Application of the Fairness Code to BBC online material

Fairness

This section is to ensure that the BBC avoids unjust or unfair treatment of individuals or organisations in its online material.

A1.1 This section and the following section on privacy are different from other sections of the Broadcasting Code. They apply to how the BBC treats the individuals or organisations directly affected by its online material, rather than to what the general audience encounters.

A1.2 As well as containing a principle and a rule, this section contains "practices to be followed" by the BBC when dealing with individuals or organisations participating in or otherwise directly affected by its online material as published. Following these practices will not necessarily avoid a breach of the Fairness Code (applied through Section Seven (Fairness) of the Broadcasting Code) (Rule 7.1). However, failure to follow these practices will only constitute a breach where it results in unfairness to an individual or organisation in the online material. Importantly, this section does not and cannot seek to set out all the "practices to be followed" in order to avoid unfair treatment.

A1.3 The following provisions in the next section on privacy are also relevant to this section:

- the explanation of public interest that appears in the meaning of "warranted" under Rule 8.1 in Section Eight (Privacy); and
- the meaning of "surreptitious obtaining of material" that appears under "practices to be followed" 8.13 in Section Eight (Privacy).

Legislation[1]

A1.4 Relevant legislation includes, in particular, sections 3(2)(f) and 326 of the Communications Act 2003 and sections 107(1) and 130 of the Broadcasting Act 1996 (as amended), Article 8 of the European Convention on Transfrontier Television (for ECTT Services only), Article 28 of the Audiovisual Media Services Directive and Article 10 of the European Convention on Human Rights, and the BBC Charter and Agreement.

Principle

A1.5 To ensure that the BBC avoids unjust or unfair treatment of individuals or organisations in BBC UK Public Online Material ("online material").

[1] Relevant legislation remains as it appears in Section Seven of the Broadcasting Code as it already makes reference to the BBC Charter and Agreement. However, we note that the European Convention on Transfrontier Television and the Audiovisual Media Service Directive are not relevant to online material.

Rule

7.1 The BBC must avoid unjust or unfair treatment of individuals or organisations in its online material.

Practices to be followed (7.2 to 7.15)

Dealing fairly with contributors and obtaining informed consent

Practice 7.2: The BBC should normally be fair in its dealings with potential contributors to online material unless, exceptionally, it is justified to do otherwise.

Practice 7.3: Where a person is invited to make a contribution to online material (except when the subject matter is trivial or their participation minor) they should normally, at an appropriate stage:

- be told the nature and purpose of the online material, what the online material is about and be given a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first published;
- be told what kind of contribution they are expected to make, for example live, pre-recorded, interview, discussion, edited, unedited, etc;
- be informed about the areas of questioning and, wherever possible, the nature of other likely contributions;
- be made aware of any significant changes to the online material as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness;
- be told the nature of their contractual rights and obligations and those of the BBC in relation to their contribution;
- be given clear information, if offered an opportunity to preview the online material, about whether they will be able to effect any changes to it; and
- be informed about potential risks arising from their contribution to the online material which may affect their welfare (insofar as these can be reasonably anticipated at the time) and any steps the BBC intends to take to mitigate these.

Taking these measures is likely to result in the consent that is given being 'informed consent' (referred to in this section and the rest of the Code as "consent").

It may be fair to withhold all or some of this information where it is justified in the public interest or under other provisions of this section of the Code.

Practice 7.4: If a contributor is under sixteen, consent should normally be obtained from a parent or guardian, or other person of eighteen or over in loco parentis. In particular, persons under sixteen should not be asked for views on matters likely to be beyond their capacity to answer properly without such consent.

Practice 7.5: In the case of persons over sixteen who are not in a position to give consent, a person of eighteen or over with primary responsibility for their care should normally give it on their behalf. In particular, persons not in a position to give consent should not be asked for views on matters likely to be beyond their capacity to answer properly without such consent.

Practice 7.6: When online material is edited, contributions should be represented fairly.

Practice 7.7: Guarantees given to contributors, for example relating to the content of online material, confidentiality or anonymity, should normally be honoured.

Practice 7.8: The BBC should ensure that the re-use of content, i.e. use of content originally obtained for one purpose and then used by the BBC for another purpose, or used in a later or different publication of online material, does not create unfairness. This applies both to material obtained from others and the BBC's own material.

Opportunity to contribute and proper consideration of facts

Practice 7.9: Before publishing factual online material, including online material examining past events, the BBC should take reasonable care to satisfy itself that:

- material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation; and
- anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute.

Practice 7.10: Online material – including, in particular, dramatisations and factually-based dramatisations – should not portray facts, events, individuals or organisations in a way which is unfair to an individual or organisation.

Practice 7.11: If online material alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

Practice 7.12: Where a person approached to contribute to online material chooses to make no comment or refuses to contribute, the online material should make clear that the individual concerned has chosen not to contribute and should give their explanation if it would be unfair not to do so.

Practice 7.13: Where it is appropriate to represent the views of a person or organisation that is not participating in or contributing to the online material, this must be done in a fair manner.

Use of Deception

Practice 7.14: The BBC should not normally obtain or seek information, material or an agreement to contribute through misrepresentation or deception. (Deception includes surreptitious obtaining of material) However:

- it may be warranted to use material obtained through misrepresentation or deception without consent if it is in the public interest and cannot reasonably be obtained by other means;

- where there is no adequate public interest justification, consent should be obtained from the individual and/or organisation concerned before the material is published online;
- if the individual and/or organisation is/are not identifiable in the online material then consent for publishing will not be required;
- material involving celebrities and those in the public eye can be used without consent for inclusion in online material, but it should not be used without a public interest justification if it is likely to result in unjustified public ridicule or personal distress. (Normally, therefore, such contributions should be pre-recorded).

Welfare of contributors

Practice 7.15 Due care should be taken over the welfare of a contributor who might be at risk of significant harm as a result of featuring in online material, except where the subject matter is trivial or their participation minor.

A contributor might be regarded as being at risk of significant harm as a result of taking part or contributing to online material for reasons including (but not limited to) the following:

- they are considered a vulnerable person;
- they are not used to being in the public eye;
- the online material involves being filmed or recorded in an artificial or constructed environment;
- the online material is likely to attract a high level of press, media and social media interest;
- key editorial elements of the online material include potential confrontation, conflict, emotionally challenging situations; or
- the online material requires them to discuss, reveal or engage with sensitive, life changing or private aspects of their lives.

The BBC should conduct a risk assessment to identify any risk of significant harm to the contributor, unless it is justified in the public interest not to do so.

The level of care due to the contributor will be proportionate to the level of risk associated with their participation in or contribution to the online material.

Meaning of "vulnerable people"

This varies, but may include those with learning difficulties, those with mental health problems, the bereaved, people with brain damage or forms of dementia, people who have been traumatised or who are sick or terminally ill.

Privacy

This section is to ensure that the BBC avoids any unwarranted infringement of privacy in its online material and in connection with obtaining material included in its online material.

A1.6 This section and the preceding section on fairness are different from other sections of the Broadcasting Code. They apply to how the BBC treats the individuals or organisations directly affected by its online material rather than to what the audience encounters.

A1.7 As well as containing a principle and a rule this section contains "practices to be followed" by the BBC when dealing with individuals or organisations participating or otherwise directly affected by online material, or in the production of online material. Following these practices will not necessarily avoid a breach of the Fairness Code (applied through Section Eight (Privacy) of the Broadcasting Code) (Rule 8.1). However, failure to follow these practises will only constitute a breach where it results in an unwarranted infringement of privacy. Importantly, this section does not and cannot seek to set out all the "practices to be followed" in order to avoid an unwarranted infringement of privacy.

A1.8 The Charter and Framework Agreement require Ofcom to consider complaints about unwarranted infringement of privacy in online material or in connection with the obtaining of material included in such online material. This may call for some difficult on-the-spot judgements about whether privacy is unwarrantably infringed by reporting, especially when reporting on emergency situations ("practices to be followed" 8.5 to 8.8 and 8.16 to 8.19). We recognise there may be a strong public interest in reporting on an emergency situation as it occurs and we understand there may be pressures on those reporting from the scene of a disaster or emergency that may make it difficult to judge at the time whether filming ~~or~~, recording or obtaining other material is an unwarrantable infringement of privacy. These are factors Ofcom will take into account when adjudicating on complaints.

A1.9 Where consent is referred to in Section Eight of this Annex it refers to informed consent.

A1.10 Please see "practice to be followed" 7.3 in Section Seven (Fairness) of this Annex.

Legislation[2]

A1.11 Relevant legislation includes, in particular, section 3(2)(f) and 326 of the Communications Act 2003 and sections 107(1) and 130 of the Broadcasting Act 1996 (as amended), and Articles 8 and 10 of the European Convention on Human Rights, and the BBC Charter and Agreement.

[2] Relevant legislation remains as it appears in Section Eight of the Broadcasting Code as it already makes reference to the BBC Charter and Agreement. However, we note that section 326 of the Communications Act 2003 is not relevant to online material.

Principle

To ensure that the BBC avoids any unwarranted infringement of privacy in its UK Public Online Material ("online material"), and in connection with obtaining material included in its online material.

Rule

8.1 Any infringement of privacy in the BBC's online material, or in connection with obtaining material included in its online material, must be warranted.

Meaning of "warranted"

In this section "warranted" has a particular meaning. It means that where the BBC wishes to justify an infringement of privacy as warranted, it should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the BBC should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

Practices to be followed (8.2 to 8.22)

Private lives, public places and legitimate expectation of privacy

Meaning of "legitimate expectation of privacy"

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

Practice 8.2: Information which discloses the location of a person's home or family should not be revealed without permission, unless it is warranted.

Practice 8.3: When people are caught up in events which are covered by the news they still have a right to privacy in both the making and the publication of online material, unless it is warranted to infringe it. This applies both to the time when these events are taking place and to any later publications that revisit those events.

Practice 8.4: The BBC should ensure that information and/or material obtained in a public place, is not so private that prior consent is required before publication from the individual or organisation concerned, unless publication without their consent is warranted.

Consent

Practice 8.5: Any infringement of privacy in the making of online material should be with the person's and/or organisation's consent or be otherwise warranted.

Practice 8.6: If the publication of the online material would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is published, unless the infringement of privacy is warranted.

Practice 8.7: If an individual or organisation's privacy is being infringed, and they ask that the filming, recording, live streaming, interviewing or obtaining of other material be stopped, the BBC should do so, unless it is warranted to continue.

Practice 8.8: When filming, recording or obtaining other material in institutions, organisations or other agencies, permission should be obtained from the relevant authority or management, unless it is warranted to obtain the material without permission. Individual consent of employees or others whose appearance is incidental or where they are essentially anonymous members of the general public will not normally be required.

However, in potentially sensitive places such as ambulances, hospitals, schools, prisons or police stations, separate consent should normally be obtained before obtaining the material from those sensitive situations and before publishing the online material (unless not obtaining consent is warranted). If the individual will not be identifiable in the online material then separate consent for publication will not be required.

Obtaining and re-use of material

Practice 8.9: The means of obtaining material must be proportionate in all the circumstances and in particular to the subject matter of the online material.

Practice 8.10: The BBC should ensure that the re-use of content, i.e. use of content originally obtained for one purpose and then used by the BBC for another purpose, or used in a later or different publication of online material, does not create an unwarranted infringement of privacy. This applies both to material obtained from others and the BBC's own material.

Practice 8.11: Doorstepping for factual online items should not take place unless a request for an interview has been refused or it has not been possible to request an interview, or there is good reason to believe that an investigation will be frustrated if the subject is approached openly, and it is warranted to doorstep. However, normally the BBC may, without prior warning interview, film or record people in the news when in public places.

(See "practice to be followed" 8.15)

Meaning of "doorstepping"

Doorstepping is the filming or recording of an interview or attempted interview with someone, or announcing that a call is being filmed or recorded for publication purposes, without any prior warning. It does not, however, include vox-pops (sampling the views of random members of the public).

Practice 8.12: The BBC can record telephone calls between the BBC and the other party if they have, from the outset of the call, identified themselves, explained the purpose of the call and that the call is being recorded for possible inclusion in a publication of online material (if that is the case) unless it is warranted not to do one or more of these practices. If at a later stage it becomes clear that a call that has been recorded will be published online (but this was not explained to the other party at the time of the call) then the BBC must obtain consent before publication from the other party, unless it is warranted not to do so.

(See "practices to be followed" 7.14 and 8.13 to 8.15)

Practice 8.13: Surreptitious obtaining of material should only be used where it is warranted. Normally, it will only be warranted if:

- there is prima facie evidence of a story in the public interest; and
- there are reasonable grounds to suspect that further material evidence could be obtained; and
- it is necessary to the credibility and authenticity of the online material.

(See "practices to be followed" 7.14, 8.12, 8.14 and 8.15)

Meaning of "surreptitious obtaining of material"

Where material is obtained without the knowledge of the individual concerned. For example, the use of long lenses or recording devices, as well as leaving an unattended camera or recording device on private property without the full and informed consent of the occupiers or their agent. It may also include recording or screenshotting telephone, video or text conversations without the knowledge of the other party, or deliberately continuing a recording when the other party thinks that it has come to an end.

Practice 8.14: Material gained by surreptitious obtaining of material should only be published when it is warranted.

Practice 8.15: Surreptitious obtaining of material or doorstepping for entertainment purposes may be warranted if it is intrinsic to the entertainment and does not amount to a significant infringement of privacy such as to cause significant annoyance, distress or embarrassment. The resulting material should not be published without the consent of those involved. However, if the individual and/or organisation is not identifiable in the online material then consent for publication will not be required.

(See "practices to be followed" 7.14 and 8.11 to 8.14)

Suffering and distress

Practice 8.16: The BBC should not obtain or publish material of people caught up in emergencies, victims of accidents or those suffering a personal tragedy, even in a public place, where that results in an infringement of privacy, unless it is warranted or the people concerned have given consent.

Practice 8.17: People in a state of distress should not be put under pressure to contribute to online material or provide interviews, unless it is warranted.

Practice 8.18: The BBC should take care not to reveal the identity of a person who has died or of victims of accidents or violent crimes, unless and until it is clear that the next of kin have been informed of the event or unless it is warranted.

Practice 8.19: The BBC should try to reduce the potential distress to victims and/or relatives when making or publishing online material intended to examine past events that involve trauma to individuals (including crime) unless it is warranted to do otherwise. This applies to dramatic reconstructions and factual dramas, as well as factual online material.

In particular, so far as is reasonably practicable, surviving victims and/or the immediate families of those whose experience is to feature in the online material should be informed of the plans for the online material and its intended publication, even if the events or material to be published have been in the public domain in the past.

People under sixteen and vulnerable people

Practice 8.20: The BBC should pay particular attention to the privacy of people under sixteen. They do not lose their rights to privacy because, for example, of the fame or notoriety of their parents or because of events in their schools.

Practice 8.21: Where online material features an individual under sixteen or a vulnerable person in a way that infringes privacy, consent must be obtained where appropriate from:

- wherever possible, the individual concerned; and
- a parent, guardian or other person of eighteen or over in loco parentis (in the case of individuals under sixteen); or
- a person with primary responsibility for their care (in the case of a vulnerable person who is unable to provide consent)

unless the subject matter is trivial or uncontroversial and the participation minor, or it is warranted to proceed without consent.

Practice 8.22: Persons under sixteen and vulnerable people should not be questioned about private matters without the consent of a parent, guardian or other person of eighteen or over in loco parentis (in the case of persons under sixteen), or a person with primary responsibility for their care (in the case of a vulnerable person), unless it is warranted to proceed without consent.

Meaning of "vulnerable people"

This varies, but may include those with learning difficulties, those with mental health problems, the bereaved, people with brain damage or forms of dementia, people who have been traumatised or who are sick or terminally ill.