

# **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](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

#### The Big Top 40 Show

*Galaxy Manchester 102 FM, 28 June 2009, 16:00*

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#### Introduction

*The Big Top 40 Show* is the current UK commercial radio network weekly chart show, featuring the Big Top 40 chart. The three hour programme is produced by Global Radio and broadcast on over 140 stations (owned by various radio groups) across the network.

Throughout the programme the Big Top 40 chart is regularly referred to as *“the chart you can change”*. Listeners are told that they may influence the top ten (known as *“the iTunes top ten”*) during the programme, by visiting the show’s website, bigtop40.com. The website features weblinks to the iTunes online store for the purchase of listed downloads before *“lock down”* (a little before 18:00) to influence the new top ten, which is played from 18:00<sup>1</sup>.

A Galaxy Manchester 102 FM listener was concerned about the number of references to iTunes made throughout the programme.

Ofcom noted repeated references throughout the broadcast to:

- iTunes;
- listeners’ ability to influence the chart; and
- invitations (including direct calls to action) to download tracks via the show’s website (before 18:00).

For example:

- *“... The Big Top 40 Show ... the chart you can change ... you decide in real time ... the Big Top 40 is the only chart powered by iTunes ... this is the Big Top 40 – the only chart you can influence as we count it down. Get online right now to Big Top 40 dot com. When you download from our website, it directly affects the top ten ... at five minutes past four, let’s check out the chart. This is the iTunes top ten ... The Big Top 40 show. Download now at The Big Top 40 Show dot com”*;
- *“...powered by iTunes, the chart you can change...”*;
- *“let’s check out the chart. This is the iTunes top ten...”*;
- *“You can download that now at Big Top 40 dot com”*;
- *“...you can help make that happen by downloading it now...”*

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<sup>1</sup> While the top ten of the Big Top 40 chart reflect iTunes’ top singles download sales, positions 11 to 40 in the chart are informed by iTunes sales data but ultimately decided by Global Radio.

We therefore asked Global Radio (“Global”), which owns Galaxy Manchester, for details of any commercial arrangement it had with any third party concerning the broadcast, together with its comments with regard to the following Code rules:

- 10.1 – Broadcasters must maintain the independence of editorial control over programme content;
- 10.3 – Products and services must not be promoted in programmes. This rule does not apply to programme-related material. (See Rule 10.6); and
- 10.4 – No undue prominence may be given in any programme to a product or service.

## Response

Global provided Ofcom with evidence to demonstrate that the agreement it had in place with iTunes involved no financial arrangement concerning the production of *The Big Top 40 Show*.

Global said that it referred on air to iTunes only to inform listeners that the top ten of the Big Top 40 chart was provided by iTunes (i.e. “*the iTunes top ten*”), as this differentiated it from tracks 11 to 40 in the chart, the positions of which were informed by iTunes but ultimately decided by Global.

The broadcaster assured Ofcom that, while the download service provider enabled it to use iTunes’ music download sales data to compile the weekly chart, Global itself retained “absolute editorial control of the programme.”

Global added that “at least 95% of single sales are now digital, and ... in the UK ... 98% of all music downloads are via iTunes” and “given the ubiquitous nature of iTunes ... it was the natural choice ... from which to source chart data which most accurately reflects consumer behaviour.”

It said that *The Big Top 40 Show* was created to reflect the “far more instantaneous movement of the charts in the UK than ever before ... and keep up to date with consumer behaviour.” By reminding listeners of their opportunity to change the chart in a more instantaneous way than previously possible, Global believed a new concept of the Big Top 40 chart was being made clear to them. In addition, the broadcaster believed that its references to the chart being “*powered by iTunes*” put this new concept into “editorial context for the listener.”

Global argued that iTunes data were used to inform the chart programme in the same way as other data providers informed previous radio chart programmes. Similarly, it argued that “calls to influence the chart remind listeners to interact with the programme and impact the chart itself, on an instantaneous basis” and are “no different to someone encouraging listeners to influence the traditional format chart by buying records throughout the week.”

The broadcaster said that the Big Top 40 website, to which listeners were referred (to influence the Big Top 40 chart) was directly derived from the programme and allowed listeners to interact with it. Global therefore considered that the Big Top 40 website was programme-related material and the references to it in the programme were editorially justified.

In conclusion Global summarised that it believed the aired references to iTunes were editorially justified and duly prominent, as:

- iTunes was the chosen (and most appropriate) data supplier of the chart;
- it was iTunes' "infrastructure" that enabled listeners to affect the outcome of the chart;
- the "*iTunes top ten*" had to be differentiated from the rest of the Big Top 40 chart, which is not solely based on iTunes' data; and
- the chart was "a new concept and must be put into editorial context for the listener."

## Decision

Having assessed the evidence available to it, Ofcom was satisfied that the broadcaster had maintained independent editorial control (Rule 10.1).

A radio chart show based on (or influenced by) download data reflects the contemporary singles market. We note Global's point that the principle proprietary download service provider in the UK is iTunes. Ofcom therefore accepts that iTunes was an appropriate source of data from which to compile a download chart.

Ofcom acknowledges that on-air encouragement for listeners to influence the chart "on an instantaneous basis" (by purchasing downloads via the show's website), and therefore interact with the programme, has some parallels with the encouragement historically broadcast to influence previous traditional format radio charts (by purchasing records in the coming week).

However, Ofcom noted three significant differences between this instance and previous radio charts based on record sales. In this case, encouragement to influence the chart:

- was directly solicited (e.g. "*Download now at The Big Top 40 Show dot com*" and "*You can download that now at Big Top 40 dot com*"), as opposed to being implied or referred to in passing;
- had become a central feature of the chart show, as the mechanism by which its editorial format was achieved; and
- involved the sale of products (downloads) and the service supplied by only one provider (iTunes) rather than all retail outlets selling records.

Under Rule 10.3 of the Code, products and services must not be promoted in programmes. However, this rule does not apply to programme-related material, which may be promoted in programmes only where it is editorially justified (Rule 10.6). Programme-related material is defined in the Code as "...products or services that are both directly derived from a specific programme and intended to allow listeners ... to benefit fully from, or to interact with, that programme".

In this case, Ofcom noted that Global considered the website, bigtop40.com, to be directly derived from the programming, and that the ability to buy downloads via the site enabled listeners to interact with the programming. In Global's view, on-air references to the website therefore constituted legitimate programme-related material. It was therefore Global's belief that on-air encouragements to listeners to influence the chart by downloading tracks at bigtop40.com amounted to editorially justified promotions.

Ofcom accepted that the website [bigtop40.com](http://bigtop40.com) was directly derived from *The Big Top 40 Show*. Furthermore, the website allowed listeners a form of interaction with the programme, to the extent that they could follow the weblinks at the website to buy downloads, which then influenced the position of tracks within the Big Top 40 chart, thereby determining the contents of the show. However, Ofcom noted that this was facilitated at [bigtop40.com](http://bigtop40.com) by means of purchasing downloads from iTunes through direct weblinks to the online iTunes Store. It was Ofcom's view that, ultimately, [bigtop40.com](http://bigtop40.com) effectively appeared to be a 'portal' for the purchase of iTunes downloads.

iTunes downloads could not meet the definition of programme-related material under the Code (Rule 10.6). The downloads were iTunes products that could be purchased through the iTunes download service. Both the downloads themselves and the service by which they were acquired existed separately from *The Big Top 40 Show*, and were not therefore directly derived from it.

Section Ten of the Code is based on a range of specific provisions in European television broadcasting legislation – the Television Without Frontiers Directive – such as the separation of advertising and programming, and restrictions on advertising minutage. Although radio licensees must comply with Section Ten of the Code, in reaching a decision in this particular case, Ofcom took into account that the European legislation does not apply to radio broadcasts.

Ofcom also took into account the specific circumstances in this case, namely that Global had updated a traditional approach to radio chart show programming to make it relevant to the contemporary digital "interactive" environment. In addition, it appeared that, for *The Big Top 40 Show's* target audience (i.e. younger listeners who are most likely to purchase downloads), the fact that a significant majority<sup>2</sup> of all music downloads are via iTunes was likely to have made the brand synonymous with the service it provides. On balance, therefore, Ofcom considered the [bigtop40.com](http://bigtop40.com) website to be programme-related material and the inclusion of references to [bigtop40.com](http://bigtop40.com) and to listeners' ability to influence the chart to be editorially justified, in the circumstances of this particular radio format.

However, Ofcom was concerned by the nature of many of the references to [bigtop40.com](http://bigtop40.com) – in particular, where they directly solicited the purchase of downloads (for example: "*You can download that now at Big Top 40 dot com*"). On some occasions such references were made within clear calls to action to purchase specific downloads (for example: "*Download now at The Big Top 40 Show dot com*").

As set out above, Ofcom noted that it was, in fact, only possible to download the tracks in question by following the weblinks at [bigtop40.com](http://bigtop40.com) to the iTunes online store. Ofcom also noted that the direct solicits and calls to action did not specify iTunes as the provider of the downloads or the download service. Nevertheless, given that a significant majority of UK singles downloads are made via iTunes, Ofcom considered that the brand itself was likely to have become synonymous with the service it provides. Further, Ofcom considered that as a result of the other information provided about the format in the programming, it was likely to have been obvious to listeners that the downloads were iTunes products, downloaded via the iTunes service. Given that the downloads themselves were not programme-related material, Ofcom concluded that these direct solicits and calls to action amounted to a

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<sup>2</sup> According to the British Phonographic Industry (BPI) annual Statistical Handbook (18 May 2009), iTunes has a 71.8% unit share of the UK singles market.

promotion of products (i.e. iTunes downloads) and the iTunes download service itself. These references were therefore in breach of Rule 10.3 of the Code.

Ofcom was also concerned about the manner and frequency of references to iTunes made throughout the programme.

Ofcom accepted that reference to "*the iTunes top ten*" was editorially justified as a means to explain the specific source and nature of the Big Top 40 chart's top ten places. Likewise, Ofcom accepted that an occasional reference to the Big Top 40 chart being "*powered by iTunes*" could be editorially justified as a means to explain the nature of the entire chart, which was influenced by iTunes as a data source. However, Ofcom did not consider that the repeated references throughout the programme to iTunes (whether referring to the top ten or the chart more generally) served any further purpose and therefore appeared gratuitous. Ofcom considered there was insufficient editorial justification for the sheer number and frequency of these references. Their inclusion in the broadcast therefore gave undue prominence to iTunes, in breach of Rule 10.4 of the Code.

#### **Breaches of Rules 10.3 and 10.4**

## In Breach

### Various programmes

*Cartoon Network (Spanish language), 27 May 2009 to 4 August 2009*  
*Boomerang Spain, 6 June 2009 to 12 July 2009*

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#### Introduction

Cartoon Network (Spanish language) and Boomerang Spain are children's channels licensed by Ofcom to Turner Entertainment Networks International Limited ("Turner"), and broadcast in Spain. The compliance department for Turner is based in London.

During a recent monitoring exercise, Ofcom noted that some children's programming on both channels, was sponsored by food products which might be categorised as High in Fat, Salt or Sugar ("HFSS") according to the nutrient profiling scheme of the Food Standards Agency, in particular Haribo (jelly sweets), Choco Krispies (cereal) and Nesquik (milk flavouring powder).

#### Regulatory Framework and Guidance

As part of its duties under the Communications Act 2003 ("the 2003 Act") in relation to broadcasting, Ofcom is ultimately responsible for setting broadcast standards for advertising and the sponsorship of programmes. The relevant objectives to be secured by these standards include:

- that persons under the age of 18 are protected (section 319(2)(a) of the 2003 Act);
- to prevent the unsuitable sponsorship of programmes included in television services (section 319(2)(j)).

The Advertising Standards Authority ("the ASA") and Broadcast Committee of Advertising Practice ("BCAP") regulate the content of broadcast advertising, under a Memorandum of Understanding with Ofcom<sup>1</sup>. Specifically, BCAP supervises and reviews the codes that govern the regulation of broadcast advertising.

The regulation of broadcast sponsorship remains with Ofcom because of its intrinsic connection with broadcasters' editorial content. It is dealt with in Section Nine of Ofcom's Broadcasting Code ("the Code").

Rule 9.3 of the Code states:

"Sponsorship on radio and television must comply with both the advertising content and scheduling rules that apply to that medium."

In February 2007 Ofcom published its Final Statement on Television Advertising of Food and Drink Products to Children. This amended the BCAP Rules on the Scheduling of Television Advertisements to specify in Rule 4.2.1(b) that:

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<sup>1</sup> This arrangement operates on a formal footing sanctioned by Parliament. The Memorandum of Understanding between the parties can be found at:

[http://www.ofcom.org.uk/consult/condocs/reg\\_broad\\_ad/update/mou/](http://www.ofcom.org.uk/consult/condocs/reg_broad_ad/update/mou/).

“The following may not be advertised in or adjacent to children’s programmes or programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 16:

...(vi) food or drink products that are assessed as high in fat, salt or sugar in accordance with the nutrient profiling scheme published by the Food Standards Agency (FSA) on 6 December 2005.”<sup>2</sup>

BCAP has issued specific guidance (“Guidance”) in order to help advertisers and broadcaster differentiate between HFSS and non-HFSS products in advertisements (and therefore by extension in sponsorship). This Guidance aims to give greater certainty about when the Rules that govern television advertisements (and sponsorship) that promote, directly or indirectly, an HFSS product apply.<sup>3</sup>

Ofcom was also concerned that the Nesquik sponsorship credit contained an advertising message. Rule 9.13 of the Code states:

“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”.

The animated credit showed of various pairs of sunglasses. The voiceover stated: *“From now you will see everything with different eyes with the glasses and ‘protagafas’ design by Kukuxumusu that you will find in every Nesquik box. Nesquik sponsors this show.”*

The caption stated: *“www.echale.nesquik.es + Free sunglasses on the Nesquik boxes and accumulating points on the rest of the packages. Promotion limited to 430.000 units. Only national territory.”*

Ofcom therefore asked Turner for its comments on the credits with regards to Rules 9.3 of the Code, and Rule 4.2.1(b) of the BCAP Rules on the Scheduling of Television Advertisements. In relation to the Nesquik sponsorship credit, Ofcom also asked Turner for its comments with regards to Rule 9.13 of the Code.

## Response

### Rule 9.3 of the Code and Rule 4.2.1(b) of the BCAP Rules on the Scheduling of Television Advertisements

Turner confirmed that Cartoon Network (Spanish Language) and Boomerang (Spain) were children’s channels. It continued that having reviewed the nutritional profile of the sponsors’ products (i.e. Haribo, Choco Krispies and Nesquik), it could confirm that they all fall into the category of HFSS foods. It therefore acknowledged that each of the sponsorship arrangements was in breach of Rule 4.2.1(b) of the BCAP Rules on the Scheduling of Television Advertisements, and therefore also in breach of Rule 9.3 of the Code.

The broadcaster continued that “there are no rules in Spain equivalent to Ofcom’s HFSS rules and therefore the classification of these food products has been harder

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<sup>2</sup> The nutrient profiling scheme scores food and drink products on the basis of selected nutrients to determine whether the product is high in fat, salt or sugar.

<sup>3</sup> The Guidance is available at [www.asa.org.uk/asa/code/tv\\_code/Guidance\\_Notes](http://www.asa.org.uk/asa/code/tv_code/Guidance_Notes).

to undertake in Spain than in the UK.” It added that there had been a “misunderstanding in its Spanish team in respect of more day-to-day food products”. Turner said that it is undertaking a training programme as a matter of urgency.

#### Rule 9.13

Turner said that having reviewed the credit for Nesquik, it acknowledged that the credit contained a promotional message and therefore went beyond the requirements for sponsorship credits. The broadcaster added that it has implemented training in this area to ensure compliance with Rule 9.13.

### **Decision**

#### Rule 9.3 of the Broadcasting Code and Rule 4.2.1(b) of the BCAP Rules on the Scheduling of Television Advertisements

Ofcom noted Turner’s point that Spain does not have any rules which are equivalent to Ofcom’s HFSS rules and therefore Turner has found classification of HFSS food products harder to undertake in Spain. However, as Turner has chosen to establish itself in the UK and, as such, holds Ofcom licences for the transmission of Cartoon Network (Spanish language) and Boomerang Spain, it must comply with all of the UK’s relevant codes and rules in relation to advertising and sponsorship of programmes.

Article 2 of the European legislation the Television Without Frontiers (TWF) Directive, requires all European Member States to ensure that all broadcasts under its jurisdiction comply with “rules of the system of law applicable to broadcast intended for the public in that Member State”. In addition, Article 16 of the TWF Directive requires Member States to protect the health of minors from the effects of advertising.

Ofcom has also had regard to the fact that its obligations under the 2003 Act are not limited to protecting children in the UK. Ofcom has responsibilities with regard to advertising transmitted by all Ofcom licensees regardless of the territory in which they choose to broadcast.

A sponsored programme is one which has had some or all of its costs met by a sponsor with a view to promoting its own or another’s name, trademark, image, activities, services, products or any other direct or indirect interest<sup>4</sup>. Sponsorship credits inform viewers that a programme is sponsored and let them know the identity of the sponsor, thereby informing the viewer of the sponsorship arrangement. This is part of the editorial environment and the regulation of sponsorship arrangements therefore rests with Ofcom.

Sponsorship credits may include a brief description of the sponsor’s brands, products or services provided, but must be clearly separated from advertising. However, in accordance with Rule 9.3 of Ofcom’s Broadcasting Code, sponsorship (and the associated credits) must comply with the terms of BCAP’s Television Advertising Standards Code and its Rules on the Scheduling of Advertisements.

Turner admitted that Cartoon Network (Spanish Language) and Boomerang Spain were children’s channels and the sponsored programmes were therefore children’s programmes. Turner also admitted that the nutritional profile of the products featured in the sponsorship credits (i.e. Haribo, Choco Krispies and Nesquik) meant that they fell into the category of HFSS products. The sponsorship was therefore in breach of

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<sup>4</sup> See Section Nine of the Ofcom Broadcasting Code.

Rule 4.2.1(b) of the BCAP Rules on the Scheduling of Television Advertisements and, accordingly, in breach of Rule 9.3 of the Broadcasting Code, which requires that sponsorship must comply with the advertising scheduling rules that apply to the relevant medium, in this case television.

**Sponsorship of various programmes on Cartoon Network (Spanish language) and Boomerang Spain by Choco Krispies – Breach of Rule 9.3 of the Code and Rule 4.2.1(b) of the BCAP Rules on the Scheduling of Television Advertisements**

**Sponsorship of various programmes on Cartoon Network (Spanish language) by Haribo – Breach of Rule 9.3 of the Code and Rule 4.2.1(b) of the BCAP Rules on the Scheduling of Television Advertisements**

Rule 9.13

Rule 9.13 of the Code is directly derived from European legislation, the TWF Directive.

The TWF Directive limits the amount of advertising a broadcaster can transmit (Article 18) and requires that advertising is kept separate from other parts of the programme service (Article 10). As sponsorship credits are treated as part of the sponsored content rather than advertising, they do not count towards the amount of airtime a broadcaster is allowed to use for advertising. To prevent credits effectively becoming advertisements, and therefore increasing the amount of advertising transmitted, broadcasters are required to ensure that sponsorship credits do not contain advertising messages.

The sponsorship credit informed the viewer that they would find a free pair of sunglasses inside each box of Nesquik. The credit therefore promoted the sponsor's product in breach of Rule 9.13 of the Code.

**Sponsorship of various programmes by Nesquik, Cartoon Network (Spanish language) – Breach of Rule 9.13 and 9.3 of the Broadcasting Code and Rule 4.2.1(b) of the BCAP Rules on the Scheduling of Television Advertisements**

Ofcom is concerned that Turner appears to have had insufficient procedures in place to ensure compliance with Rule 9.3 of the Code and Rule 4.2.1(b) of the Rules on the Scheduling of Television Advertisements. In light of this, Ofcom is requiring the broadcaster to attend a meeting to discuss its compliance processes and procedures. Further, Ofcom is putting the licensee on notice that any further breaches of Rule 9.3 and Rule 4.2.1(b) of the Rules on the Scheduling of Television Advertisements will be taken extremely seriously and in such circumstances Ofcom may consider further regulatory action.

## In Breach

### Win This Week with Sky

Hallam FM (South Yorkshire), 28 September 2009, 07:05

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#### Introduction

*Win This Week with Sky* was a sponsored listener competition feature broadcast in Hallam FM's breakfast show.

In this instance, it opened with the following pre-recorded sponsor credit:

*"Win This Week with Sky; like drama and entertainment; choose the variety pack; Hallam FM."*

The presenter then said:

*"Every morning this week we're giving away Sky plus an HD box, including a year's subscription to Sky, including the Style and Culture and Knowledge pack, plus the HD pack, and an HD-ready TV as well – a fantastic prize! Sky let you choose the type of TV you want, without paying for stuff you don't, as Sky have six entertainment packs to choose from. Do you want get under the skin of your type of culture? Choose the TV you want with Sky's Style and Culture pack, or for drama and entertainment choose Sky's variety pack. We'll play a game now. Contestant number one is Liz Harrison in Denaby. Hello..."*

A listener questioned the validity of the claim, *"Sky let you choose the type of TV you want, without paying for stuff you don't"*, and referred to Ofcom's recent Finding concerning the competition, *Win with Sky*, when Hallam FM was found in breach of the Code, for failure to gain appropriate approval in advance (in this case, from the Radio Advertising Clearance Centre) for the broadcast of a sponsor credit.<sup>1</sup>

Under the Code, sponsor credits on radio may contain advertising claims. However, as the advertising claim in this case had been made outside the sponsor credit and as part of the programming itself, we sought Hallam FM's comments with regard to Rule 9.5 of the Code, which states:

"There must be no promotional reference to the sponsor, its name, trademark, image, activities, services or products or to any of its other direct or indirect interests. There must be no promotional generic references. Non-promotional references are permitted only where they are editorially justified and incidental."

#### Response

Bauer Radio, which owns Hallam FM, said that it was "aware of a similar complaint from a listener ... for a previous Sky campaign ... concerning clarity over the different Sky packs". It added that, "although this read was longer than normal, we wanted to make sure we made it clear to listeners that we were describing the prize accurately."

The broadcaster did not believe it had breached Rule 9.5 of the Code, as it had retained editorial control of the competition, adding that "the mechanic involved a

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<sup>1</sup> See Broadcast Bulletin issue number 140 (24 August 2009), which can be found at: [http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb140/Issue140.pdf](http://www.ofcom.org.uk/tv/obb/prog_cb/obb140/Issue140.pdf).

listener describing one of their favourite TV programmes, with the participant invited to guess the TV show in question. Before we put this promotion to air we took extreme care to make sure the listener clues covered a full range of shows and not just those available on Sky's channels. On the day in question the clue was for a BBC programme."

## Decision

Bauer Radio appeared to believe it had not breached the Code on the grounds that it had maintained editorial independence and avoided giving undue prominence to Sky programmes within the competition itself.

Broadcasters are reminded that only non-promotional references to a sponsor and its products/services are permitted in the programming it has sponsored and such references must be both editorially justified and incidental. Where the sponsor is also providing a broadcast competition prize, its on-air description should therefore be sufficient for listeners to be able to decide whether they wish to enter the competition, but should not generally include advertising messages or other information about the sponsor and/or its products/services.

In this instance, the broadcast competition appeared to comprise four distinct sections:

- a pre-recorded sponsor credit (which had been appropriately cleared for broadcast) – *"Win This Week with Sky; like drama and entertainment; choose the variety pack; Hallam FM"*;
- a presenter-read description of the broadcast competition prize available each morning – *"Every morning this week we're giving away Sky plus an HD box, including a year's subscription to Sky, including the Style and Culture and Knowledge pack, plus the HD pack, and an HD-ready TV as well – a fantastic prize!"*;
- presenter-read information about the sponsor and its products/services – *"Sky let you choose the type of TV you want, without paying for stuff you don't, as Sky have six entertainment packs to choose from. Do you want get under the skin of your type of culture? Choose the TV you want with Sky's Style and Culture pack, or for drama and entertainment choose Sky's variety pack"*; and
- the presenter-led broadcast competition itself – *"We'll play a game now. Contestant number one is Liz Harrison in Denaby. Hello..."*

Ofcom considered that the prize description was clear and sufficient to enable listeners to decide whether they would like to enter the competition.

However, Ofcom did not agree with the broadcaster's argument that the additional information about the sponsor's products/services was necessary "to make sure [the broadcaster] made it clear to listeners that [it was] describing the prize accurately". The information clearly promoted the sponsor's products/services and included an advertising claim (*"Sky let you choose the type of TV you want, without paying for stuff you don't..."*) and product descriptions. Promotional references to the sponsor and its products/services are prohibited in programming and the feature was therefore in breach of Rule 9.5 of the Code.

In view of Hallam FM's previous breach of Section Nine of the Code, as referred to above, and the breach recorded here, Ofcom intends to discuss Bauer's compliance processes with it in more detail.

**Breach of Rule 9.5**

## In Breach

### STV Business Briefing

*STV, May to August 2009, 22:30*

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#### Introduction

*STV Business Briefing* was a series of short reports that followed STV's evening news programme. It included business news reports relevant to Scotland and market share prices. The programme was sponsored by STV Jobs (a job finding service).

Ofcom asked STV to comment on the sponsorship arrangement under Rule 9.1 (news and current affairs programmes on television may not be sponsored).

#### Response

STV assured Ofcom that it took compliance with the Code very seriously and was fully aware of the prohibition on the sponsorship of news and current affairs programmes. The broadcaster advised that it had based its sponsorship of the *STV Business Briefing* report on Ofcom's guidance that accompanies the Code. This states that "short specialist reports following a news programme - including sport, travel and weather reports - may be sponsored."

STV took the view, based on Ofcom's guidance, that the report met the criteria of a 'short specialist report' and was therefore open to sponsorship. The broadcaster advised that it treated the *STV Business Briefing* as a short specialist report as the content was restricted to business information only. The format mirrored that of a sports report and it was clearly separated from the main news programme. STV argued that sports reports contain opinion and analysis in the same way as the *STV Business Briefings*. It would therefore be unfair for Ofcom to record a breach finding, when STV had followed the terms of the guidance. STV also advised that it ceased broadcasting this report on 24 August 2009.

#### Decision

Rule 9.1 of the Code prohibits the sponsorship of news and current affairs programmes. This rule is derived from the requirements of the Television Without Frontiers Directive<sup>1</sup>. It supports the important principle that news must be reported with due accuracy and presented with due impartiality. A broadcaster's editorial control over the content of its news should not be, or appear to be, compromised.

Other information that traditionally accompanies news, such as sports and weather reports, may be sponsored provided this is separated from the news. There is no absolute prohibition on the sponsorship of business features. Reports consisting of factual information, such as stock prices, may be sponsored because it is unlikely that the sponsorship will be seen to compromise the accuracy and impartiality of the information provided. However, sponsorship of reports that contain analysis or opinion on business news is incompatible with the requirements of Rule 9.1.

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<sup>1</sup> Article 17(4) of the Television Without Frontiers Directive states that: "News and current affairs programmes may not be sponsored".

Ofcom noted that the guidance to Rule 9.1 only gives examples of topics – sport, travel, weather – that do not deal with matters of political or industrial controversy, or current public policy. We believe it is sufficiently clear from the Code and guidance that programmes that do contain analysis of such issues cannot be sponsored.

In this instance, we noted the *STV Business Briefing* was introduced as a round-up of business news. It provided short reports on matters of local business interest, including explanation and analysis of current events and issues, such as the increase in the number of public service workers in Scotland, which it attributed to “*the Government’s rescue of the stricken banking sector.*” Reports were also included on Government reassurance to shipyard workers about their jobs, and the controversy surrounding a senior banker’s pay. These clearly dealt with matters of political and industrial controversy.

In conclusion, the *STV Business Briefings* went beyond providing factual market information (which may be sponsored). As such, Ofcom judged the programme to be a news report and the sponsorship was therefore in breach of the Code.

### **Breach of Rule 9.1**

The original decision to find this programme in breach was appealed by the broadcaster, leading to a review. This finding is the result of that review.

## In Breach

### Beauty Simplified

*Sunrise TV, 28 July 2009, 11:00*

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#### Introduction

Sunrise TV is a general entertainment channel for the UK Asian community. *Beauty Simplified* is a phone-in programme presented by a beautician, Bina Khan, who offers callers beauty tips and advice.

A viewer was concerned that a range of beauty products was promoted in the programme and the promotions included prices and details of where the products could be purchased.

Ofcom noted that the programme included discussions concerning four products that were available through the presenter's personal website, BinaKhan.com, and various sponsored links to WellJuice.com, which produced and supplied the products.

The presenter occasionally referred to her own website, although only once by name (e.g. "...go for diet lemon juice ... probably you know how to get it if you go to my website, yes?" and "...if you don't know where it is then visit my website, BinaKhan.com, and you can find the location by clicking on to store location...")

Given the references to the presenter's website (BinaKhan.com), through which viewers could purchase products produced and supplied by WellJuice.com and featured in the programme, we sought Sunrise TV's comments with regard to the following Code Rules:

- 10.1 – Broadcasters must maintain the independence of editorial control over programme content;
- 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

Sunrise TV said that it had no commercial arrangement in place with the operator of the website, WellJuice.com. It added that the presenter had confirmed that, while all the products she recommended on her website (BinaKhan.com) were available from that company, she also had no commercial relationship with it concerning the programme. The broadcaster also stated: "At no time is any broadcast on Sunrise TV assigned in any way to a third party."

Sunrise TV said that the presenter was "well known within the Asian community, having hosted similar shows on radio and written extensively in Asian publications and is considered an expert in home remedies." It added that, as with all presenters, Bina Khan was required to comply with the programme's brief - in this case, "to

provide the viewers with an interactive programme offering beauty tips and advice using natural remedies that are generally available in a discussion based environment prompted by viewers' phone calls" and to "act in accordance with the production values that have been set in place."

The broadcaster said that the references to products and services in the programme were "spontaneous and unrehearsed." However, it acknowledged that "during the course of this show undue prominence was inadvertently given to the products available from WellJuice.com through the BinaKhan.com website and this represented a breach of Code Rule 10.4." Sunrise TV also acknowledged that the website, BinaKhan.com, was not programme-related material, as it was not directly derived from the programme. It added that, "by giving the advice in the way that she did, Bina Khan inadvertently promoted her own website and as a consequence the specific products in a manner that would appear to contravene Rule 10.3."

The broadcaster said it had therefore reminded all presenters to avoid promoting or giving undue prominence to products or services in programmes and had "stressed the particular importance of these obligations in respect of live interactive programming when offering spontaneous and unrehearsed responses to questions and statements by participants in such programmes."

Sunrise TV said that the presenter had "offered her apologies for the shortfall in the professional standards expected of her", and offered its own "unreserved apologies for the shortfalls highlighted by this complaint."

## **Decision**

Ofcom notes Sunrise TV's assurances that there was no commercial arrangement in place between the broadcaster or the presenter and the operator of the website, WellJuice.com, concerning the programme and that "at no time is any broadcast on Sunrise TV assigned in any way to a third party." On the basis of the evidence available to it, Ofcom was satisfied that product placement had not occurred (Rule 10.5) and that the broadcaster's editorial independence had been maintained (Rule 10.1).

Where editorially justified, presenters may make reference to products and/or services in programmes. For example, they may find it appropriate to refer the audience to a channel's or programme's own website to obtain further information concerning the broadcast. However, references to products and/or services in phone-ins need special care, especially if the presenter is speaking in the capacity of an expert and has associated professional interests that are separate from the broadcast (e.g. a personal website).

The presenter made reference to a number of generic products, such as dried fruit soup, and green, lemon and mint teas. However, on a few occasions, she also mentioned the availability of the following products on her personal website, BinaKhan.com (through sponsored links to the producer and supplier, WellJuice.com):

- Bio Hair Oil;
- Diet Lemon;
- Egg Hair Oil; and
- Castor Oil.

Ofcom noted that the presenter did appear to take some care when responding to callers and appeared to be aware of possible Code compliance pitfalls. For example:

- when asked by a caller about egg hair oil – noted by the caller as a particularly expensive product – the presenter offered her instructions on how to make her own, as opposed to promote further its purchase;
- the only time the presenter actually stated her web address in the programme (as opposed to referring to it generically as “*my website*”), was to enable a caller to locate her nearest retail outlet, rather than to purchase any product via BinaKhan.com; and
- the presenter generally appeared to advise callers in line with Code requirements – i.e. not to promote specific products but instead give her view on the most appropriate general solutions for callers’ questions, problems or circumstances.

While Ofcom did not find a breach of Rule 10.3, there appeared to be no editorial justification for her referring to her own website – either generically (“*my website*”) or by naming it (BinaKhan.com). Ofcom noted that a range of products discussed in the programme were promoted on the website, through which they could also be purchased. The programme therefore gave undue prominence to her personal web service and the products available on it, in breach of Rule 10.4 of the Code.

#### **Breach of Rule 10.4**

## In Breach

### Various programmes

*Ahlebait TV, 23 August 2009, 10:30*

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#### Introduction

Ahlebait TV broadcasts religious teachings to a Shia-Muslim audience.

Throughout various programmes, a prayer service is promoted via scrolling text at the bottom of the screen. Viewers are invited to submit their name and message to a premium rate text service at a cost of 50p plus standard network charges. By using this service, viewers can request a live Dua (prayer) to be included in another of Ahlebait's programmes, *Dua from Holy Places*.

A viewer objected to the promotion of this service.

Ofcom sought the broadcaster's comments on the promotion under Rule 10.3 (products and services must not be promoted in programmes) of the Code.

#### Response

Ahlebait TV advised that the promotion related to a service provided during its programme *Dua from Holy Places*. This programme offers viewers the opportunity to receive a live prayer, read by one of its representatives located in a holy place, during the programme.

Ahlebait TV advised that during the programme, viewers are invited to submit their details via a landline telephone number. The broadcaster explained that this entry route attracts a large number of callers, who cannot all be accommodated within the duration of the programme. Therefore an additional SMS entry route is offered outside of the programme, which is promoted throughout other programmes.

#### Decision

The Code requires that advertising and programming should be distinct and clearly separated. As a general rule, products and services should not be promoted in programming. There are limited exceptions to this rule. For instance, programme-related material may be promoted in or around the programme from which it is derived (Rule 10.6). Programme-related material is defined in the Code as "...products or 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".

Rule 10.9 of the Code states that premium rate services will normally be regarded as products or services and must not therefore appear in programmes unless:

- they form part of the editorial content of the programme; or
- they fall within the definition of programme-related material.

In this case, Ofcom noted that this premium rate SMS service was programme related in that its purpose was to allow viewers to submit prayer requests to the programme *Dua from Holy Places*. However, the service was promoted outside of

this programme, during broadcasts from which the prayer line was not directly derived. Because the service was not related to the programmes during which it was promoted, the promotion was not justified and was therefore in breach of the Code.

**Breach of Rule 10.3**

## In Breach

### La Rixe

Shorts TV, 12 September 2009, 13:30

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#### Introduction

Shorts TV is an arts channel aimed at adults specialising in short films; it is available without any access restrictions. As part of its “Best in Fest” short film season, Shorts TV broadcast a 22 minute feature film in French entitled *La Rixe* (‘The Brawl’). English subtitles were provided. The film portrayed a police force’s struggle to maintain order in an unruly suburb, culminating in a confrontation with some of its residents

The film included 14 instances of highly offensive language being used by the characters in the film. This was translated as “fuck” and its derivatives in the English subtitles. There was also a scene lasting around three minutes in which three police officers were attacked by a gang. The sequence showed police officers being beaten with clubs, and a female officer being repeatedly kicked in the stomach. The gang fled the scene leaving the police officers incapacitated and the film concluded with brief but bloody images of the injuries sustained.

One viewer complained that the film should not have been broadcast at this time of day given the strong language used and the violent gang scene. Ofcom therefore sought the broadcaster’s comments under the following rules of the Code:

- Rule 1.11 – Violence must be appropriately limited in programmes before the watershed; and
- Rule 1.14 – The most offensive language must not be broadcast before the watershed.

#### Response

Shorts TV said the film had been incorrectly scheduled by its compliance team and acknowledged that the offensive language and violent gang scene complained of were inappropriate. In light of this error, the broadcaster said it has undertaken a review to determine how this mistake occurred to preventing a similar incident happening in the future.

The broadcaster however said that Shorts TV is aimed at adults and therefore child viewing figures for the film would be negligible. It further added that the offensive language, spoken in rapid, colloquial French, would have most likely gone beyond the level of child viewers’ comprehension. Whilst recognising the seriousness of the error, Shorts TV maintained that these factors would have gone some way in lessening the impact of the dialogue.

#### Decision

Ofcom research indicates that the word “fuck” and its derivatives are considered by viewers to be some of the most offensive language. Its inclusion in subtitles of this afternoon programme was in clear breach of Rule 1.14 which prohibits the use of such language before the watershed.

As regards Rule 1.11 and the scene featuring the gang attack on three police officers, Ofcom noted that it showed police officers being assaulted in a very violent way. Although a number of the blows did not show the point of impact, this key scene was graphic enough to leave viewers in no doubt about the viciousness of the attack or the effect on the police officers. Ofcom also noted that the scene lasted about three minutes, which was considerable given that the film itself was 22 minutes long. The violence shown was clearly not appropriately limited.

Neither was it in Ofcom's view, justified by the context as required by Rule 1.11. Ofcom noted that the scene was pivotal to the plot and included in a feature film, and that Short TV does not appear to attract a significant child audience. None of these factors however justified showing this violent scene before the watershed – as is acknowledged by the broadcaster. The programme was therefore in breach of Rule 1.11.

Ofcom urges the broadcaster to introduce more robust procedures as soon as possible.

#### **Breaches of Rules 1.11 and 1.14**

## In Breach

### The Hotmix: Eminem

4Music, 27 September 2009, 14:00

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#### Introduction

*The Hotmix* is a series of programmes featuring music videos linked by a particular theme. This edition played a compilation of songs by the artist Eminem.

One viewer complained to Ofcom that some of the songs contained the word “fuck”. Ofcom noted that the programme contained two instances of this word in two separate music videos.

Ofcom sought comments from Box TV, which owns and complies 4 Music, under Rule 1.14 of the Code (the most offensive language must not be broadcast before the watershed)

#### Response

Box TV explained that owing to a breakdown in its compliance procedures, this programme was not viewed before broadcast by the compliance manager. It recognised the language was inappropriate for a pre-watershed transmission and apologised for any offence caused by this oversight.

In light of this incident, Box TV reminded its staff of the importance of clearing material for broadcast and introduced an additional compliance check to its procedures. The broadcaster hoped these measures will prevent a recurrence of this type of human error.

#### Decision

Our research indicates that the word “fuck” and its derivatives are an example of the most offensive language. Ofcom welcomed Box TV’s apology and the implementation of an extra layer in its compliance process to minimise the likelihood of a similar incident.

However, Ofcom was concerned that a programme featuring songs by Eminem, who is widely known to use offensive language in his lyrics, was cleared for transmission without prior viewing by Box TV’s compliance team. A broadcaster must carry out appropriate checks before broadcasting such a programme in the afternoon.

The broadcast of the most offensive language at this time was a clear breach of Rule 1.14

#### Breach of Rule 1.14

## In Breach

### Drivetime

*OnFM, 9 September 2009, 15:00*

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#### Introduction

OnFM is a community radio station that broadcasts to the Hammersmith area in West London. During this edition of its *Drivetime* programme, an unedited version of the song “Leave Me Alone (I’m Lonely)” by the artist Pink, containing two instances of the word “fuck”, was aired.

A listener complained to Ofcom about the broadcast of the offensive lyrics. Ofcom sought the broadcaster’s comments under Rule 1.14 of the Code (the most offensive language must not be broadcast when children are likely to be listening).

#### Response

OnFM said it fully recognised that the broadcast of this language was unsuitable. OnFM explained that the error occurred because the presenter had mistakenly selected the unedited rather than the ‘radio edit’ version of the song. It said that because of the live nature of the broadcast and the fact that the examples of offensive language featured in quick succession during the song, there was no time for the presenter to remove the track.

In response to the incident, OnFM issued an on-air apology later in the same programme. It also introduced a number of new safeguards to minimise the likelihood of a recurrence of the same problem, including the vetting of all new music tracks and pre-recording a number of programmes.

#### Decision

Ofcom research indicates that the word “fuck” and its derivatives are examples of the most offensive language. Such language should not be broadcast on radio when children are particularly likely to be listening, as with this programme.

Ofcom noted OnFM’s on-air apology and welcomed the seriousness with which OnFM treated the matter, which has led to the broadcaster improving its compliance procedures. However, the broadcast of the most offensive language at this time, when a significant number of children may have been listening, is a clear breach of the Code.

#### Breach of Rule 1.14

## In Breach

### **Baba Ji Online**

*DM Digital, 13 May 2009, 11:00*

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#### **Introduction**

Ofcom received a complaint that a presenter gave callers (and viewers) potentially harmful medical and other advice during this programme.

On 29 May 2009, Ofcom asked DM Digital to provide a copy of the programme. Despite several further requests from Ofcom for the recording, and written undertakings by DM Digital that the recording would be supplied, the broadcaster did not supply the recording to Ofcom until 10 August 2009 (over 10 weeks after the initial request by Ofcom).

Ofcom asked the broadcaster to provide formal comments in relation to Condition 11 of its Television Licensable Content Service (“TLCS”) licence. This states that: “The Licensee shall adopt procedures acceptable to Ofcom for the retention and production of recordings in sound and vision and of any programme which is the subject matter of a Standards Complaint” and “the Licensee shall:...At the request of Ofcom forthwith produce to Ofcom any such recordings for examination or reproduction.” Guidance makes clear that recordings must be retained for 60 days by holders of TLCS licences.

#### **Response**

DM Digital said that after receiving the original request for the recording from Ofcom, the content in question had been transferred to DVD in June 2009 and it believed the disc had been sent to Ofcom at that time, which it evidently had not. Due to the channel moving to new premises, the broadcaster said the matter of providing the recording to Ofcom had been overlooked. DM Digital apologised for the delay in providing the recording, said that this had not been a deliberate act; and gave assurances that the late provision of recordings would not happen again in future.

#### **Decision**

It is a condition of DM Digital’s licence that recordings of all output are retained for 60 days after transmission and that Ofcom is provided “forthwith” with any material on request. It took DM Digital over 10 weeks to supply the requested recording. Ofcom considers this to be an entirely unacceptable delay and represents a serious breach of Condition 11 (Retention and production of recordings) by DM Digital.

Should these problems recur, Ofcom may consider further regulatory action. This breach will be held on the licensee’s record.

#### **Breach of Licence Condition 11 (Retention and production of recordings)**

## Resolved

### Lazzat-e-Iftaar

*PTV Global, 28 August 2009, 19:40*

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#### Introduction

PTV Global is a channel aimed at a Pakistani audience. The Ofcom licence for the PTV Global channel is held by Pakistan Television Corporation Ltd. (“PTV”). PTV also operates five other channels (including one called PTV Home), none of which can be received in Europe and are therefore not licensed by Ofcom.

The programme *Lazzat-e-Iftaar* was a 15 minute cookery programme broadcast during the Muslim holy month of Ramadan<sup>1</sup>. During the programme a presenter demonstrated how to make dishes which would be suitable to break the daily fast.

The set was branded with the logo of a milk product called Olpers. The branding appeared behind the presenter and on the front of the cookery workbench. Four cartons of Olpers milk appeared on the set: three on a shelving unit and one on the workbench. The presenter referred to Olpers verbally, as well as using the product in one of the recipes she made.

A complainant was concerned that the programme contained “heavy product placement”.

Ofcom asked the broadcaster for its comments 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.
- 10.5 – Product placement is prohibited.

#### Response

PTV told Ofcom that the programme was intended for transmission on the PTV Home channel which it transmits to Asia. It said that Olpers milk and Olpers milk products, are only distributed for sale in Pakistan and some countries in the Middle East. It was therefore never the intention to advertise it on a channel which is broadcast in a country where the product is not distributed.

PTV said its policy is not to broadcast branded programmes on the PTV Global channel. The broadcaster explained that content is shared between the PTV Global channel and the PTV Home channel. PTV initially receives the content in the form of VHS tapes and DVDs, and then a member of its staff transfers each 24 hour period worth of content on to servers ready for transmission on both the PTV Home and PTV Global channels.

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<sup>1</sup> Ramadan is an Islamic holy month during which participating Muslims fast from sunrise until sunset.

PTV continued that there was one version of the programme *Lazzat-e-Iftaar* which was meant for transmission on the PTV Home channel and another which was meant for transmission on the PTV Global channel.

PTV stated that, on this occasion, the branded content was broadcast on the PTV Global channel in error, because the member of staff responsible for transferring the content from the VHS tapes and DVDs to the servers ready for transmission, picked the wrong version for broadcast on the PTV Global channel.

In order to prevent such an error occurring again, PTV has implemented a new system. In one location a member of staff now transfers the content intended for transmission on the PTV Home channel onto one server. In a separate location another member of staff transfers content intended for transmission on the PTV Global channel onto another server. The broadcaster assures Ofcom that this new process will ensure that only content which has been compiled for broadcast on the PTV Global channel will be transmitted on that channel.

PTV added that it had received payment for the inclusion of references to Olpers in the programme when it was broadcast in Asia on the PTV Home channel, but confirmed that it did not receive payment for the inclusion of the references in the programme broadcast on PTV Global.

## **Decision**

One of the fundamental principles of European broadcasting regulation is that advertising and programming (that is editorial content) must be kept separate. This is set out in Article 10 of the Television Without Frontiers Directive which is in turn reflected in the rules in Section Ten (Commercial References in Programmes) of the Code.

Ofcom noted that PTV had received payment for the inclusion of the references to Olpers milk in the programme when it was broadcast in Asia on the PTV Home channel.

Rule 10.5 of the Code prohibits product placement. The Code sets out that, for the purposes of this rule, arrangements covering the inclusion of products or services in a television programme acquired from outside the UK (and films made for cinema) are not considered to be product placement, provided that no broadcaster regulated by Ofcom and involved in the broadcast of that programme (or film) directly benefits from the arrangement.

Ofcom noted that in this case, the licensee, PTV, also owned the non-Ofcom licensed channel (PTV Home) on which the programme was originally broadcast, and to which this product placement arrangement related. Therefore in this case, the Ofcom licensee was not only involved in the broadcast of that programme but also directly benefited from the placement arrangement.

However, Ofcom acknowledged that the programme was never meant for transmission on PTV Global and that its broadcast on this service was unintentional.

Ofcom welcomes the steps taken by PTV as a result of the broadcast to prevent a similar error occurring in the future (i.e. PTV has separated the content meant for transmission in the UK and Europe on the PTV Global channel from content meant for transmission in Asia on the PTV Home channel).

While we have concerns about the broadcast of this material, in light of the actions taken by the broadcaster and its good compliance record in this area Ofcom considers this matter resolved.

**Resolved**

## Fairness and Privacy Cases

### Partly Upheld

#### Complaint by Mr Syed Golam Dastagir

*Bangla TV News, Bangla TV, 8, 9, 10 and 11 August 2008*

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**Summary:** Ofcom has upheld this complaint of unfair treatment in the programme as broadcast. However, it has not upheld the complaint of unwarranted infringement of privacy in the programme as broadcast.

Between 8 and 11 August 2008, *Bangla TV News* reported on the public support Mr Syed Golam Dastagir and Mr Syed Samadul Haque had been garnering for Mr Mahi Ferdous Jalil who had been convicted and sentenced to a term of imprisonment for his part in a car insurance fraud. The reports included a photograph of Mr Dastagir along with a City of London Police press release entitled "*Car Insurance Fraud Gang Sentenced*". The report also referred to Mr Dastagir and Mr Haque as "*convicted criminals*".

Mr Dastagir complained to Ofcom that he was portrayed unfairly and that his privacy was unwarrantably infringed in the programmes as broadcast.

Ofcom found as follows:

- The comments included in the news item about Mr Dastagir were likely to have left viewers in little doubt that he had been convicted of a criminal offence. In the absence of material to support the allegation that Mr Dastagir was a "*convicted criminal*" and in the absence of an opportunity for him to respond to this allegation, the programmes resulted in unfairness to him.
- In some circumstances a legitimate expectation of privacy may attach to the disclosure of an individual's name and photographs of them. However Ofcom found that in the particular circumstances of this case and in view of the principles of open justice, Mr Dastagir did not have a legitimate expectation of privacy in relation to the disclosure of his name and a photograph of him in relation to an alleged criminal conviction. Ofcom therefore considered that Mr Dastagir's privacy had not been infringed. Having reached this view, it was not necessary for Ofcom to go on to consider the question of whether any infringement was warranted.

#### Introduction

Between 8 and 11 August 2008, Bangla TV (Worldwide) Limited ("Bangla TV"), which broadcasts to the Bengali community, broadcast two news items (both subsequently repeated several times between these dates) about the public support Mr Syed Golam Dastagir and Mr Syed Samadul Haque had been garnering for Mr Mahi Ferdous Jalil who had been convicted and given a custodial sentence for his part in a car insurance fraud.

The reports included a photograph of Mr Dastagir, which appeared alongside photographs of Mr Haque and Mr Jalil, against a City of London Police press release entitled "*Car Insurance Fraud Gang Sentenced*" in the background. The police press release was then shown without Mr Dastagir's photograph, but with the word "*Convicted*" imposed over it and with Mr Jalil's photograph. The news report

broadcast on 8 and 9 August 2009 referred to both Mr Haque and Mr Dastagir as being “*convicted criminals*”. The reports broadcast on 10 and 11 August 2009 also referred to an allegation made by Bangla TV that both Mr Haque and Mr Dastagir had been implicated in credit card fraud and financial misappropriation when working with the channel and that no action had been taken against them for the sake of the channel’s reputation.

Mr Dastagir complained to Ofcom that he was treated unfairly and that his privacy had been unwarrantably infringed in the programmes as broadcast.

## **The Complaint**

### **Mr Dastagir’s case**

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

- a) He was portrayed unfairly in the programme as a convicted criminal.

Mr Dastagir said that the reports referred to him by name and included a police press release along with his photograph and over which the word “*Convicted*” appeared. Mr Dastagir said that he had never been convicted by any court and that the allegation was untrue. He said that he was not given an opportunity to respond to the allegation in that he was not contacted by the programme makers for his comments.

In summary, Mr Dastagir complained that his privacy had been unwarrantably infringed in the programme as broadcast in that:

- b) His photograph was used in a way that portrayed him, wrongly, as a convicted criminal.

### **Bangla TV’s case**

In summary, Bangla TV responded to Mr Dastagir’s complaint of unfair treatment as follows:

- a) Bangla TV said that the news reports did not portray Mr Dastagir as being “*Convicted*”. Bangla TV said that the reports did not state that Mr Dastagir had been convicted, but that it had stated that “*However, after losing a case, Nishat Dastagir left London without paying £88,000 pound to Bangla TV*”.

Bangla TV said that the word “*Convicted*” had appeared in the graphic template (based on the City of London Police Press release) and Mr Dastagir’s photograph was inserted on the corner of this graphic. It said that the report included his photograph as Mr Dastagir had spoken on another programme in favour of Mr Jalil, who had been convicted for insurance fraud. Bangla TV said that Mr Dastagir had supported Mr Jalil at a press conference and had said that Bangla TV were wrong to report on Mr Jalil’s conviction in earlier programmes. Bangla TV said that that the news reports highlighted the events of the press conference and that Mr Dastagir had once worked for Bangla TV.

In a letter dated 18 July 2009 sent by Bangla TV to Ofcom in response to request for further information in relation to the complaint, Bangla TV said that Mr Dastagir had not been imprisoned on criminal charges, though he had been

dismissed from Bangla TV in 2004 for misconduct. It said that the news report had mistakenly suggested that Mr Dastagir had been charged and was a criminal.

Bangla TV said that the programme makers had tried to contact Mr Dastagir via his mobile telephone but had been unsuccessful in speaking to him.

In summary, Bangla TV responded to Mr Dastagir's complaint of unwarranted infringement of privacy in the programme as broadcast as follows:

- b) Bangla TV said that the word "*Convicted*" was not used under the photograph of Mr Dastagir. It said that it was a template graphics and since Mr Dastagir had been speaking publically about Mr Jalil's conviction, the programme makers used his photograph in the corner of the graphic. Bangla TV said that Mr Dastagir's complaint that he was portrayed as convicted criminal was not justified.

## **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.

Mr Dastagir'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 recordings of the programme as broadcast, with translated transcripts, and written submissions from both parties. Ofcom also considered the provisions of its Broadcasting Code ("the Code").

### *Unfair treatment*

- a) Ofcom considered the complaint that Mr Dastagir was portrayed unfairly and wrongly in the programme as a convicted criminal and was not given an opportunity to respond to the allegation.

In considering this head of complaint, Ofcom took account of Rule 7.1 of the Code which states that broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes. Ofcom also took account of Practice 7.9 of the Code which states that broadcasters must take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that was unfair to an individual or organisation. It also took into consideration Practice 7.11 of the Code which states that if a programme alleges wrongdoing or makes any significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

Ofcom noted that the news report broadcast between 8 and 9 August 2009 was introduced by a presenter who commented, in relation to the support that Mr Dastagir and Mr Haque had been raising for Mr Jalil, that:

*“It is not surprising that criminals convicted and sentenced for different types of crimes would try to collect public support for other criminals... Bangla TV is shocked and concerned at the comments made by the criminal group...”*

Ofcom then considered the comments contained within the main report itself. It noted that the report stated that Mr Dastagir had been “kicked out” by a number of organisations for “financial scandals” and that:

*“Bangla TV has said that they are not surprised by the effort made by convicted criminals to gather public support in favour of other criminals. But Bangla TV is surprised and concerned at the comments made by the criminal group about the responsibilities of the media...”*

Ofcom also took note that Mr Dastagir was named throughout the news report and that a photograph of him was included.

Ofcom noted that news reports broadcast between 10 and 11 August 2009 did not include the allegation that Mr Dastagir was a convicted criminal. However, it did refer to his and Mr Haque’s “futile attempt at concealing the serious offence of the insurance fraud”. It also commented that:

*“Basically, Bangla TV did not take any legal action against them so far about the complaint against them for credit card fraud and other financial misappropriation for the sake of the organization and its image”.*

Ofcom also noted that Mr Dastagir’s photograph did not appear in the report at precisely the same time as the word “Convicted”, but that his photograph had been featured alongside the police press release entitled “Car Insurance Fraud Gang Sentenced” immediately beforehand.

Ofcom considered that the inclusion of the photographs of Mr Dastagir along with the comments made by the presenter introducing the reports broadcast between 8 and 11 August 2009 and the comments included in the reports themselves would have given viewers the impression that Mr Dastagir had been convicted of a criminal offence and that he had been involved in “financial misappropriation”.

Ofcom took the view that Bangla TV failed to provide Ofcom with any material to that might have corroborated the claim made in the news reports that Mr Dastagir was a “convicted criminal” or had been proven to have been involved in any “financial misappropriation”. While Ofcom recognised that Bangla TV accepted it had mistakenly referred to Mr Dastagir as a “convicted criminal”, Ofcom took the view that Bangla TV had not taken reasonable care to satisfy itself that material facts were not presented in a way that resulted in unfairness to Mr Dastagir.

Ofcom took the view that the news reports included a serious allegation of wrongdoing and that at no point did the programme makers take steps to provide Mr Dastagir with an opportunity to respond to it. Ofcom noted that Bangla TV claimed they had tried to contact Mr Dastagir on his mobile phone but had received no answer. However, Ofcom also noted that Mr Dastagir said he had not been contacted by Bangla TV, and that the broadcaster had provided Ofcom with no evidence to show that the calls were made to a mobile phone number registered to Mr Dastagir.

In these circumstances, Ofcom found that the programmes broadcast between 8 and 11 August 2009 resulted in unfairness to Mr Dastagir.

### *Privacy*

- b) Ofcom next considered Mr Dastagir's complaint that his privacy was unwarrantably infringed in that a photograph of him was broadcast in the programmes in which he was portrayed wrongly as a convicted criminal.

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 the Code which states that "any infringement of privacy in programmes or in connection with obtaining material included in programmes, must be warranted".

In considering whether or not Mr Dastagir's privacy had been infringed, Ofcom first determined whether he had a legitimate expectation of privacy in relation to the photograph and information about him that was broadcast.

Ofcom acknowledged that Mr Dastagir's full name was referred to in the programmes and a photograph of him was shown. In Ofcom's view, a person's name or identity is not in itself information that necessarily attracts a significant expectation of privacy. However, it recognises also that there may well be circumstances in which the disclosure of information of this nature may be understood to be personal or sensitive and may therefore attract an expectation of privacy.

In the circumstances of this particular complaint, Ofcom acknowledged that the broadcasters had failed to provide evidence to corroborate the claim made in the programmes that Mr Dastagir had a criminal conviction (see head a) above). However, Ofcom took the view that information relating to a criminal conviction (or acquittal) is not to a private matter and has nothing to do with Mr Dastagir's private life. Court proceedings are a matter of public record and the public nature of the operation of the courts is an integral of the principle of open justice (unless formal reporting restrictions are in place). For this reason, Ofcom concluded that Mr Dastagir did not have a legitimate expectation of privacy in relation to the disclosure in the broadcast of his full name and photographs of him in the context of news reports that alleged that he had a criminal conviction.

Having concluded that Mr Dastagir did not have a legitimate expectation of privacy in this regard, Ofcom found that his privacy was not infringed in the programmes as broadcast. It was therefore not necessary for Ofcom to further consider whether any infringement of privacy was warranted or not.

Ofcom concluded therefore that Mr Dastagir's privacy was not unwarrantably infringed in the programmes as broadcast between 8 and 11 August 2009.

**Accordingly, Ofcom has upheld Mr Dastagir's complaint of unfair treatment. It has not upheld his complaint of unwarranted infringement of privacy in the programmes as broadcast.**

**The broadcaster was found in breach of Rule 7.1 of the Code.**

## Partly Upheld

### Complaint by Mr Syed Samadul Haque

*Bangla TV News, Bangla TV (Worldwide) Limited, 8 and 9 August 2008*

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**Summary:** Ofcom has upheld this complaint of unfair treatment in the programme as broadcast. However, it has not upheld the complaint of unwarranted infringement of privacy in the programme as broadcast.

Between 8 and 9 August 2008, *Bangla TV News* reported on the public support Mr Syed Samadul Haque and Mr Syed Golam Dastagir had been garnering for Mr Mahi Ferdous Jalil who had been convicted and sentenced to a term of imprisonment for his part in a car insurance fraud. The reports included photographs of Mr Haque along with a City of London Police press release entitled "*Car Insurance Fraud Gang Sentenced*". The reports also stated that Mr Haque had served more than six months "*behind bars*" in Bangladesh for fraud and referred to him and Mr Dastagir, as "*convicted criminals*".

Mr Haque complained to Ofcom that he was portrayed unfairly and that his privacy was unwarrantably infringed in the programmes as broadcast.

Ofcom found as follows:

- The comments included in the news item about Mr Haque were likely to have left viewers in little doubt that he had been convicted of a criminal offence. In the absence of material to support the allegation made in the programmes that Mr Haque was a "*convicted criminal*" and in the absence of an opportunity for him to respond to this allegation, the programmes resulted in unfairness to him.
- In some circumstances a legitimate expectation of privacy may attach to the disclosure of an individual's name and photographs of them, However Ofcom found that in the particular circumstances of this case and in view of the principles of open justice, Mr Haque did not have a legitimate expectation of privacy in relation to the disclosure of his name and photographs of him in relation to an alleged criminal conviction. Ofcom therefore considered that Mr Haque's privacy had not been infringed. Having reached this view, it was not necessary for Ofcom to go on to consider the question of whether any infringement was warranted.

### Introduction

On 8 and 9 August 2008, Bangla TV (Worldwide) Limited ("Bangla TV"), which broadcasts to the Bengali community, repeatedly broadcast a news item which reported on the public support Mr Syed Samadul Haque and Mr Syed Golam Dastagir had been garnering for Mr Mahi Ferdous Jalil who had been convicted and given a custodial sentence for his part in a car insurance fraud.

The item included a number of photographs of Mr Haque, one of which appeared to show him being arrested by Bangladeshi police in an unrelated incident. The item also included another photograph of Mr Haque along with photographs of Mr Dastagir and Mr Jalil, against a City of London Police press release entitled "*Car Insurance Fraud Gang Sentenced*" visible in the background. The police press release was then shown without Mr Haque's or Mr Dastagir's photograph with the word "*Convicted*" imposed over it with a photograph of Mr Jalil. The report also stated

that Mr Haque had spent six months “*behind bars*” in Bangladesh and referred to both Mr Haque and Mr Dastagir as being “*convicted criminals*”.

Mr Haque complained to Ofcom that he was treated unfairly and that his privacy was unwarrantably infringed in the programme as broadcast.

## **The Complaint**

### **Mr Haque’s case**

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

- a) He was portrayed unfairly in the programme.

Mr Haque said that the report included his photograph alongside a police press release in which the word “*Convicted*” appeared. Mr Haque said that he has never been convicted by any court and that the allegation, that he was a convicted criminal, was untrue.

In summary, Mr Haque complained that his privacy had been unwarrantably infringed in the programme as broadcast in that:

- b) His photograph appeared along with a police press release in a way that portrayed him as a convicted criminal.

### **Bangla TV’s case**

In summary, Bangla TV responded to Mr Haque’s complaint of unfair treatment as follows:

- a) Bangla TV said that the news report did not portray Mr Haque as a convicted criminal. It said that the report did not state that Mr Haque had been convicted, but had stated that “*Syed Samadul Haque arrested in Dhaka with Fraud case and was in prison for more than six months*”.

Bangla TV said that the word “*Convicted*” appeared in the graphic template (based on London City of Police Press release) and that Mr Haque’s photograph was inserted on the corner of the graphic. It said that the report included his photograph as Mr Haque had spoken on another programme in favour of Mr Jalil, who was one of the men who had been convicted for car insurance fraud. Bangla TV said that Mr Haque had supported Mr Jalil at a press conference and had said that Bangla TV were wrong to report on Mr Jalil’s conviction in earlier programmes. Bangla TV said that the news report highlighted the events of the press conference and that Mr Haque had once worked for Bangla TV but had been suspended on “corruption charges”.

In summary, Bangla TV responded to Mr Haque’s complaint that his privacy had been unwarrantably infringed in the programme as broadcast as follows:

- b) Bangla TV said that Mr Haque was not referred to as being “*Convicted*” in the news report. In fact, it said that the word had appeared under the photograph of Mr Jalil.

## **Further comments from Bangla TV**

In response to request by Ofcom for further information in relation to the material it relied upon to support the allegation that Mr Haque had a criminal conviction and had been imprisoned, Bangla TV said that Mr Haque had been arrested and imprisoned in relation to a fraud case in Bangladesh. It also said that he was facing other criminal charges. Bangla TV provided Ofcom with a number of documents that appeared to relate to legal proceedings in Bangladesh in which Mr Haque was named as a defendant.

## **Comments in response by Mr Haque**

In response to the further information provided by Bangla TV, Mr Haque said that he was arrested in Bangladesh in 2007 as a result of a state of emergency being called by the new government and that many media executives and journalists were arrested at the time. He said that the documents that Bangla TV provided to Ofcom were irrelevant and did not prove that he was a convicted criminal.

## **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.

Mr Haque'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 of the programmes as broadcast, with translated transcripts, and written submissions from both parties. Ofcom also considered the provisions of its Broadcasting Code ("the Code").

### *Unfair treatment*

- a) Ofcom considered the complaint that Mr Haque was portrayed unfairly and wrongly in the programme as a convicted criminal.

In considering this aspect of Mr Haque's complaint, Ofcom took account of Rule 7.1 of the Code which states that broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes. Ofcom also took account of Practice 7.9 of the Code which states that broadcasters must take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that was unfair to an individual or organisation.

Ofcom noted that the news report was introduced by a presenter who commented that:

*"Mr Syed Samadul Haque, who was kicked out from Bangla TV for his part in a credit card fraud..."*

The presenter went on to state, in response to the public support that Mr Haque and Mr Dastagir had been raising for Mr Jalil, that:

*“It is not surprising that criminals convicted and sentenced for different types of crimes would try to collect public support for other criminals...Bangla TV is shocked and concerned at the comments made by the criminal group...”*

Ofcom then noted the comments contained within the main report itself. It noted the report stated that Bangla TV had “kicked him [Mr Haque] out” for committing fraud and that he was later arrested in Dhaka, Bangladesh where he “served more than six months behind bars” for fraud. The report later stated that:

*“Bangla TV has said that they are not surprised by the effort made by convicted criminals to gather public support in favour of other criminals. But Bangla TV is surprised and concerned at the comments made by the criminal group about the responsibilities of the media...”*

Ofcom took note that Mr Haque was named throughout the news item and his photograph appeared a number of times.

Ofcom also noted that Mr Haque’s photograph did not appear in the report at precisely the same time as the word “Convicted”, but that his photograph had been featured alongside the police press release entitled “Car Insurance Fraud Gang Sentenced” immediately beforehand.

Ofcom considered that the inclusion of the photographs of Mr Haque along with the comments made by the presenter introducing the report and the comments included in the report itself would have given viewers the impression that Mr Haque had been convicted of a criminal offence.

Ofcom took the view that Bangla TV failed to provide Ofcom with any material that might have corroborated the claim made in the news item that Mr Haque was a “convicted criminal”. Ofcom was not satisfied that the material submitted to it by Bangla TV revealed anything more than that Mr Haque had, at one time, been named as a defendant in one or more legal actions in Bangladesh. No evidence was submitted to Ofcom that revealed unequivocally that Mr Haque had been convicted of any criminal offence. Ofcom therefore took the view that Bangla TV had not taken reasonable care to satisfy itself that material facts were not presented in a way that resulted in unfairness to Mr Haque.

In these circumstances, Ofcom found that the programmes broadcast a total of six times between 8 and 9 August 2009 resulted in unfairness to Mr Haque.

### *Privacy*

- b) Ofcom considered Mr Haque’s complaint that his privacy was unwarrantably infringed in that a photograph of him was broadcast in the programmes in which he was portrayed wrongly as a convicted criminal.

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 the Code which states that “any infringement of privacy in programmes or in connection with obtaining material included in programmes, must be warranted”.

In considering whether or not Mr Haque’s privacy had been infringed, Ofcom first determined whether he had a legitimate expectation of privacy in relation to the photograph and information about him that was broadcast.

Ofcom acknowledged that Mr Haque’s full name was referred to in the programmes and a number of photographs of him were shown. In Ofcom’s view, a person’s name or identity is not in itself information that necessarily attracts a significant expectation of privacy. However, it recognises also that there may well be circumstances in which the disclosure of information of this nature may be understood to be personal or sensitive and may therefore attract an expectation of privacy.

In the circumstances of this particular complaint, Ofcom acknowledged that the broadcasters had failed to provide evidence to corroborate the claim made in the programmes that Mr Haque had a criminal conviction (see head a) above). However, Ofcom took the view that information relating to a criminal conviction (or acquittal) is not to a private matter and has nothing to do with Mr Haque’s private life. Court proceedings are a matter of public record and the public nature of the operation of the courts is an integral of the principle of open justice (unless formal reporting restrictions are in place). For this reason, Ofcom concluded that Mr Haque did not have a legitimate expectation of privacy in relation to the disclosure in the broadcast of his full name and photographs of him in the context of news reports that alleged that he had a criminal conviction.

Having concluded that Mr Haque did not have a legitimate expectation of privacy in this regard, Ofcom found that his privacy was not infringed in the programmes as broadcast. It was therefore not necessary for Ofcom to further consider whether any infringement of privacy was warranted or not.

Ofcom concluded therefore that Mr Haque’s privacy was not unwarrantably infringed in the programmes as broadcast between 8 and 9 August 2009.

**Accordingly, Ofcom has upheld Mr Haque’s complaint of unfair treatment. It has not upheld his complaint of unwarranted infringement of privacy in the programmes as broadcast.**

**The broadcaster was found in breach of Rule 7.1 of the Code.**

## Not Upheld

### Complaint by Mr Darren Clarke

*Spotlight, BBC1 Northern Ireland, 5 May 2009*

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**Summary:** Ofcom has not upheld this complaint made by Mr Darren Clarke of unfair treatment in the programme.

This edition of the current affairs programme *Spotlight* looked at stem cell procedures offered by hospitals in China for people suffering from problems with their sight. The programme followed the Clarke family as they took their daughter, Dakota, to China for treatment. Dakota was born with Septo Optic Dysplasia, a congenital condition which gave her underdeveloped optic nerves and left her sight with only light perception. Dakota was treated by Beike, a company in China which appeared to offer the possibility of her sight improving. Once she had received the treatment, her parents expressed their pleasure with the results, although a local hospital found that the treatment had had no effect on Dakota's eyesight. The programme included interviews with a number of Western experts who stated that the chances of the procedure ever working were near impossible.

Mr Darren Clarke, Dakota's father, complained to Ofcom that he had been treated unfairly in the programme as broadcast.

In summary Ofcom found the following:

- Mr Clarke was not misled as to the nature of the programme as it appeared to accord with representations that had made to them pre-broadcast.
- Mr Clarke and his family were not presented as weak minded and gullible, rather, they were accurately presented as parents devoted to helping their child.

### Introduction

On 5 May 2009, BBC1 Northern Ireland broadcast an edition of *Spotlight*, the channel's flagship investigative current affairs programme. This edition followed parents whose children had been born virtually blind and were considering stem cell procedures offered by hospitals in China to try and cure their conditions. One such parent was Mr Darren Clarke, whose daughter, Dakota, had been born with Septo Optic Dysplasia ("SOD"), a congenital condition which gave her underdeveloped optic nerves and left her sight with only light perception.

Mr Clarke and his wife researched on the internet and found a stem cell procedure offered by Beike BioTech ("Beike"), a company in China, which appeared to offer the possibility of Dakota's sight improving. After a year of fundraising, the Clarks managed to collect the £30,000 necessary to take Dakota to China for the treatment. Once she had received the treatment, her parents expressed their pleasure with the results. However, on their return, their local hospital carried out an objective test on her, which found that the treatment had had no effect on Dakota's sight.

The programme included interviews with a number of Western academics, who stated that the chances of the procedure ever working were near impossible. It also included an interview with the Chief Executive of Beike, Dr Sean Hu, who argued that

the procedure was effective. He said Western academics had visited the company's hospitals and congratulated them on their work.

Mr Clarke complained to Ofcom that he had been treated unfairly in the programme as broadcast.

## **The Complaint**

### **Mr Clarke's case**

In summary, Mr Clarke complained that he was unfairly treated in the programme as broadcast in that:

- a) He was misled as to the nature of the programme.

Mr Clarke said that he was assured that the programme would be an unbiased look at the treatment, but the programme did not approach any medical professional that agreed with it. Mr Clarke knew that the programme makers had details of doctors who did agree with the procedure, but chose not to interview them.

- b) The programme did not provide a fair representation of his family in that the doctors the programme did show expressed opinions that made them look weak minded and gullible and implied that he had wasted the money he had raised from the public. Furthermore, the programme did not show the progress his daughter had shown.

### **The BBC's case**

In summary, the BBC responded to Mr Clarke's complaint of unfair treatment as follows:

- a) In response to the complaint that Mr Clarke was misled as to the nature of the programme the BBC said that, from the start of the production, it was made clear to the family that this edition of *Spotlight* would tell their story of hope but would also conduct an objective and balanced analysis of stem cell treatment and the medical issues surrounding its use. The BBC said that the programme makers had conversations with Mr and Mrs Clarke in which they explained the remit of *Spotlight*, a well known current affairs programme in Northern Ireland, and had confirmed the Clarkes were happy to proceed on that basis.

The BBC said that this approach was confirmed at a meeting held at the BBC in Belfast on 26 January 2009 which was attended by Mr and Mrs Clarke and senior members of BBC staff. The meeting was called to discuss the details of the programme and to ensure that Mr and Mrs Clarke were aware that it would be looking at the scientific evidence relevant to the claims for the treatment in question. The BBC said it was pointed out on several occasions that there was a high degree of scepticism about the procedure among specialists in the UK and that all those present had confirmed that the Clarkes said they understood the programme would carry out a thorough and even-handed investigation and were happy with that approach. In addition to the meeting, the reporter, Mr Darragh MacIntyre, interviewed the family on a number of occasions, before, during and after the visit to China, and repeatedly drew attention to the scepticism of Western doctors when discussing the treatment. The BBC said that Mr MacIntyre's questioning was sceptical throughout his interviews with the Clarkes

and this would have gone a long way towards making clear the likely nature of the programme.

The BBC said that, in the light of the discussions and the character of the subsequent interviews, it believed the family was appropriately informed about the content and approach of the programme and understood that *Spotlight* would carry out a full and fair investigation, reaching a conclusion based on the facts.

The BBC also said that Mr and Mrs Clarke were aware of the mainstream medical opinion before they agreed to take part in the programme and told the programme makers on a number of occasions that they understood there was a prospect that the treatment for their daughter would not be successful. The BBC said this was fairly reflected in the programme. It was also clear that Mr Clarke understood from the outset that mainstream Western experts did not believe there were any scientific or medical grounds for thinking that this kind of stem cell treatment could help to improve the eyesight of people with SOD.

The BBC said that, during their investigation, the programme makers interviewed a number of leading medical experts in the field of stem cell research and ophthalmology, who confirmed that there was no scientific evidence to suggest the treatment could help patients with SOD. The programme makers had been unable to find any mainstream, credible experts who supported the treatment offered by Beike for patients with SOD and that it was neither necessary nor appropriate to include the views of doctors who did not have the appropriate expertise. However, the programme did include an interview with Dr Hu, the chief executive of Beike, who explained the company had carried out its own research into the use of stem cells and was unequivocal about the positive benefits of the treatment provided by his clinics. Dr Hu confirmed that Beike had yet to conduct any scientific trials on the procedure it used for SOD or the related condition Optic Nerve Hypoplasia.

The BBC said, in conclusion, that it believed the programme fairly reflected Mr Clarke's hopes that the treatment for his daughter would be successful, while accurately presenting the scientific evidence for the treatment and the claims made by companies such as Beike, who market such treatment on the internet.

- b) In response to Mr Clarke's complaint that the programme did not provide a fair representation of his family, nor the progress their daughter had shown, the BBC said that the programme presented a fair and accurate representation of Mr and Mrs Clarke and their motivation for seeking treatment for their daughter in China. Mr and Mrs Clarke said they understood Western doctors did not believe that stem cell treatment could help improve the eyesight of children with SOD, but they were prepared to do whatever they could to help their daughter. The BBC said that the programme fairly portrayed them as caring parents whose overriding concern was to try to help their daughter.

The BBC said that the programme consistently reflected the family's view that they felt the treatment was worthwhile and their daughter was reaping the benefits. After Dakota had been given five separate stem cell injections, Mr and Mrs Clarke again confirmed their view that the treatment was working, despite acknowledging that doctors in the West said there was no scientific evidence to support this.

The BBC said that the programme also explained that the Clarkes were not alone in believing that the stem cell treatment worked and that the programme reported

that over 800 foreign patients had been treated by Beike, including Megan Traynor, who was also featured in the programme. Mr and Mrs Traynor told the programme they were in no doubt that their daughter had improved as a result of the treatment she received in China.

The BBC said that the programme was justified in reporting the informed opinion of relevant experts who said there was no medical reason to spend time and money on the type of treatment offered in China. These were general comments directed primarily towards companies such as Beike, not at the Clarke family. The BBC said that the experts featured in the programme expressed a degree of empathy for families such as the Clarkes. An interview with American academic, Professor Tim Caulfield, was specifically designed to address the way companies like Beike put parental testimonials on their websites to promote and endorse their business.

The BBC said that the programme gave Mr and Mrs Clarke the opportunity to explain that they had considered their options, seen the parental testimonials on the website and decided to opt for stem cell treatment in full knowledge of the weight of medical opinion. At no stage did the programme express an opinion or pass judgement on the motives or views of either family.

The BBC said that the conclusion of the programme presented a fair and accurate assessment of whether the treatment in China had led to any improvement in Dakota's health. The programme explained that Mr and Mrs Clarke agreed to an objective, scientific test on Dakota's sight at the Royal Victoria Hospital in Belfast and that the tests showed there was no measurable evidence of any improvement and the programme's only responsible option was to report this, just as it would have reported a positive outcome if that had been the result of the tests. However the programme reflected Mr and Mrs Clarke's their hope for the treatment and their conclusion that their daughter's sight had improved dramatically and showed specific examples they gave, such as her ability to follow a picture held up in front of her or the fact she could walk across a room to pick up her dummy and said that her bowel problems had improved.

### **Mr Clarke's Comments**

Mr Clarke said the programme makers were informed of doctors who, after treating people before and after the treatment had recorded a difference were told that Dakota's own ophthalmologist had confirmed an improvement in sight three days after she had returned from China, and had booked her for a test for glasses. He said the programme makers had asked him to keep the results to himself for fear of "spoiling the programme's impact". Mr Clarke said that the programme makers made no effort to contact the ophthalmologist or, as far as he was aware, the doctors they were told about. Mr Clarke said that Dr Larry Brothers, who had treated Rylea, the second child with the condition in the programme to have the treatment in China and show improvements, had his own practice in the USA and seemed to have the appropriate experience to comment. Mr Clarke said he also told the programme makers about Macie Morse and gave them contact details for her mother, who had the medical records to show the improvement the treatment had had on Macie. The programme makers did not contact Ms Morse.

### **The BBC's comments**

The BBC said that the programme did not include the views of the people mentioned by Mr Clarke because they were not experts in this field. Dr Brothers was an

optometrist not an ophthalmologist, who worked for a company “*specializing in family eye care*” and only worked with ophthalmologists to manage pre-surgery and post-surgery care. The programme included interviews with the most eminent experts in this field, including Professor Colin McGuckin, a leading authority on stem cell technology, and Dr Larry Tyschen, an expert in paediatric ophthalmology, who had examined hundreds of children with SOD.

However the programme did devote a significant amount of time to the views of those who believe that the treatment offered by Beike was effective for SOD. The programme also carried an interview with Dr Hu, who explained that the company had seen improvements in its patients, although he did admit that the company had carried out no formal trials into its treatment for SOD.

The BBC said that the programme also reflected existing parental testimonials by reporting the apparent success story of Rylea Bartlett, an American girl who underwent similar treatment to Dakota and was reported to have had a “*major improvement in her vision*” following her treatment by Beike.

The BBC said that at no stage had Mr or Mrs Clarke told the programme makers that an ophthalmologist in Northern Ireland had confirmed an improvement in Dakota’s sight due to the treatment she received at Beike and that therefore the programme makers had not asked the family to keep such information to themselves. The programme makers were aware that Dakota underwent a scheduled eye test after returning from China and that the test apparently showed that she might benefit from wearing glasses, but that this was not unusual for people with SOD as many, including Dakota, did have some light perception. The programme makers did not ask the family to keep this information to themselves, but did not believe it was material or relevant to the final programme.

The BBC said that the programme had relied upon a proven, scientific test to assess the benefits of the treatment provided by Beike for Dakota and had compared the results of existing electrophysiology tests carried out on her eyesight before the treatment with the results of a second electrophysiology test undertaken on the BBC’s behalf after the treatment. The tests at the Royal Victoria Hospital in Belfast were conducted with Mr and Mrs Clarke’s permission and the results were analysed by a qualified, independent expert, who concluded that the results did not show any measurable improvement in Dakota’s eyesight.

## **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.

Mr Clarke’s complaint was considered by Ofcom’s Executive Fairness Group (“the Group”). In reaching its decision, the Group carefully considered all the relevant material provided by both parties. This included a recording of the programme as

broadcast and transcript, both parties' written submissions and their supporting materials.

Ofcom considered Mr Clarke's complaint of unfair treatment.

- a) Ofcom first considered the complaint that Mr Clarke was misled as to the nature of the programme, in particular, that he was assured that the programme would be an unbiased look at the treatment but that the programme did not approach any medical professional that agreed with it:

In the context of this head and head b) of complaint Ofcom noted that Rule 7.1 of Ofcom's Broadcasting Code ("the Code") provides that broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes. In considering this part of the complaint, Ofcom took account of, in particular, Practice 7.3 of the Code sets out that in order for potential contributors to a programme to be able to make an informed decision about whether to take part, they should be given sufficient information about: the programme's nature and purpose; their likely contribution; any changes to the programme that might affect their decision to contribute; and the contractual rights and obligations of both parties.

In considering this head of complaint, Ofcom examined all of the unedited footage of the Clarke family's contributions to the programme pre-broadcast so to ascertain whether the programme makers had taken reasonable steps to ensure that the Clarkes were aware of the type of programme they were contributing to and what the nature of their contribution was likely to be. In particular, Ofcom examined whether the programme makers demonstrated any bias against the stem cell treatment and whether they were unfair in their choice of medical professionals.

Ofcom turned to the first interview the Clarkes did with the programme makers and noted that Mr Clarke said at the outset:

*"I'm Darren, this is Charlene and this is Dakota who is hoping to go to China for stem cell research in March. We're trying to do the fund raising for it at the minute. She'll be the first in the UK to go through it so it's a big step".*

Ofcom noted that the interview then turned to concentrate on the details of stem cell treatment, such as what it entailed and how the Clarkes came to the decision to try it.

Ofcom took the view that the unedited footage illustrated that the programme makers had adequately informed Mr Clarke of what the nature of the programme they were contributing to was likely to be and the intended nature of the Clarke's contribution.

Ofcom then considered whether Mr Clarke was misled into believing that the programme would be an unbiased look at the treatment. Ofcom noted that the dialogue between the programme makers and the Clarkes was extensive and invariably included questions regarding the treatment. Ofcom noted that in the fifth interview Mr MacIntyre asked the Clarkes about the treatment but also put questions to the family about the scepticism felt in western academic circles:

*“What...What are the doctors saying who are saying you shouldn't go? Are they saying that there are risks attached to it? Are they saying it won't have any impact?”*

In the 13<sup>th</sup> interview Mr MacIntyre said:

*“People will say that, experts will say this isn't working, this is a placebo, you are imagining things, what do you say to them?...The experts will say with the greatest kindness that you guys are seeing things.”*

In the 14<sup>th</sup> interview, he said:

*“There's a bit of a debate at home about whether this treatment works or should we do it at all but there's maybe another argument might be that if it doesn't do you any harm why don't they offer similar treatments in the UK, what do you say at that point?”*

Ofcom took the view that these questions would have served to illustrate that to Mr and Mrs Clarke that the programme makers were aware of the two opposing view-points on the worthiness of stem cell procedure, and that both views would be represented in the programme. Ofcom therefore considered that Mr Clarke would have been aware of the issues the programme makers were preparing to consider in the programme. Ofcom also took the view that the programme makers' approach in giving the Clarks, on several occasions, the opportunity to respond to those who did not believe the treatment would work indicated the balance with which they intended on reporting the story.

As regards Mr Clarke's complaint that the programme makers chose not approach Western doctors who were pro stem-cell research, Ofcom takes the view that the editorial decision as to which individuals to include in a programme is for the programme makers provided that choice does not lead to unfairness. In this instance, Ofcom was satisfied that the programme makers took reasonable care in informing Mr Clarke of the likely contributions and were fair in including the opinions of such academics from the relevant field of practice.

Ofcom was therefore satisfied that the programme makers took reasonable care in informing Mr Clarke of the likely content of the programme he was contributing to whilst making the programme and that that he would have had a reasonable understanding of what the programme would have been.

Ofcom therefore found no unfairness to Mr Clarke in this regard.

- b) Ofcom next considered Mr Clarke's complaint that the programme did not provide a fair representation of his family in that the doctors the programme did show expressed opinions that made them look weak-minded and gullible and implied that he had wasted the money he had raised from the public. Furthermore, the programme did not show the progress his daughter had shown.

In considering this head of complaint, Ofcom gave particular regard to Practice 7.9 which states that before broadcasting a factual programme, 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.

In considering whether Mr and Mrs Clarke were unfairly represented as being weak minded and gullible, Ofcom examined the contributions they had made that

had featured in the programme. In particular, Ofcom noted the following excerpts from the programme:

Mr MacIntyre      *“What are the doctors saying, who are saying that you shouldn’t go? Are they saying there are risks attached to it or are they saying that it won’t have any impact?”*

Mrs Clarke        *“It’s both. It’s well, you know, it doesn’t work, it can’t work and you’re putting your child in risk of taking it to a different country and taking them into hospital where they can risk infection and I’m like, I bring her into this hospital and risking her getting an infection.”*

Mr Clarke         *“We’re not going under any false hope. I know that there is the chance that it can’t work. But at the same time, you have to look at past results and think OK, at least we can’t kick ourselves and say we didn’t try that.”*

Later in the programme, Mr Clarke said:

*“We are not going under any false hopes you know there is the chance whether it can work. But at the same time you have to look at past results and think ok, at least we can’t kick ourselves and say we didn’t try that.”*

Ofcom felt that these excerpts were an accurate and positive reflection of the judgment that the Clarke family had come to on this issue, namely, that they were aware that there was a chance that the procedure would have no positive impact on Dakota, but were parents fully devoted to helping their child as best they could and by any means possible.

Ofcom then turned to the testimonies given by some of the medical professionals in the programme, namely, Professor McGuckin and Dr Tyschen, and American academic Professor Tim Caulfield.

Ofcom noted that Professor McGuckin said:

*“Unfortunately people get very excited about stem cell technologies. And people start to think that stem cells are going to be the answer to everything”.*

Dr Tyschen said:

*“I’ve said that I don’t think it would be a useful use of their time and money that this is not an effective treatment [...] like a chimpanzee writing the five acts of King Lear in one sitting [...] However, putting myself in the seat of the parent I can understand why they would need to cling to the hope and belief that what they had done was beneficial for their child.”*

Professor Caulfield said:

*“You know, when you pay twenty thousand dollars for a treatment, when you’ve travelled to China or the Dominican Republic, or the Ukraine, that...you know you’re going to have an investment in that. And you may; you know what? I think I do feel a little better now that you mention it”.*

Ofcom noted that these testimonies were emphatic in their criticism of stem cell procedures. However, it was reasonable for the programme makers to include these testimonies and it did not impact on the viewers overall impression of the Clarkes as devoted parents willing to do what they could to help their child. Ofcom also noted that it was clear from the programme that the Clarkes were aware of and had considered opinions such as those set out above. Viewers would therefore have been able to make the distinction between Mr and Mrs Clarke, who were aware of all possible eventualities, and the people Professor McGuckin was referring to who *“think that stem cells are going to be the answer to everything”*.

With regards to the progress Dakota had shown, Ofcom considered how the programme presented Mr Clarke’s description of her progress against how it presented the results produced by the testing at the hospital in Northern Ireland. Ofcom noted that Mr Clarke asserted in the programme that there had been a positive impact on Dakota’s vision and substantiated his claim by explaining the tests he had used to measure the difference and by giving examples of day-to-day instances that illustrated the difference. It noted the following excerpts from the programme:

- |              |                                                                                                                                                                                                                             |
|--------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Mr MacIntyre | <i>“I arrive to the news that little Dakota Clarke appears to have made remarkable progress after a handful of treatments. The question is: how is Dakota?”</i>                                                             |
| Mr Clarke    | <i>“Faring well, faring well, she’s shown an improvement every single day.”</i>                                                                                                                                             |
| Mr MacIntyre | <i>“You travelled half the way round the world to get here. Do you feel it’s worth it now?”</i>                                                                                                                             |
| Mr Clarke    | <i>“Yeah. I would do it again, I would tell anybody to do it and why we are not doing this at home I do not know.”</i>                                                                                                      |
| Mr MacIntyre | <i>“His is an astonishing report. Far away from the sceptical west and just weeks after they booked into the Beike clinic on the top floors of this modern hospital, Dakota’s sight seems to the family much improved.”</i> |

Ofcom noted that in contrast, the results provided by the hospital in Northern Ireland indicated that the procedure had had no impact on Dakota’s condition. Ofcom took the view that the programme provided due balance to each viewpoint in that it relayed the results of the tests ran by the hospital to the viewer and then immediately showed Mr Clarke’s response and opinion. Ofcom noted the following comments made by Mr Clarke:

*“The electrophysiology test isn’t convincing enough for me what again what’s convincing for me is when people hold up a picture to her, they’re giving it this, and she is able to...where she never did that before, em that’s more convincing... The objective test is seeing your daughter doing what she does, getting on with her life now a lot better.”*

Ofcom considered that the programme clearly conveyed both Mr Clarke’s views and those of the hospital regarding the improvement made in Dakota’s condition and allowed viewers to weight those different views.

Taking the above into account, Ofcom considered that Mr and Mrs Clarke were both portrayed as parents trying to do what was best for their daughter and that both Mr Clarke's opinions and those of professionals who did not believe the procedure could work were included in the programme.

Ofcom therefore found no unfairness to Mr Clarke in this respect.

**Accordingly, Ofcom has not upheld Mr Clarke's complaint of unfair treatment in the programme as broadcast.**

## Not Upheld

### Complaint by Ms Martina Keany

*Help! I Need a Wedding Entertainer, Wedding TV, 7 February 2009*

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**Summary:** Ofcom has not upheld this complaint made by Ms Martina Keany of unfair treatment and unwarranted infringement of privacy in the programme as broadcast.

The programme showed auditions for an entertainer to perform at the wedding of a celebrity couple. One contestant was Ms Keany, who performed a stand-up comedy act. Ms Keany's performance was met with a poor response from the panel, one of whom, the bride-to-be, walked out.

Ms Keany complained to Ofcom that she was treated unfairly in the programme and that her privacy was unwarrantably infringed in the broadcast of the programme.

In summary Ofcom found the following:

- Ms Keany was properly informed about the nature of the programme and the broadcaster had taken sufficient steps to be confident that she had provided informed consent for her participation.
- Ms Keany participated actively and willingly during the making of the programme and Ofcom did not consider that the nature of the programme changed significantly so as to affect her original consent to participate.
- Because no significant changes in this regard had occurred, Ms Keany's consent remained valid, and that it was not unfair for the programme makers to refuse Ms Keany's request to withdraw her contribution.
- Ms Keany had provided informed consent to participate in the programme, so she did not have a legitimate expectation of privacy in respect of her audition. Her privacy was therefore not infringed in the broadcast.

### Introduction

On 7 February 2009, Wedding TV broadcast an edition of *Help! I Need a Wedding Entertainer*, a series that followed the wedding preparations of former *Big Brother* contestants Ms Grace Adams-Short and Mr Mikey Dalton.

This edition centred on auditions for an entertainer to perform at the couple's wedding. The contestants performed a variety of acts, including music, magic and comedy in front of a panel of judges including Ms Adams-Short and Mr Dalton together with Mr Danny Latimer and Ms Sophie Anderton.

One contestant was Ms Martina Keany, who performed a stand-up comedy act. As she walked onto the stage the presenter, in voiceover, commented:

*"Brace yourselves people; you've never seen anything like this before."*

Ms Keany's performance was met with a poor response from the panel. Ms Adams-Short walked out and the act was stopped by Ms Anderton, who said:

*“I can’t take any more – it’s just not funny.”*

Ms Keany complained to Ofcom that she was treated unfairly in the programme and that her privacy had been unwarrantably infringed in the programme as broadcast.

## **The Complaint**

### **Ms Keany’s case**

In summary, Ms Keany complained that she was treated unfairly in the programme in that:

- a) She was misled as to the nature of the programme.

By way of background, Ms Keany said that she had originally intended to audition as a singer, but was told by the programme makers that she had to perform a comedy act instead. Furthermore, she said that she was not made aware of how intimidating and undermining the programme would be. Consequently, she said that she was unprepared for her performance and was left feeling very nervous before getting on stage. Ms Keany said that she felt that this was intrusive, manipulative, insulting, degrading and had left her feeling as if she had been abused.

- b) After the performance Ms Keany withdrew her consent to appear in the programme. She said that the programme makers told her that, because she had already signed a consent form (which Ms Keany thought related to health and safety), they would use the footage if they wanted.

In summary, Ms Keany complained that her privacy was unwarrantably infringed in the programme as broadcast in that:

- c) She was not told by the programme makers that the footage of her act was being broadcast. Instead, she heard about the broadcast from a third party.

By way of background, Ms Keany was given an express assurance by the programme makers’ receptionist that all footage of her would be destroyed. The director and producer of the programme both rang Ms Keany and assured her that only the good bits of her performance would be shown and that the footage “may” be broadcast. In spite of these assurances and representations, Ms Keany said that the footage was still broadcast.

### **Wedding TV’s case**

In summary, Wedding TV responded to Ms Keany’s complaint of unfair treatment as follows:

- a) In response to the complaint that Ms Keany was misled as to the nature of the programme, Wedding TV said that it was a “feel good” channel and that this programme was made in this spirit. Wedding TV said that its intention was to feel “joyous” in the lead up to the celebrity wedding and to feel “as live” in its style of editing.

Wedding TV said that on the day of the auditions the programme makers were inundated with singing acts and it was decided, since Ms Keany had listed multiple talent options on her application, that it would be favourable if she could

perform her comedy routine. It said all contestants attended of their own accord and were given plenty of time to read and sign release forms, and practise their routine in the green room before any filming took place. Wedding TV said the first time the producers or the panel of celebrity judges saw this routine was when filming commenced and their reactions were recorded and included within the programme.

- b) In response to the complaint that Ms Keany withdrew her consent to appear in the programme, Wedding TV said that various communications pertaining to whether the segment would air or not took place between Ms Keany and the programme makers prior to transmission. Wedding TV said it was agreed that the programme makers would view the footage with fresh eyes to ascertain whether it was suitable for transmission. Wedding TV said that it ultimately decided that to remove Ms Keany's unwittingly funny performance would be detrimental to the show, and that her depiction was representative of her talents.

In summary, Wedding TV responded to Ms Keany's complaint of unwarranted infringement of privacy in the broadcast as follows:

- c) Ms Keany was not told that footage of her performance would be broadcast. Wedding TV said that Ms Keany was given plenty of time to read and sign the release form. Point 1 of the release form stated, "Wedding TV Limited (WTVL) has the right to film, tape and photograph You during and in connection with the filming of the Production."

## **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.

Ms Keany'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 recordings of the programmes as broadcast and transcripts, both parties written submissions and recordings and transcripts of unedited material. In its considerations, Ofcom also took into account of its Broadcasting Code ("the Code").

### *Fairness*

- a) Ofcom first considered Ms Keany's complaint that she was misled as to the nature of the programme.

In particular, Ofcom considered her complaint that she had originally intended to audition as a singer, but was told by the programme makers that she had to perform a comedy act instead.

In considering this complaint, Ofcom took into account Rule 7.1 of the Code, which states that broadcasters must avoid unjust or unfair treatment of individuals in programmes. Ofcom considered whether Ms Keany gave her 'informed consent' to participate in the programme. Practice 7.3 of the Code sets out that in order for potential contributors to a programme to be able to make an informed decision about whether to take part, they should be given sufficient information about: the programme's nature and purpose; their likely contribution; any changes to the programme that might affect their decision to contribute; and the contractual rights and obligations of both parties.

Ofcom first considered the information available to Ms Keany before the recording of her contribution. Ofcom noted that the advertisement for potential participants described the programme as "Wedding TV's answer to X Factor and Britain's Got Talent". Ofcom took the view that this statement drew on the established format of *X-Factor* and *Britain's Got Talent* to illustrate the nature of any contribution to the programme would take to potential contributors. Consequently, Ofcom felt that potential contributors would have had a clear idea of what type of programme they would be participating in.

Ofcom also noted the information Ms Keany had given the programme makers before the audition and in particular what acts she had said she was able to perform. Ofcom noted Ms Keany's "Star Now" advertisement included with her application which stated, "Yes, I am a singer songwriter and do impressions comedy." Ofcom also noted that Ms Keany described her acting experience as, "Comedy – 10 years – playing parts in plays – 10 years – accents and mimicking excellent can play and be many many." Ms Keany also said, "I was in many plays and musicals but most of all I enjoyed my own comedy roles I wrote my own material and was invited to perform on stage with my half hour to an hour act all over the country and make people laugh."

Ofcom took the view that, in light of these representations made by Ms Keany, the programme makers were entitled to believe that she was willing to perform a comedy act for the programme.

Ofcom also noted that Ms Keany had signed a consent form to appear in the programme. However, Ofcom considered that it does not view the signing of a consent form alone as determinative on a decision as to consent and will instead look at all information made available to the contributor, as it has done above. Ofcom further took the view that the consent form offered little information about the type of programme Ms Keany was due to participate in to her. Ofcom subsequently concluded that the consent form itself held little weight in establishing whether Ms Keany had provided informed consent.

Ofcom then considered whether the format of the programme itself was consistent with the information made available to Ms Keany prior to filming. Ofcom noted that the programme took a traditional audition format, in which a variety of contestants performed their act in front of a panel of judges; this was very much in the same vein as *X Factor* and *Britain's Got Talent*, both given as points of reference to potential participants. Ms Keany, who had been specifically asked by the programme makers to perform her comedy routine, was shown doing so willingly.

Ofcom took the view that the format was consistent with the information made available to Ms Keany prior to filming and that Ms Keany, by performing her comedy routine, had demonstrated her consent to participate in the programme.

Ofcom therefore concluded that it was reasonable for the programme makers to have believed that the consent provided by Ms Keany was based on an accurate understanding of the nature and purpose of the programme. Because neither the programme nor her contribution had undergone any significant changes, Ofcom concluded that Ms Keany's consent to appear in the programme as broadcast was informed.

Ofcom therefore found no unfairness to Mrs Keany in this regard.

- b) Ofcom then considered Ms Keany's complaint that she withdrew her consent to appear in the programme.

As set out at head a), Ofcom considered that the programme as broadcast followed the nature and format as described to her before her contribution. Ofcom was satisfied that Ms Keany appeared to have been informed about the nature and purpose of the programme and what type of contribution she was expected to make. Ofcom considered that the programme as broadcast was in line with the information Ms Keany was given before agreeing to take part and that no significant changes had arisen between the recording of her contribution and the broadcast of the programme. Although, shortly after the recording of the programme, Ms Keany had sought to withdraw her consent, Ofcom concluded that the programme makers had been reasonably entitled to consider that they had obtained Ms Keany's informed consent to her participation in the programme and that, in the absence of any significant changes to the programme or her contribution, that consent remained valid.

Ofcom therefore found no unfairness to Mrs Keany in this regard.

#### *Privacy*

- c) Ofcom considered Ms Keany's complaint that her privacy was unwarrantably infringed in the programme as broadcast in that she was not told that footage of her performance would be broadcast.

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. Rule 8.1 the Code states that any infringement of privacy in programmes or in connection with obtaining material included in programmes, must be warranted. In considering complaints about the unwarranted infringement of privacy, Ofcom will therefore, where necessary, address itself to two distinct questions: First, has there been an infringement of privacy? Second, if so, was it warranted? (Rule 8.1 of the Code.) Ofcom also had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

For the reasons already stated at decision head a) above, Ofcom was satisfied that Ms Keany had understood the nature and purpose of the programme and her contribution to it and that the consent she had given to the programme makers to film her at the audition and to subsequently broadcast it was informed. Ofcom was satisfied that no significant changes had subsequently arisen that affected her consent. In these circumstances Ofcom took the view that Ms Keany did not have a legitimate expectation of privacy with regard to the audition material shown in the programme.

Having found no legitimate expectation of privacy, Ofcom found that Ms Keany's privacy was not infringed in the programme as broadcast. It was not therefore necessary for Ofcom to further consider whether any infringement of privacy was warranted.

**Accordingly, Ofcom has not upheld Mrs Keany's complaint of unfair treatment and unwarranted infringement of privacy in the broadcast.**

## Other Programmes Not in Breach

Up to 16 November 2009

Programme	Transmission Date	Channel	Category	Number of complaints
3D Week (trailer)	05/11/2009	Channel 4	Inaccuracy/Misleading	1
A Question of Sport	30/10/2009	BBC 1	Generally Accepted Standards	1
Adaktusson	19/10/2009	TV8	Generally Accepted Standards	1
Afternoon Live With Kay Burley	05/11/2009	Sky News	Generally Accepted Standards	1
Almost Live From Studio Five	10/11/2009	Fiver	Generally Accepted Standards	1
Amy Bidwell	23/10/2009	Star 107 (Cambridge Ely)	Competitions	1
Antiques Roadshow	01/11/2009	BBC 1	Under 18's in Programmes	1
Aviva sponsors ITV Drama Premiers	19/10/2009	ITV1	Generally Accepted Standards	1
Aviva sponsors ITV Drama Premiers	26/10/2009	ITV1	Generally Accepted Standards	1
Aviva sponsors ITV Drama Premiers	11/11/2009	ITV1	Generally Accepted Standards	1
Aviva sponsors ITV Drama Premiers	02/11/2009	ITV1	Inaccuracy/Misleading	1
Back at the Barnyard	08/11/2009	ITV1	Generally Accepted Standards	1
Bang Babes	11/08/2009	Tease Me	Sex/Nudity	1
Bayttab Dil Ki Tamanna Hai (trailer)	21/10/2009	Sony TV Asia	Violence	1
BBC Breakfast	10/11/2009	BBC 1	Generally Accepted Standards	1
BBC News	12/11/2009	BBC 1	Generally Accepted Standards	1
Benidorm	30/10/2009	ITV1	Generally Accepted Standards	1
Bikini Diet - GMTV		ITV1	Sponsorship	1
Bleach, Nip, Tuck: The White Beauty Myth	27/10/2009	Channel 4	Generally Accepted Standards	7
Bleach, Nip, Tuck: The White Beauty Myth	27/10/2009	Channel 4	Generally Accepted Standards	2
Bleach, Nip, Tuck: The White Beauty Myth	03/11/2009	Channel 4	Generally Accepted Standards	2
Bleach, Nip, Tuck: The White Beauty Myth	03/11/2009	Channel 4	Generally Accepted Standards	12
Bleach, Nip, Tuck: The White Beauty Myth	03/11/2009	Channel 4	Generally Accepted Standards	2
Brainiac: Science Abuse	25/10/2009	Sky Three	Generally Accepted Standards	1
Bremner, Bird & Fortune: Last Show Before Recovery	21/10/2009	More4	Generally Accepted Standards	1
Brighton Beach Patrol	30/10/2009	Five	Violence	2
Brighton Beach Patrol	25/10/2009	Fiver	Sex/Nudity	1
Cards of Destiny	10/09/2009	MATV	Use of Premium Rate Numbers	1

Carpet Right sponsorship	n/a	Sky1	Generally Accepted Standards	2
Channel 4 News	26/10/2009	Channel 4	Due Impartiality/Bias	2
Channel 4 News	27/10/2009	Channel 4	Due Impartiality/Bias	1
Channel 4 News	03/11/2009	Channel 4	Due Impartiality/Bias	1
Channel 4 News	08/11/2009	Channel 4	Due Impartiality/Bias	1
Channel 4 News	06/10/2009	Channel 4	Generally Accepted Standards	5
Channel 4 News	26/10/2009	Channel 4	Violence	1
Chris Moyles Show	15/10/2009	BBC Radio 1	Generally Accepted Standards	1
Collision	09/11/2009	ITV1	Generally Accepted Standards	1
Coronation Street	22/10/2009	ITV1	Dangerous Behaviour	1
Coronation Street	28/10/2009	ITV1	Generally Accepted Standards	2
Coronation Street	05/11/2009	ITV1	Generally Accepted Standards	1
Coronation Street	09/11/2009	ITV1	Generally Accepted Standards	1
Coronation Street	06/11/2009	ITV1	Offensive Language	1
Coronation Street	28/10/2009	ITV1	Sex/Nudity	2
Coronation Street (trailer)	07/11/2009	ITV1	Generally Accepted Standards	1
Daily Cooks Challenge	13/11/2009	ITV3	Inaccuracy/Misleading	1
Damage (trailer)	31/10/2009	STV	Offensive Language	1
Dare To Ask	30/09/2009	Peace TV Urdu	Religious Offence	2
Deal or No Deal	23/10/2009	Channel 4	Animal Welfare	1
Dispatches	26/10/2009	Channel 4	Inaccuracy/Misleading	1
Doc Martin	01/11/2009	ITV1	Inaccuracy/Misleading	1
Doctor Who (trailer)	07/11/2009	BBC 1	Generally Accepted Standards	1
EastEnders	05/11/2009	BBC 1	Dangerous Behaviour	2
EastEnders	29/10/2009	BBC 1	Sex/Nudity	1
Elite Days	15/06/2009	Elite TV	Sex/Nudity	1
Elite Days	28/05/2009	Elite TV	Sex/Nudity	1
Elite Days	24/06/2009	Paul Raymond TV	Sex/Nudity	1
Elite Days	25/06/2009	Paul Raymond TV	Sex/Nudity	1
Emmerdale	30/10/2009	ITV1	Generally Accepted Standards	1
Emmerdale	02/11/2009	ITV1	Generally Accepted Standards	1
Family Guy	04/11/2009	BBC 3	Generally Accepted Standards	1
Fearne and Peaches Geldof	29/10/2009	ITV2	Generally Accepted Standards	2
Five News update	04/10/2009	Five	Sex/Nudity	1
Friday Night with Jonathan Ross	23/10/2009	BBC 1	Generally Accepted Standards	1
GMTV	03/11/2009	ITV1	Religious Offence	2

Harry Hill's TV Burp	07/11/2009	ITV1	Crime (incite/encourage)	1
Harry Hill's TV Burp	10/10/2009	ITV1	Generally Accepted Standards	5
Harry Hill's TV Burp	10/10/2009	ITV1	Religious Offence	4
Harry Hill's TV Burp	17/10/2009	ITV1	Religious Offence	1
Harry Hill's TV Burp	07/11/2009	ITV1	Religious Offence	1
Harry Hill's TV Burp	01/11/2009	ITV1	Violence	2
Have I Got News For You	30/10/2009	BBC 1	Generally Accepted Standards	2
Heart of the Matter: Tonight	23/10/2009	ITV1	Due Impartiality/Bias	1
Hollyoaks	11/11/2009	Channel 4	Dangerous Behaviour	1
Hollyoaks	30/10/2009	Channel 4	Offensive Language	1
Hollyoaks	05/11/2009	E4	Generally Accepted Standards	1
How Not to Decorate	05/11/2009	Five	Generally Accepted Standards	1
Hung	25/10/2009	More4	Religious Offence	1
Hung (trailer)	18/10/2009	More4	Sex/Nudity	1
I Know What You Ate Last Summer	10/11/2009	Five	Offensive Language	1
I'm Paid More Than the PM: Tonight	02/11/2009	ITV1	Due Impartiality/Bias	1
Is It Better to be Mixed Race?	02/11/2009	Channel 4	Generally Accepted Standards	2
It's Only a Theory	11/11/2009	BBC 4	Other	1
ITV News	31/10/2009	ITV1	Generally Accepted Standards	2
ITV News	04/11/2009	ITV1	Generally Accepted Standards	2
ITV News	10/11/2009	ITV1	Generally Accepted Standards	3
James Merritt	16/10/2009	Kiss 101	Generally Accepted Standards	1
Jamie's American Road Trip	23/10/2009	Channel 4	Animal Welfare	1
Jamie's American Road Trip	06/11/2009	Channel 4	Violence	3
Jeremy Vine	14/10/2009	BBC Radio 2	Generally Accepted Standards	2
Jonathan Ross	14/11/2009	BBC Radio 2	Generally Accepted Standards	1
Live from Studio Five	30/10/2009	Five	Generally Accepted Standards	1
Live from Studio Five	09/11/2009	Five	Generally Accepted Standards	1
Live from Studio Five	11/11/2009	Five	Religious Offence	1
Loose Women	29/10/2009	ITV1	Generally Accepted Standards	1
Loose Women	04/11/2009	ITV1	Generally Accepted Standards	1
Loose Women	03/11/2009	ITV1	Religious Offence	2
Match of the Day 2	01/11/2009	BBC 2	Generally Accepted Standards	1
Match of the Day 2	08/11/2009	BBC 2	Generally Accepted Standards	1
MATV	19/08/2009	MATV	Use of Premium Rate	1

			Numbers	
Meaning of Stars	09/09/2009	Venus TV	Commercial References	1
Michael Jackson : This Is It or Is It?	05/11/2009	The Unexplained Channel	Generally Accepted Standards	1
Michael Jackson: The Live Seance	06/11/2009	Sky1	Advertising	1
Michael Jackson's Private Home Movies	05/11/2009	Sky1	Generally Accepted Standards	1
Michael McIntyre's Comedy Roadshow	17/10/2009	BBC 1	Religious Offence	1
Midsomer Murders	28/10/2009	ITV1	Generally Accepted Standards	3
Midsomer Murders	28/10/2009	ITV1	Generally Accepted Standards	9
Midsomer Murders	06/11/2009	ITV1	Offensive Language	1
Most Haunted (trailer)	30/10/2009	Virgin1	Sex/Nudity	1
Most Haunted Live: Halloween 2009	27/10/2009	Living	Inaccuracy/Misleading	1
Naked Britain	09/11/2009	Sky1	Generally Accepted Standards	1
Nazi Doctors	30/10/2009	Discovery	Generally Accepted Standards	1
Neighbours	03/11/2009	Five	Generally Accepted Standards	1
New You've Been Framed!	07/11/2009	ITV1	Generally Accepted Standards	1
News	13/08/2009	ATN Bangla	Advertising	1
News	04/11/2009	BBC Radio 1	Offensive Language	1
News	26/10/2009	BBC Radio 4	Generally Accepted Standards	1
News	23/10/2009	Real Radio Northeast	Inaccuracy/Misleading	1
News at Ten	02/11/2009	ITV1	Generally Accepted Standards	2
Nick Ferrari	09/11/2009	LBC 97.3FM	Generally Accepted Standards	1
North Manchester FM	27/08/2009	North Manchester FM	Generally Accepted Standards	1
Not Forgotten	09/11/2009	Channel 4	Inaccuracy/Misleading	1
Nothing to Declare	04/11/2009	Living	Offensive Language	1
Numb3rs	17/10/2009	Five USA	Violence	1
Oops TV	05/11/2009	Sky1	Under 18's in Programmes	1
Pants Off, Dance Off	27/10/2009	Viva	Sex/Nudity	1
Petrie Hosken	02/11/2009	LBC 97.3FM	Generally Accepted Standards	1
PS3 sponsorship	08/11/2009	Sky2	Unconscious influence/hypnosis/subliminal	1
Race and Intelligence: Science's Last Taboo	26/10/2009	Channel 4	Generally Accepted Standards	2
Real Radio Football Phone in	24/10/2009	Real Radio Scotland	Generally Accepted Standards	1
Regional News and Weather	27/10/2009	BBC 1	Generally Accepted Standards	1

Regional News and Weather	10/11/2009	BBC 1	Generally Accepted Standards	1
Renault sponsorship of films on 4	08/11/2009	Channel 4	Generally Accepted Standards	1
Renault sponsorship of films on 4	11/11/2009	E4	Generally Accepted Standards	1
Reversible Errors	26/10/2009	Five	Sex/Nudity	1
Rihanna "Russian Roulette"	24/10/2009	Capital Radio	Crime (incite/encourage)	1
Rihanna "Russian Roulette"	23/10/2009	Capital Radio	Dangerous Behaviour	1
Rude Tube	23/10/2009	Channel 4	Animal Welfare	1
Rude Tube	12/11/2009	E4	Generally Accepted Standards	1
Sally Jessy Raphael	27/10/2009	ITV2	Other	1
Saw III	22/10/2009	Channel 4	Advertising	2
Scary Sleepover	08/11/2009	CITV	Offensive Language	1
Scratch 'n' Sniff's Den Of Doom	31/10/2009	ITV1	Sex/Nudity	1
Sitarron Ka Jaham		DM Digital	Commercial References	1
Sky Today with Dermot Murnaghan	16/10/2009	Sky News	Generally Accepted Standards	1
Sky Today With Dermot Murnaghan	04/11/2009	Sky News	Violence	1
South East Today	05/11/2009	BBC 1 South East	Religious Offence	1
South Park (trailer)	02/11/2009	Comedy Central	Violence	1
Sponsorship of various programmes		SCI FI Channel (UK)	Sponsorship	1
Stephen Nolan	15/11/2009	BBC Radio Five Live	Offensive Language	1
Steve Allen	02/11/2009	LBC 97.3FM	Generally Accepted Standards	1
Sunrise With Eamonn Holmes	26/10/2009	Sky News	Due Impartiality/Bias	1
Supercasino	07/11/2009	Five	Generally Accepted Standards	1
Supersize v Superskinny	27/10/2009	E4	Generally Accepted Standards	1
The Alan Brazil Sports Breakfast with Ronnie Irani	30/10/2009	Talksport	Generally Accepted Standards	3
The Alan Titchmarsh Show	05/11/2009	ITV1	Generally Accepted Standards	1
The Andrew Marr Show	08/11/2009	BBC 1	Generally Accepted Standards	1
The Armstrong and Miller Show	23/10/2009	BBC 1	Generally Accepted Standards	6
The Armstrong and Miller Show	30/10/2009	BBC 1	Under 18's in Programmes	1
The Basil Brush Show	07/11/2009	CBBC	Offensive Language	1
The Bigamist Bride: My Five Husbands (trailer)	22/10/2009	Channel 4	Sex/Nudity	1
The Bill	05/11/2009	ITV1	Substance Abuse	1
The F Word	03/11/2009	Channel 4	Animal Welfare	2
The F Word	03/11/2009	Channel 4	Offensive Language	1
The F Word	10/11/2009	Channel 4	Religious Offence	1
The Graham Norton Show	02/11/2009	BBC 1	Generally Accepted Standards	1

The Graham Norton Show	09/11/2009	BBC 1	Generally Accepted Standards	1
The Home Show	02/11/2009	More4	Offensive Language	1
The Pad	06/08/2009	Adult Channel	Sex/Nudity	1
The Paul O'Grady Show	09/11/2009	Channel 4	Generally Accepted Standards	1
The Sex Inspectors (trailer)	08/11/2009	Virgin1	Sex/Nudity	1
The Sunday Service with Johnny Borrell	01/11/2009	XFM London	Format	1
The Thick of It	31/10/2009	BBC 2	Offensive Language	1
The Thick of It	07/11/2009	BBC 2	Offensive Language	1
The Thick of It	14/11/2009	BBC 2	Offensive Language	1
The Unbelievable Truth	26/10/2009	BBC Radio 4	Generally Accepted Standards	2
The Weakest Link	04/11/2009	BBC 1	Generally Accepted Standards	1
The Weakest Link	06/11/2009	BBC 1	Generally Accepted Standards	3
The Weakest Link	11/11/2009	BBC 1	Generally Accepted Standards	1
The Weakest Link	06/11/2009	BBC 1	Religious Offence	1
The Wright Stuff	27/10/2009	Five	Generally Accepted Standards	1
The Wright Stuff	05/11/2009	Five	Religious Offence	1
The X Factor	14/11/2009	ITV1	Advertising	1
The X Factor	15/11/2009	ITV1	Advertising	1
The X Factor	31/10/2009	ITV1	Generally Accepted Standards	1
The X Factor	25/10/2009	ITV1	Generally Accepted Standards	1
The X Factor	07/11/2009	ITV1	Other	2
The X Factor	31/10/2009	ITV1	Sex/Nudity	4
The X Factor	15/11/2009	ITV1	Sex/Nudity	1
The X Factor	31/10/2009	ITV1	Competitions	1
This Morning	09/10/2009	ITV1	Generally Accepted Standards	1
Toby Anstis	06/10/2009	Heart FM (Dorset)	Competitions	1
Top Gear	25/10/2009	BBC 2	Generally Accepted Standards	1
U105 Lunch	06/11/2009	U105	Offensive Language	1
UK Border Force	14/11/2009	Sky2	Generally Accepted Standards	1
UK's Toughest Jobs	27/10/2009	Discovery Shed	Substance Abuse	1
Venus TV	08/09/2009	Venus TV	Use of Premium Rate Numbers	1
Waterloo Road	28/10/2009	BBC 1	Generally Accepted Standards	1
Waterloo Road	04/11/2009	BBC 1	Generally Accepted Standards	1
Waterloo Road	04/11/2009	BBC 1	Sex/Nudity	1
Wonderland	05/11/2009	BBC 2	Generally Accepted Standards	1

