following to Ofcom:

- 1) on 17 December 2005, which was the final of the 2005 series of *The X Factor*, SMS votes amounting to 13.9% of the total votes were received too late to be included; and
- 2) on 25 November 2006, 2 December 2006 and 16 December 2006 (the final of the 2006 series), SMS votes accounting for between 4% and 7% of the total votes for *The X Factor* were received too late to be included.

ITV plc said that the overall results of the votes on these dates would not have been altered by the votes received late. Text message ("SMS") votes cost 35 pence plus the cost of a return text message (typically ten or twelve pence). ITV plc implemented a reimbursement/reparation programme in respect of the affected votes.

Ofcom asked Channel TV to comment with regard to Rule 2.2 of the Code ("...portrayals of factual matters must not materially mislead the audience") and Rule 10.10 of the Code ("Any use of premium rate numbers must comply with the Code of Practice issued by...ICSTIS" (now renamed PhonepayPlus¹)). In particular, Ofcom asked Channel TV:

¹ ICSTIS was renamed PhonepayPlus on 15 October 2007. For more information, visit its website at www.phonepayplus.org.uk

- to provide evidence to demonstrate the effect of the loss of votes in each case, in particular, whether the final result as announced would have been affected if the lost votes had been counted; and
- to provide evidence to confirm that the broadcaster or programme makers had not overridden the audience's votes ("editorial override").

Response

Channel TV said it believed the affected programmes had complied with Rules 2.2 and 10.10 of the Code. The results announced in the affected programmes were consistent with the votes received. Channel TV said that viewers were at no point misinformed as to the outcome of a vote, or provided with inaccurate or misleading updates during the live broadcasts of the affected programmes. *The X Factor* production team and Channel TV had both been "acutely aware" of the requirements of the ICSTIS Code (now the PhonepayPlus Code) and *The X Factor* had been set up and designed to be compliant with it. Compliance with the ICSTIS Code had been reviewed throughout the series. Channel TV confirmed that there had been no editorial override of viewers' votes, save for where the rules determined that the judges' discretion could eliminate one of the two contestants who received the lowest numbers of votes in each episode, until only four contestants remained (whereupon viewers' votes alone determined who was eliminated).

Channel TV stated that *The X Factor* production team made consistent efforts to ensure viewers were aware of when and how votes should be cast. With hindsight, it said it regretted that SMS voting had not been closed before telephone voting, but that the programme makers had adopted what was common practice at the time. Furthermore, the degree of delay experienced on 17 December 2005 and 25 November, 2 and 16 December 2006 would not have been mitigated by closing SMS voting some five minutes early. Channel TV said that when the second and third series of *The X Factor* were broadcast, it had not technically been possible to prevent viewers being charged for calls made outside the voting window. Channel TV said that BT had addressed this issue at the instigation of *The X Factor* production team for the 2007 series. SMS and red button voting had been suspended for the 2007 series and they would remain suspended until the platforms' operators could also ensure that viewers were not charged for votes made outside the voting window and that votes made within the voting window would be received in time to be counted and taken into account.

17 December 2005 programme

Effect of the lost votes

Channel TV confirmed that 1,724,460 SMS votes (35.93% of the total number of valid SMS votes received) were received too late to be included. The overall winner (Shayne Ward) received the majority of these late SMS votes and the result would have remained the same had the late SMS votes been included.

Channel TV said that there were two possible reasons for a viewer SMS vote being received too late to be included:

- first, that a viewer simply voted after the vote had closed; and

- secondly, that a viewer voted in time, but receipt was delayed due to inadequacies in the viewer's mobile telephony system.

Channel TV said that the problems experienced for the final of the 2005 series had arisen principally because of unexpectedly high levels of voting. The final for the 2005 series received more than twice the number of votes received for the final of the 2004 series and some six million more votes were received for the final than had been received for the semi-final.

Channel TV also disclosed that 60,687 telephone votes (0.83% of the total number of valid telephone votes received) were also received too late to be included as a result of problems with non-BT operators. Channel TV said that they were most likely to have arisen for telephone calls made from mobile phones. They would not have altered the result of the vote had they been received in time as there were over 151,000 votes between the ultimate winner (Shayne Ward) and the runner up. As Ofcom had requested, Channel TV provided the necessary data to demonstrate this.

Channel TV said that a number of steps had been taken between the second and third series of *The X Factor* to seek to prevent (or at least reduce) recurrence of late receipt of votes in the third series. Principally, changes had been made to improve the throughput of SMS messages from mobile network operators.

Editorial override

Channel TV provided detailed voting data to demonstrate that the winner, Shayne Ward, had been the choice of the majority of viewers who voted. Therefore, there was no evidence of editorial override.

25 November 2006 programme

Effect of the lost votes

Channel TV said that 33,340 SMS votes (4.05% of the total number of valid SMS votes received) were received too late to be included, due to an issue with the Vodafone network. Again, a small number of telephone votes (5,064, representing 0.39% of the total number of valid telephone votes received) were received too late to be included. The overall result of the vote would not have been altered by these late votes. On this vote, the judges had decided which of the bottom two contestants would be eliminated, and there were 71,087 votes between the contestants who received the second and third lowest numbers of viewer votes. Therefore, the late SMS and telephone votes would not have altered the result of the vote. Channel TV provided Ofcom with the relevant information and data to support this.

Editorial override

Channel TV provided detailed voting data to demonstrate that the winner of the vote on this occasion had been the choice of the majority of viewers who voted. Therefore, there was no evidence of editorial override.

2 December 2006 programme

Effect of the lost votes

Channel TV stated that 92,904 SMS votes (6.78% of the total number of valid SMS votes received) were received too late to be included, due to an issue with the O2

network. The late votes did not alter the results of the vote; the contestant with the lowest number of votes before the late votes were taken into account remained the contestant with the lowest number of votes once they had been taken into account. The MacDonald Brothers were correctly eliminated and, as requested by Ofcom, Channel TV provided the relevant information and data to demonstrate this.

8,008 telephone votes (0.38% of the total number of valid telephone votes received) were also received too late to be included. The overall result of the vote would not have been affected by these late votes as, after the late SMS votes were taken into account, there were 14,229 votes between the two contestants with the lowest number of votes and Channel TV provided Ofcom with the relevant information and data to support this.

Editorial override

Channel TV provided detailed voting data to demonstrate that the winner of the vote on this occasion had been the choice of the majority of viewers who voted. Therefore, there was no evidence of editorial override.

16 December 2006 programme

Effect of the lost votes

Channel TV said that 136,881 SMS votes (4.08% of the total number of valid SMS votes received) were received too late to be included, due to high demand across all mobile phone networks. 9,828 telephone votes (0.22% of the total number of valid telephone votes received) were also received too late to be included. The winning contestant (Leona Lewis) had 2.27 million more votes than the other finalist, so the overall result would not have been altered by the late votes. As requested by Ofcom, Channel TV provided the relevant information and data to demonstrate this.

Editorial override

Channel TV provided detailed voting data to demonstrate that the winner of the vote on this occasion (Leona Lewis) had been the choice of the majority of viewers who voted. Therefore, there was no evidence of editorial override.

Decision

Effect of the lost votes

Ofcom has examined all the relevant information and supporting data provided by Channel TV and has ascertained that the outcomes of the votes on 17 December 2005, 25 November 2006 and 2 and 16 December 2006 were **not** affected by the SMS and telephone votes that were received too late to be included. Viewers were not misled by the announcements of the results of the votes made in the programmes, which were correct.

Ofcom found that, in this case, the late receipt of SMS and telephone votes occurred as a result of technical platform failings in viewers' mobile phone networks that were, in effect, beyond the control of *The X Factor* production team. Ofcom notes that the programme-makers had not anticipated the substantially increased number of votes received in the 2005 final programme and that, following the very large number of SMS votes received late for the 2005 final programme, steps had been taken to improve the management of the receipt of SMS messages for the 2006 series.

Ofcom notes that following the recurrence of the same or similar issues on several occasions in the 2006 series (albeit that smaller numbers of SMS and telephone votes were affected), further actions were taken to seek to prevent recurrence, including suspending SMS and red button voting until the platforms' operators could ensure that viewers were not charged for votes made outside the voting window and that votes made within the voting window would be received in time to be counted and taken into account.

Editorial override

Ofcom has seen evidence that confirms that the majority of the votes had been cast in favour of the winners referred to above. Further, Ofcom has also seen evidence that confirms that those who were eliminated from these programmes were voted off by the audience. Therefore, there was no editorial override by the programme-makers and Ofcom does not consider that viewers were misled as to the outcomes of the votes on any of these occasions.

In conclusion, Ofcom did not consider that the Code was breached by Channel TV in any of the identified programmes. However, Ofcom both noted and welcomed the reimbursement and reparation programme implemented by ITV plc in respect of the affected programmes.

Not in breach

The X Factor

ITV1, 15 December 2007, 19:15 & 21:35

Introduction

The X Factor is a talent show for singers broadcast on ITV1. It is conducted annually with the winner gaining a record contract. Once auditions have taken place around the country, each Saturday evening there is a live programme, during which each contestant performs. Viewers are invited to vote by premium rate services ("PRS") for the contestant they prefer and one or two contestants are eliminated each week. About an hour after the first programme, the live results programme is broadcast, during which voting lines are closed.

For the first weeks of the competition (until only five contestants remain in the competition), the two contestants who receive the fewest viewer votes are named and have to perform again in a 'sing-off'. The three judges then decide who, of those two acts, will be eliminated. When only five contestants remain in the competition, the way contestants are eliminated is changed. In these final three programmes of the series, viewers' votes alone determine who remains in the competition and who is eliminated.

ITV Network commissions the series from the independent production company FremantleMedia/talkbackThames ("talkbackThames"). Under the ITV networking arrangements, the production company is entitled to select a Channel 3 licensee to comply the production. In this case, talkbackThames selected Channel Television ("Channel TV") to comply *The X Factor*.

In the live final transmitted on Saturday 15 December 2007, the two competing contestants were Rhydian Roberts and Leon Jackson. The winner was Leon Jackson.

2,731 viewers complained to Ofcom. In summary, the majority of the complainants were concerned about the following issues:

- a) *that they were unable to vote for their favourite act and were therefore concerned that the final result that was announced was unfair and/or invalid;*
- b) *that they were charged for vote/s which they did not believe had been counted;*
- c) *that the vote was "rigged" by the broadcaster and/or the programme's producers in favour of the contestant who won, Leon Jackson;*
- d) *that the presenter's claim on air that the votes were "neck and neck" was untrue and was intended to encourage viewers to vote, purely to raise more PRS revenue; and*
- e) *that it was unfair that in the final part of the programme, the telephone number to vote for Leon Jackson was announced ten minutes before the number for Rhydian Roberts, possibly resulting in more votes for Leon.*

Channel TV was asked to respond to these complaints. The relevant Code Rules are Rule 2.2 which states that: "...portrayals of factual matters must not materially mislead the audience" and Rule 10.10 which requires that: "Any use of premium rate

numbers must comply with the Code of Practice issued by...ICSTIS" (now renamed PhonepayPlus)".

Response

Channel TV provided Ofcom with detailed telephony and other data to illustrate the systems and procedures that were in place to handle viewers votes on the night of the live final.

Design of the technical platform for handling viewer votes

Channel TV explained that *The X Factor's* service provider, Harvest Media Group ("Harvest") works with BT Agile Media to deliver the UK vote. This is achieved by use of BT's Recorded Information Delivery Equipment (RIDE) platform which has a capacity to handle over 200,000 votes per minute.

In response to Ofcom's request for information to explain why viewers were unable to get through to vote for their chosen contestant, Channel TV provided data to demonstrate that the line availability of the RIDE platform is designed to be "phone number neutral". Therefore all callers have an equal chance of getting through, irrespective of their choice of contestant. In other words, the chances a caller has of getting through are not determined by the "voting number" (usually the last three or four digits of the telephone number), but by the number of callers overall calling the shared first digits of the voting number, therefore no individual contestant could be disadvantaged disproportionately compared to any other.

If call volumes exceed the capacity of the RIDE platform at any given time, all those calls, irrespective of the chosen contestant, fail to get through. Channel TV provided data to Ofcom that it had sourced from BT to demonstrate that there was adequate capacity on the RIDE platform to handle the large amounts of calls generated by the live final. However, it remained possible that individual network operators may have experienced problems with their own servers due to instances of high call volumes.

In addition, Channel TV stated that for the 2007 series BT had ensured that any votes cast outside the vote window would not be charged to the caller. Channel stated that it believed that this point in particular removed one of the more understandable concerns by viewers who vote without paying sufficient attention to the specified time constraints.

Procedures in place

Channel TV also provided detailed information on the procedures in place to check and manage the voting system. These included the aggregation of the votes through a third party purpose-built platform and extensive checks on the operation of this platform at its installation, before each series and by means of constant monitoring during the live vote, and checking against a periodical manual vote.

In addition to the management of the platform itself, Channel TV also detailed the extensive liaison procedures in place so that the production company (talkbackThames), the company responsible for designing and implementing the interactive media services (Harvest) and ITV Consumer itself can test voting lines, and confirm vote details such as timings during the shows, contestant order and numbers.

Channel TV stated that this whole process and the role of the service provider, Harvest Media, had been checked by Deloitte & Touche LLP (“Deloitte”) (an independent firm of auditors) hired by ITV plc and that Deloitte was satisfied that the issues in question were handled appropriately by all parties. Channel TV said that it had also ensured that a suitable response was available to viewers who complained and that there was an appropriate press release agreed by Channel TV and talkbackThames and issued by ITV plc’s Press Office.

Decision

Turning specifically to the range of complaints made by viewers:

- a) *that viewers were unable to vote for their favourite act and were therefore concerned that the final result that was announced was unfair and/or invalid;*

Having assessed the detailed information provided to it regarding the RIDE platform and the management of votes, Ofcom could find no evidence that voting problems on the night affected the outcome of the vote: in particular, Ofcom has seen evidence which confirms that the design of the RIDE platform is such that all callers have an equal chance of getting through, irrespective of their choice of contestant. This is due to the system processing calls on a “number neutral” basis. This means that the platform’s total call capacity is based on all calls containing the shared first digits of the voting number, not the specific end digits relating to any individual contestant. Therefore, even if the total call capacity had been exceeded due to a particularly high number of calls, no single contestant would have been disadvantaged disproportionately.

Ofcom has also assessed data that demonstrated that the RIDE platform had sufficient capacity to handle the large number of calls generated by the final. On the basis of the voting data, Ofcom is able to confirm that the majority of viewers did vote for Leon Jackson and that the final result was therefore valid.

It is possible that callers were unable to get through as a result of a number of factors occurring prior to calls reaching the voting platform (which is not the responsibility of or within the control of the vote platform provider, BT). These include network or local exchange congestion, premium rate call bars that callers may not have been aware of, misdialling and callers trying to vote by SMS text even though this facility was not provided. Ofcom has seen evidence that the proportion of such calls that were “lost”, was equal for each of the two contestants in question. For example, the proportion of calls “lost” for Leon Jackson as a result of network or local exchange congestion was 1%, while in the case of Rhydian Roberts, it was 0.99%.

- b) *that viewers were charged for vote/s which they did not believe had been counted;*

Ofcom has assessed evidence that demonstrates that if a caller successfully got through and received one of the *The X Factor* contestant messages informing them that their vote had been registered, then the viewer would have been charged and their vote would have been counted. If the caller was not on the BT Network then it is possible, according to BT, for a different network provider to make a billing error. Additionally, if a caller tried to vote outside the voting window they would have heard a message saying that vote lines were either not open or that lines had closed. In both these cases the caller would not have been charged.

Ofcom has obtained data which shows that, as explained above, there was enough capacity on the RIDE platform to handle the large amounts of calls generated by the live final. It is however possible that individual network operators may have experienced problems with their own servers due to high instances of call volumes. Viewers who remain concerned about this issue should make enquiries with their own network operators who supply the service for their phone line or mobile telephone.

Ofcom is therefore sufficiently reassured that Channel TV took the steps necessary to ensure that voting lines were managed to ensure that only those calling during the allocated voting periods were charged. As a consequence, those viewers who continue to dispute the costs on their bill relating to voting in this final of *The X Factor* should contact their network provider. Viewers who remain dissatisfied should contact either the Communications and Internet Services Adjudication Scheme (Cisas)² or the Office of the Telecommunications Ombudsman (Otelos)³.

c) that the vote was “rigged” by the broadcaster and/or the programme’s producers in favour of the contestant who won, Leon Jackson;

Having assessed the data supplied to it, Ofcom has found no evidence that there was any unfair conduct in the management of the vote, in favour of one contestant or the other. It is clear from this evidence that there were more votes for Leon Jackson and he was therefore correctly identified as the winner. This has also been corroborated by the independent auditors, Deloitte.

d) that the presenter’s claim on air that the votes were “neck and neck” was untrue and was intended to encourage viewers to vote, purely to raise more PRS revenue;

Ofcom has assessed the minute-by-minute log of PRS voting for the live final provided to it by Channel TV and on the basis of this, has judged that at the time presenter Dermot O’Leary stated there was 1% between both finalists, this statement was correct. Ofcom therefore does not consider that it was inappropriate or false for the presenter to use the phrase “neck and neck” to describe the closeness of the vote.

e) that it was unfair that in the final part of the programme, the telephone number to vote for Leon Jackson was announced ten minutes before the number for Rhydian Roberts, possibly resulting in more votes for Leon.

The phone numbers used for Leon and Rhydian were the same throughout the duration of the programme and had been revealed in the first part of the programme where three acts were competing to be in the final two. Having assessed the voting data, Ofcom ascertained that both artists received a peak of calls when they

² Cisas is an Ofcom-approved dispute resolution service set up to settle disputes between telephone companies/Internet Service Providers and their customers. It uses independent and impartial adjudications to settle disputes and is free to consumers and small businesses. <http://www.arbitrators.org/cisas>

³ Otelos looks at complaints made against telephone companies/Internet Service Providers that are members of the Ombudsman scheme. The Ombudsman has powers to act after consumers have given the company in question the opportunity to resolve any dispute. <http://www.otelos.org.uk/>

performed their version of the “winner’s single”, but overall and sustained votes throughout the duration of the second part of the programme were higher for Leon than for Rhydian. Ofcom did not therefore consider that the difference of nine minutes – between Leon’s final performance and that of Rhydian – had made a material and substantial difference to the overall flow of incoming votes.

In conclusion Ofcom is satisfied that all appropriate steps were taken by Channel TV to ensure that the voting process for the live final of *The X Factor 2007* was fair, openly accountable and transparent. No evidence was found to suggest that the telephone voting systems and the management and oversight of *The X Factor* were compromised by editorial interference on the part of the broadcaster or technological malfunction on the part of the telephony services arranged for and conducted during each programme.

Ofcom therefore judged that the programme was not in breach of Rule 2.2 or Rule 10.10 of the Code.

Not in Breach