

Ofcom Broadcasting Code Review
Response from MTVNE, Comedy Central and Nickelodeon
September 2009

MTVNE, Comedy Central and Nickelodeon are owned by Viacom, and together manage 40 Ofcom licences in the UK, Europe and Africa on cable, satellite and DTT. These channels also have a significant presence online and via mobile telephony.

This response represents the collective view of the Viacom owned Ofcom licensed channels.

Sexual Material Rules

Question 1

- a) Do you consider that the rule in relation to ‘adult-sex’ material needs to be clarified?
- b) Do you agree with our proposed amendments to the rule on ‘adult-sex’ material (Proposed Rule 1.18 to replace Rule 1.24)?

Yes

Question 2

- a) Do you consider that the introduction of a new rule in relation to material of a strong sexual nature is appropriate?
- b) Do you agree with our proposed rule on material of a strong sexual nature (proposed Rule 1.19)?

No

- c) If you do not agree with our proposed new rule, please explain why and suggest alternative wording where appropriate.

We believe that proposed new Rule 1.18 will resolve most if not all of Ofcom’s concerns in relation to the broadcast of inappropriate sexual content after 9pm on channels without mandatory access restrictions. This rule makes it perfectly clear that content with the primary purpose of sexual arousal or stimulation may only appear after 10pm on channels with mandatory access restrictions, and is likely to eliminate those areas which have, up to now, been a source of regular complaint.

Given this, we do not believe that it is necessary to introduce a new, detailed set of additional rules which further define the kind of sexual content that may be shown after 9pm on channels without access restrictions. The combined impact of Rule 1.18, current Rule 2.1 (protection from harmful and offensive content), and Rule 1.20 (protection before 9pm) are sufficient to ensure that children and viewers are protected. Broadcasters such as MTVNE are well practised at identifying the strength and context of sexual content, and ensuring that it is broadcast at an appropriate time, if at all, and do not require additional rules to guide them.

We are concerned to ensure that any changes to the Code do not lead to additional regulatory obligations on programme genres that are not currently affected. We believe, however, that the proposed new rule 1.19 will result in broadcasters having to change their compliance and editorial procedures, and to take a different approach to the broadcast or scheduling of certain programmes which up to now have been fully compliant with the Broadcasting Code, and which have attracted no complaint. Rather than clarification, we are concerned that unnecessary additional obligations are being imposed on broadcasters.

It is clear from the language in Rule 1.19 that Ofcom believes a greater degree of contextual justification will be required in the future and that the degree can determine whether or not sexual material will be considered suitable for broadcast after the watershed without access restrictions. We believe that the intention of the proposed changes is to require broadcaster to apply greater rigour to their decisions regarding context.

In particular, the concept of ‘*strong* contextual justification’, rather than simply ‘contextual justification’, is a clear signal to broadcasters that they must take a harder internal line when considering whether the context of certain content would allow it to be shown at a particular time, or even at all. This amendment goes far beyond the definition of context provided in Section 2 of the current Broadcasting Code. A programme’s context is either appropriate or it is not, and the use of ‘strong’ is a subjective term which simply serves to distort an otherwise balanced and proportionate compliance judgement.

If Ofcom are minded to introduce a rule to distinguish sexual material that appears after the watershed not categorised as adult, the rule should replace the word ‘strong’ with ‘appropriate’ contextual justification.

In addition, the proposed Rule contains a non exhaustive list of five tests. We believe that it is more appropriate for these factors to be outlined in Guidance Notes along with other factors that broadcasters would be recommended to consider. We believe that the Code itself should merely contain the Rule thus leaving the Guidance Note to be discursive.

We would also suggest that the wording of the third test should be altered as follows - even the mildest sexual material may cause arousal or stimulation among some viewers and we believe this change to the wording would help distinguish between sexual material on the basis of its primary purpose. This change is consistent with the wording of Rule 1.18.

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- *the purpose of the sex scenes within the programme, i.e. whether this is to support an editorial purpose. If the primary purpose is sexual arousal or stimulation of the viewer Rule 1.18 applies*

Question 3

- a) Do you consider that the rule in relation to material equivalent to the BBFC R-18 rating needs to be separated from the rule in relation to R-18 rated works?
- b) Do you agree with our proposed rule on material equivalent to the BBFC R-18 rating (proposed Rule 1.17)?

Yes.

Question 4

- a) Do you consider that the rule in relation to pre-watershed material needs to be clarified?
- b) Do you agree with our proposed amendments to the rule on pre-watershed material (proposed Rule 1.20 to replace Rule 1.17)?

Yes.

Question 5

- a) Do you consider that the associated revisions are appropriate following the other rule revisions outlined above?
- b) Do you agree with our proposed associated revisions in Section One?

Yes.

Competitions and Voting Rules (Code Section Two)

Question 7

a) Do you consider that the introduction of new rules in relation to competitions and voting is appropriate?

Ofcom issued a Licence Variation to all broadcasters in May 2008, which set out in detail the obligations on broadcasters for viewer communications including competitions and voting. It is therefore appropriate that these obligations are explained in the Code for a wider audience.

b) Do you agree with our proposed new rules in relation to competitions and voting (proposed Rules 2.11 to 2.13 to replace Rule 2.11)?

The proposed rules have been distilled from the more extensive versions contained in the Licence Variation. We believe that it would afford broadcasters a greater degree of clarity for stakeholders and citizens if the original versions from the Licence Variation were included in the Guidance Note for the proposed new rules.

There is a reference in this and other paragraphs of the Review to risks of ‘potential general harm’ and also ‘financial harm’, neither of which is defined. We understand that ‘potential general harm’ might refer to the suffering caused to viewers or contestants who suffer from poorly administered competitions. We also understand that financial harm refers to potential financial loss suffered by participants in a competition or vote resulting from the ineffective or incompetent operation of the methods of participation. We would however expect these terms to be explored more fully in the Guidance. As they stand, these definitions are too broad and will result in a great many possible circumstances falling into scope. ‘Potential general harm’ is a very vague concept and could conceivably include anyone who enters a competition and doesn’t win. Ofcom need to set the bar much higher.

Question 8

a) Do you consider that the introduction of new meanings in relation to competitions and voting are appropriate?

We believe that it is essential that competitions and voting are defined for the purposes of the Code.

b) Do you agree with our proposed new meanings in relation to competitions and voting?

We agree with the definition of competitions.

We agree with the proposed definition of voting provided that the Guidance Note contains further clarification for broadcasters described at (c).

c) If you do not agree with our proposed new meanings, please explain why and suggest alternative wording where appropriate.

There are a number of viewer communications that are commonly called ‘votes’ by broadcasters but without a contest being involved. It is arguable that these types of schemes should be described as opinion polls and would be exempt from these rules as a result. However, the proposed wording implies that “voting” only occurs in relation to a contest, the outcome of which is influenced or decided by viewers. The proposed rule therefore limits broadcasters to using ‘vote’ or ‘voting’ to invitations to viewers to decide contests. Any

scheme that broadcasters devised to elicit preferences from viewers would have to be described as something other than a 'vote' or 'voting'.

For example, an invitation to viewers to recommend a music video that a broadcaster should include in its schedules or a programme featuring a particular comedian may be more commonly suggested as a 'vote' for a music video or programme.

We believe that the Guidance should contain further clarification on the tests that broadcasters should use to judge whether or not a scheme is a 'contest' intended to be covered by the proposed rules or not. In cases where the exact process involved and the extent to which a broadcaster acts on the outcome of the viewer communications do not amount to a contest, there should be guidance on how these schemes are described to viewers.

Commercial References in Television Programming Rules (Code Section Nine)

Question 10

a) Do you consider that the rules on commercial television would benefit from being separated from those for radio?

We welcome the proposed separation of the rules for commercial television and radio, which reduces the potential for confusion over which rules apply to a specific service.

b) Do you agree with the introduction of the proposed new Section Nine on commercial references in television programming?

Yes.

Question 11

a) Do you consider that it is appropriate for Ofcom to include the enforceable provisions relating to product and prop placement, replicated from the AVMS Directive (Implementation) Regulations, as rules in the revised Code?

Yes.

Questions 12

a) Would you consider that it appropriate for Ofcom to introduce rules that would allow Public Information Programming (as described above)? If so please explain why. If not, please explain why not.

We support the proposal to introduce rules to allow Public Information Programming (PIP), but questions whether they will in fact make much difference to the types of programmes that are in the end produced, given the tight set of rules designed to prevent surreptitious advertising or allow broadcasters to circumvent rules for sponsorship.

The proposed PIP Rule 9.26, for example, prohibits all references to a name, trademark, activities etc of the entity involved in funding the programme and yet the not-for-profit funders are likely to be working in the areas that the PIP they fund will cover. It is unlikely that not-for-profit organisations will fund projects that do not allude to their activities in some way. This appears to be contrary to the intended purpose of the introduction of these new rules.

A not-for-profit entity would presumably be eager to fund PIP dealing with subject matter that it is in their interest to promote in some way. The principle reason for educating the audience

about public interest matters is to promote a cause, which inevitably will be the focus of that entity's activities. Rule 9.26 appears to make this impossible and therefore appears to defeat the object. For example, an organisation such as Drinkaware might want to fund PIP dealing with the perils of teenage drinking. The proposed rules would appear to disallow this on the basis that the PIP would deal with Drinkaware's 'activities' in the realm of drinking and health more generally.

The intention appears to be to encourage an increase in public interest content and allow programming to be made that would otherwise not be made in the absence of this type of funding. Whilst we agree generally that PIP is a welcome proposal we are not convinced that the current proposals will allow a significant increase in the amount of organisations able to fund PIP or the amount of content for broadcast. In order for this to happen we believe Rule 9.26 should be drafted in such a way as to allow PIP funders to deal with subjects in which they are actively involved provided that the subject is genuinely in the public interest and the PIP can additionally comply with Rules 9.27 to 9.33.

Rule 9.30 also appears to be unnecessarily restrictive. We believe that PIP funder credits should adhere to the same rules as for other sponsored programmes. This would help viewers to understand more clearly the relationship between the funder and the content and afford the viewers the opportunity to contact the funder for further information on the subject. It would also provide clarity for broadcasters who are used to dealing with the existing rules for sponsorship credits. In this way there would seem to us to be far more viewer benefit than the proposed rules currently allow for.

Question 13

- a) Do you consider that the proposed new Section Nine would benefit from the introduction of new meanings?
- b) Do you agree with our proposed new meanings for Section Nine?

Yes.

Question 14

- a) Do you consider that the introduction of new Principles in relation to Section Nine is appropriate?
- b) Do you agree with the proposed new Principles for Section Nine?

Yes.

Question 15

- a) Do you consider that the proposed Rules 9.1 to 9.5 are broadly the same, in terms of both scope and intent, of current Rules 10.1, 10.2, 10.3, 10.4 and 10.12?

Yes.

- c) Do you agree with the introduction of the proposed new Rule 9.6?
- d) If you do not agree with the proposed new Rule 9.6, please explain why and suggest alternative wording where appropriate.

No. The Licence Variation issued to all broadcasters in May 2008 sets out the obligations covered by this proposed new rule quite clearly. It is unclear what benefit there is to including this proposed new rule. The introduction of new rule 9.6 therefore very much depends on the proposed Guidance to explain how Ofcom is attempting to protect viewers by its introduction.

Question 16

a) Do you consider it appropriate to introduce the proposed new Rule 9.9?

Yes. The reference should be to “viewers” not “listeners”.

Question 17

a) Do you consider that the introduction of a new competition and voting section is appropriate?

Yes.

b) Do you agree with the proposed new competition and voting section for Section Nine?

c) If you do not agree with our proposed new competition and voting section, please explain why and suggest alternative wording where appropriate.

We do not agree entirely with the proposed new section. It is not correct to insist that it is the broadcaster’s responsibility to “draw up” terms and conditions for competitions as they may not be the promoter. This language should be limited to state that the broadcaster has an obligation to highlight the availability of such terms and conditions and they are appropriately promoted.

Broadcasters are not always the promoter of competitions although they remain responsible for the competitions as required by the Licence Variation August 2008. On some occasions competitions are devised and organised by the programme producer on behalf of the broadcaster and the competitions are transmitted by the broadcaster. The Terms and Conditions of these competitions are drafted by the producer but the broadcaster shall oversee all aspects of such competitions. In these instances it would be appropriate for the broadcaster to make viewers aware of the underlying promoter.

We believe that we are currently explaining significant conditions to viewers. It is not clear how different this proposed new rule is from the existing requirements. Guidance will be required to explain what is meant by “significant conditions” that must be highlighted to the viewer. The Guidance should also explain that there may be a greater number of “significant conditions” that need to be expressed where competitions are run via premium telephony as the accessibility to full competition conditions is clearly less than on internet or hard copy entry competitions. In the case of internet or hard copy entry mechanics the benefit of referencing the terms and conditions, and the accessibility of them, is that any significant restrictions, as well as all other terms and conditions, can be accessed in one place and do not overload the viewer with information at the expense of the overall experience. We believe there is a potential risk of alienating the audience with a mass of information that they would find in any event on the competition entry page.

d) Do you agree that it is appropriate to apply these rules to BBC services funded by the licence fee?

Yes.

Question 18

a) Do you consider that the rules in relation to programme-related material would benefit from clarification?

Yes.

b) Do you agree with the introduction of the proposed programme-related material section for Section Nine?

We agree with this proposal but not with some of the detail.

c) If you do not agree with the proposed programme-related material section, please explain why and suggest alternative wording where appropriate.

We believe that the second introductory paragraph is unnecessarily negative. It implies that Ofcom is taking a negative and overly harsh stance on programme related material. We have suggested a redraft to reflect a positive obligation to ensure that editorial integrity, separation and transparency are maintained:

“These rules ensure that the promotion of programme-related material in television programming adheres to the key principles of editorial integrity, separation and transparency”.

Question 19

a) Do you consider that the proposed cross reference to the Cross-promotion Code would assist stakeholders?

We do not agree with this proposal.

b) If you do not consider that the proposed cross reference to the Cross-promotion Code would assist stakeholders, please explain why and suggest alternative wording where appropriate.

We believe that this cross reference is unnecessary.

Question 20

a) Do you consider that the meanings in relation to sponsorship of television would benefit from revision?

b) Do you agree that the revised meanings are consistent with those currently used, but more accurately reflect the definition of sponsorship as set out in the AVMS Directive?

Yes.

Question 21

a) Do you consider that the rules in relation to the content of sponsored output would benefit from clarification?

b) Do you agree with the introduction of the proposed new rules on the content of sponsored output in Section Nine?

Yes.

Question 22

a) Do you consider that the rules in relation to sponsorship credits would benefit from clarification?

Yes.

b) Do you agree with the introduction of the proposed rule?

We do not agree with the proposed rule as currently drafted

c) If you do not agree with the proposed rule, please explain why and suggest alternative wording where appropriate.

There are currently many instances of products themselves being the sponsor of programmes. The current drafting appears to preclude products sponsoring programmes. A sponsorship credit for a product as the sponsor might consist entirely of shots of the product. This would automatically put such a sponsorship credit in breach of the requirement that products 'must not be given undue prominence' and as a direct result of this, there will be less money in the market. In practice it is difficult to draw a distinction between a brand and a product. For example, Coca Cola could be viewed as both a brand and a product. If such a new restriction is applied by Ofcom, then we believe revenue streams would be reduced as a result of fewer opportunities in the market.

We do not believe that the rule should prohibit the sponsorship of programmes by products. We suggest that the rule is re-drafted to take account of this eventuality and to make a distinction between the considerations broadcasters should take in to account when dealing with sponsorships by brands and products.

Our view is that the proposed Rule 9.23 imposes an additional obligation on broadcasters for brand sponsorships to determine at what point having an image of the product on the sponsorship credit becomes unduly prominent. We feel that further clarity is required from Ofcom regarding what would constitute undue prominence within a sponsorship credit.

Question 23

a) Do you consider that the rules in relation to appeals for funds would benefit from clarification?

b) Do you agree with the introduction of the proposed Rule 9.29 and the section on appeals for funds for programming or services?

Yes.

Question 24

a) Do you consider that the proposed rule revisions are appropriate and would remain consistent with current rule requirements?

Yes.

Question 25

a) Do you wish to suggest an alternative approach to the proposed revisions in relation to the regulation of commercial references on television?

We broadly welcome the proposals for the new Section Nine. We believe that there could be a helpful addition as set out at (b) below.

b) If so, please outline your proposals, which should comply with relevant legislation (including the Communications Act 2003, the Audiovisual Media Services Directive, the AVMS Directive (Implementation) Regulations 2009 and Article 10 of the European Convention on Human Rights).

Broadcasters are constantly looking for new and innovative ways to keep in touch with their audiences through the broadcast stream, mobile and online. In particular, there has been a rapid growth in the use of social networking sites. These sites provide broadcasters with a unique opportunity to engage the audience and build a community around a channel, individual programme or programme strand.

Social networking sites such as MySpace, Facebook and Twitter are becoming an everyday part of our culture and society. As a broadcaster we feel it is increasingly important to adapt as technology evolves and use these social networking sites as an additional means to interact with our viewers. We feel that further consideration should be given to the promotion of free viewer contact through social networking sites where they are not used for monetary gain by the broadcaster but rather as a means of adopting this social phenomenon to interact with our audience better. References to these services in programmes are currently covered by the prohibition on the promotion of products and services in programmes; we would be keen to explore the possibility of a new Code Rule on the promotion of routes solely for the purpose of free viewer communications. We take the view that sites such as these are a huge part of the social arena and we feel that we should be able to reference these without falling foul of the Code.

Currently it is only possible for a broadcaster to direct viewers to these nascent communities by first travelling through its own website and subsequently making viewers aware of the social networking site. Any direct reference within a programme to a social networking site is prohibited by the existing rules for commercial references.

We believe that it should be possible for broadcasters to direct viewers to their presence on social networking sites within programmes and programme trailers. We suggest that this could be achieved through an addition to the rule on viewer communications. Important factors in allowing these references are that:

- the means of viewer communication remains free at the point of use for the viewer (subject to an internet connection);
- there is no commercial relationship between the broadcaster and the internet website owner/operator to provide viewer communication facilities; and
- the internet website is demonstrably used by a significant part of the viewing public.

We also believe that this type of viewer communication is in line with the headline principles of Digital Britain that encourages greater internet use and availability.

We suggest the following as a paragraph for inclusion after the proposed rule 9.6:

“Programmes can contain references to internet websites for free viewer communication. References to commercial internet websites for the purposes of free viewer communication must be brief and not unduly prominent or promotional”.

Sections of the Code where no revisions proposed

Question 44

a) Do you agree with the proposed approach which only proposes changes to Section One of the Code in relation to material of a sexual nature; only proposes changes to Section Two in relation to Competitions and Voting; and proposes no changes to Sections Three to Eight?

b) If you do not agree with our approach, please explain which other sections of the Code you consider should be reviewed and why.

We consider that Code Rule 2.13 should be reviewed with specific reference to music programming. Technology for the lighting of music concerts and events has moved on considerably over the last few years and ever more elaborate effects are now possible.

We fully understand and appreciate the need to protect PSE sufferers from programmes that might induce seizures or otherwise cause harm. However, we raise the concern that the currently understood implementation of such protection may not be the best way to achieve such protection and afford the vast majority of viewers who do not suffer from PSE the best possible viewing experience.

MTVNE tests content that it judges may contain high levels of flashing / strobing / fast cutting with 'Harding software' to ensure compliance with the Ofcom Guidance Note on Flashing Images and Regular Patterns in Television, Re-issued as Ofcom Notes (25 July 2005). Approximately 90% of our acquired long form content and approximately 70% of music videos that we check fails the Harding test. This content is then further edited to remove / reduce any flashing / strobing / fast cutting that exceed the permitted levels as indicated by the 'Harding' test results. The cost and time taken is considerable and almost everyday there is a discussion within the team over a programme, music video or live concert recording that has failed a "Harding Test".

Some of the content that fails the Harding test only fails by a few frames and less than a second. We are not aware of any evidence that flashes of very short duration would be problematic for sufferers of PSE. Also, if the same content is tested on two different machines the results will differ. We feel that the testing devices on the market are not consistent. We would therefore like Ofcom to issue guidance on the degree of tolerance permitted.

Alternative Technological Solutions

A preferred solution would be for viewers who suffer from photosensitive epilepsy to have a modified TV or Set top box that reduces or eliminates the effect of flashing / fast cutting. With almost 700 channels being broadcast in the UK, this is the only fail safe way for PSE sufferers to be properly protected. This would allow all non-PSE sufferers to receive a better viewing experience as the content would not have to be 'dulled down'.

Another suggestion would be for a warning to appear on the EPG so that when a viewer switched to a programme that contained flashing a warning on the EPG would be activated.

MTVNE could work with other music broadcasters to develop a uniform symbol to alert PSE sufferers of flashing images. A bug could appear on screen in addition to the EPG warning.

Viewer Awareness

While we accept the responsibility placed upon broadcasters we feel that more could be done to make viewers aware of the risk to PSE sufferers from watching TV. Ofcom could help by publishing precautions which are known to reduce the risk to PSE sufferers; for example:

- Watch the television in a well-lit room.
- Have a small lamp on top of, or close to the television.
- Not to sit too close to the television. Watch from a distance of at least 2.5 meters.
- Use the remote control wherever possible – to avoid having to go close to the TV.

We understand that 100 Hz TV & LCD TV's are unlikely to trigger seizures in people with PSE. If correct, this could be confirmed in the same awareness statement.

MTVNE would be willing to assist in any such awareness campaign as we did in the Audio Description campaign earlier in the year.

MTVNE acknowledge that any consideration and eventual change to the existing Rule 2.13 would take time to be implemented. Therefore MTVNE would like to seek guidance from Ofcom on three particular types of programming:

1) Live Performances

For live performances, such as the European Music awards and live concerts, we include a warning board at the start of the programme and after every break. Within the live show we often have highly creative lighting and special effects – last year we had a spectacular indoor thunderstorm and another set had a dramatic fast moving floor display. For our Ofcom licensed channels being distributed both within the UK and outside of the UK we have to remove or greatly reduce these special effects for subsequent broadcasts. This results in viewers of our non Ofcom licensed channels (e.g. in Germany and Italy) being able to witness and experience the full creativity of the show but not viewers of our Ofcom channels. We therefore feel that the Ofcom channel viewers are receiving a poorer viewing experience than non Ofcom channel viewers.

MTVNE would like guidance on whether we could rely on the fact that the creative lighting and special effects are editorially justified in such shows and be able to broadcast the shows unedited with an appropriate warning at the start and throughout the show.

2) Music Videos

Some music videos fail the Harding test. We do not have the right to edit a music video and we therefore send them back to the label for editing, which causes delay in getting material to air. The Ofcom channel viewers are therefore missing out both in terms of time delay and creative quality of final product once edited. Sometimes the label refuses to edit the video. In such cases, MTVNE would like guidance on whether we could rely on the fact that it is “not reasonably practicable” for MTVNE to edit and follow the Ofcom guidance and include an appropriate warning at the start and throughout the duration of the video in order to play the video?

Also, the audience expectation of a music video channel is relevant. We believe that our audiences see flashing images and fast editing techniques as part of the music genre and they would expect to find such content on our channels. We would therefore argue that flashing images in music related content are editorially justified.

3) Programmes Featuring Flashing as Part of the Editorial

We often have programmes that feature celebrities and red carpets that contain large amounts of flash photography. Our current understanding is that we have to remove / reduce the flashes so that the programme passes the ‘Harding test’. MTVNE would like guidance on whether we could rely on the fact that the flash photography is editorially justified in such shows and be able to broadcast the shows unedited with an appropriate warning at the start and throughout the show

c) Do you agree with Ofcom’s approach which will be to provide, and update, guidance to all sections on an on-going basis? If so, are there particular areas where you consider an updating of guidance would be helpful?

We believe that the approach is correct. We would additionally welcome the opportunity to comment on the Guidance that Ofcom will consider for any new rules resulting from this consultation before it is finalised. This will ensure that the necessary clarity is given for broadcasters in the new Guidance and help prevent breaches in the future.