

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 16 December 2009 and covers all programmes broadcast on or after 16 December 2009. The Broadcasting Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>.

Note: Programmes broadcast prior to 16 December 2009 are covered by the 2005 Code which came into effect on 25 July 2005 (with the exception of Rule 10.17 which came into effect on 1 July 2005). The 2005 Code can be found at http://www.ofcom.org.uk/tv/ifi/codes/bcode_2005/.

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

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

It is Ofcom's policy to describe fully the content in television and radio programmes that is subject to broadcast investigations. Some of the language and descriptions used in Ofcom's Broadcast Bulletin may therefore cause offence.

Standards cases

In Breach

George Galloway

Talksport, 20 November 2009, 22:00

Introduction

George Galloway presents a twice weekly late-night discussion programme on Talksport in which he debates a wide range of topical issues. Eight programmes broadcast in November and December 2009 included a music-based feature in which Mr Galloway asked listeners to identify a topical news event linking music clips played in the programme and to contact the station with their answers. There was generally no prize on offer.

However, in the programme broadcast on 20 November 2009, a prize was offered and, as such, the feature was a listener competition. A series of music clips was played on air and listeners were invited to contact the station to identify the topical news event linking the clips for the opportunity to win a prize - a copy of George Galloway's book, *The Fidel Castro Handbook*. The required answer to the competition was the Duchess of Cornwall turning on Christmas lights in a London shopping arcade.

Listeners were invited to enter the competition in the same way as they would participate in a discussion on the programme – by calling Talksport's studio telephone number, by text message or by email. Calls to the premium rate telephone number cost 10p per minute from a BT landline, text messages were 50p plus standard network charges and emails were free. Listeners were advised of these charges during the programme, as was the case when they were invited to submit views and opinions to the discussion parts of the programme.

Ofcom received a complaint from a listener who had called the studio at 00:10 to submit his answer to the competition. The complainant claimed he was informed (by a 'call screener') that his answer was correct but, as another entrant had just given the same answer, he had not won the prize. His call was then terminated. The complainant said that the presenter did not announce that a winning answer had been received until 00:50.

At 00:50, the presenter said on air that the winning entry had been submitted by the same listener who had already won the prize the previous week and, as such, the winner had agreed that the prize should go to the second winning entrant. The complainant believed, from the discussion he had had with the call screener, that the presenter was referring on air to him as the second winning entrant. However, another entrant was subsequently announced as the winner.

The complainant therefore questioned whether the competition had been conducted fairly. In particular, he was concerned that further invitations to listeners to enter had been broadcast after his telephone call in which he had been told that a correct answer had already been submitted.

Ofcom asked the broadcaster for its comments regarding the matter under Rule 2.11¹ of the Code (competitions should be conducted fairly) and to provide details of the competition ‘mechanic’ and relevant terms and conditions.

Response

The broadcaster said that the features were designed to provide some light material to counterbalance the serious nature of the discussions and it was never intended to be a formal competition with “extra entry charges” and “high-value prizes”. It said this was reflected by Talksport’s presentation, by the fact that entry routes were the same for listeners wishing to contact the studio to participate in topical discussion, and the fact that only three out of the eight similar features offered a prize. The broadcaster said that this feature was devised by the producer and that only he and the presenter were aware of the correct answer.

Talksport said that listeners contacting the studio by telephone were asked the purpose of their call by the call screener. The call screener noted details of the caller’s discussion point or competition answer. Competition answers were then displayed on a screen in the presenter’s view. The screen displayed a maximum of nine answers at any one time. To prevent repetition, the call screener was instructed not to display duplicate competition answers on the screen. If a duplicate answer was submitted, the caller was advised of this, and the call was terminated. The broadcaster said that this practice avoided “callers being kept on the line unnecessarily”.

Talksport explained that the call screener was also responsible for printing off emails and text messages (whether they were discussion comments or competition entries) in batches and handing them to the producer who selected a number of them “at random” for compliance checks. These were then given to Mr Galloway who selected which answers to read out on air. It added that, as soon as the producer or the presenter spotted a correct answer – either on the screen or in the selection of print-outs – the presenter was instructed to read it out on air as soon as possible. Talksport said that, because of the volume of emails and text messages received during the programme, it was not possible for all contributions to be scrutinised and, as such, the winner was the entrant whose correct answer was detected first.

With regard to the winner, the broadcaster said the producer found a correct answer, submitted by email, in the final fifteen minutes of the programme [at approximately 00:45]. However, as the entrant in question had already won the previous week’s competition, that listener consented to forego the prize. The producer then found another email that contained the correct answer and so the prize was awarded.

Talksport’s telephone records indicated that it received 140 calls, 44 of which were identified as competition entries. Thirty of these were answered by the call screener, and 14 by the producer, when the call screener was unavailable. It added that a further 71 calls were made to the studio but, as there were no details logged for these calls other than a name and number, the broadcaster could not establish how many of these had been competition entries. However, from the call log information that was available, the broadcaster was able to identify that the first correct answer appeared to be received at 23:37 but did not go to air. Talksport added that its call logs suggested this was because the entrant’s call had been terminated prematurely.

¹ It should be noted that on 16 December 2009, a revised version of the Code was issued. For programmes broadcast on or after 16 December 2009, Rules 2.13 to 2.16 are relevant.

Talksport said the records of its text message service provider showed that it received 172 text message entries to the competition and that three of these contained the correct answer. These were received at 23:39, 23:59 and 00:01 but none were spotted by either the presenter or the producer.

The broadcaster was unable to provide details about the number of email competition entries it had received.

Talksport stressed that listeners were invited to enter the competition in the same way (and at the same cost) as they could participate in debates on the programme. Talksport was of the view that it was impossible for every entry to be scrutinised and put to air and the winner was therefore the person whose correct entry was the first to be spotted. The minute the first correct entry was spotted, it was put to air as soon as possible. It argued that because the first correct answer spotted by the producer or the presenter was declared the winning entry, no route had a natural advantage over another. The broadcaster added that no further 'solicits' [invitations to listeners] to enter the competition were made after a winner had been found. It was therefore satisfied that the competition was promoted and conducted in accordance with the requirements of Rule 2.11.

Talksport said neither the producer nor the call screener had any recollection of the complainant's call. Whilst it was unable to confirm or deny the complainant's alleged conversation with the station, it repeated that the call screener did not know the correct answer and said the producer was never in the habit of confirming that callers were correct.

Decision

Rule 2.11 of the Code required² that competitions should be conducted fairly. Ofcom noted Talksport's submission that the feature in question was not intended to be a "formal competition". However, broadcast competitions are features in which the audience is invited to enter by any means for the opportunity to win any prize, irrespective of its value.

In this case, Ofcom noted that the competition's published terms and conditions, as supplied by Talksport, applied to all competitions conducted on the radio station. Rule 15 of the terms and conditions stated that "competition winners will be chosen at random unless otherwise specified" [emphasis added]. In this case, Ofcom noted that after playing one of the clips of music, Mr Galloway promoted the competition as follows:

"Why on earth am I playing that? First person to tell me wins a book."

In Ofcom's view, the promotion indicated that the prize would be awarded to the first listener who submitted the correct answer. This was contrary to the broadcaster's 'random selection' condition, as set out above, but it was nevertheless open to the broadcaster to choose a different selection method, given that it had incorporated the phrase "unless otherwise specified" within that published condition. However, Ofcom identified several flaws in the broadcaster's selection method on this occasion, which raised issues about the fair conduct of the competition.

² See footnote 1.

For a competition to be conducted fairly, Ofcom expects all routes of entry to have equal prominence (unless stated otherwise) – that is, entries by telephone should be treated in the same way as those by text message or email. In this case, from the information provided by Talksport, Ofcom was concerned that listeners' entries had not been treated equally.

With regard to telephone entries, Ofcom noted that the presenter's screen, on which the call screener displayed call details, was limited to nine entries at any one time. In the event of a large volume of callers submitting an answer or contacting the studio to take part in a discussion, a correct competition answer may have gone unnoticed. Further, if this was the case, or if a correct answer was submitted but the caller was unavailable when the presenter put them to air, subsequent callers with the same correct answer may have been discarded by the call screener, as they would have been identified as providing duplicate answers.

Ofcom was also concerned at the apparently casual way in which entries submitted by text message and email were checked. Because the producer selected a batch of answers to check "at random", Ofcom considered there was every possibility that correct answers, for which text message entrants had paid a minimum of 50 pence per message to submit, had been overlooked.

Further, merely checking through batches of answers and declaring the winning entry to be the first correct answer spotted did not, in Ofcom's view, ensure that the prize went to the entrant who had submitted it first, which was how it had been indicated on air the winner would be selected "...*First person to tell me wins a book*". Ofcom noted that the producer had found a correct answer in the final fifteen minutes of the programme at approximately 00:45, but owing to a previous win, he searched and found another. However, Ofcom noted that, from the text message service providers' records, there had been a correct answer received by telephone at 23:37 (after which the call was terminated prematurely); and then another correct answer was received by text message at 23:39, although this was not detected.

This meant that a further five clues and solicits to enter the competition (including three after the complainant's call at 00:10) were broadcast after a winning answer had been submitted.

Ofcom was particularly concerned about the financial detriment suffered by entrants, the scale of which was unclear. In addition, Ofcom was disappointed that Talksport did not appear to intend providing a refund procedure for reimbursement of those entrants who had been affected.

It is acceptable for broadcasters to use their own discretion when selecting audience members to participate in discussion items. It is generally understood that such contributions are not chosen at random but, instead, go through an editorial selection process. However, Ofcom does not consider the informal nature of a competition (as in this case) to provide sufficient justification for using a similar selection method. Listeners were invited to participate via premium rate entry routes with a view to winning a prize and, as such, Ofcom considered that it should have been clear to Talksport that Rule 2.11 applied.

Ofcom noted that there appeared to be discrepancies between the complainant's account and the recollections of relevant Talksport staff. In light of the absence of evidence available to Ofcom, it was not possible for to determine precisely how the complainant's competition entry had been dealt with.

Nevertheless, from the evidence that was available, it was clear to Ofcom that the broadcaster's method of selecting a winner in this competition was not as described on air at the time that listeners were invited to enter. It is a matter for broadcasters to determine the method by which a competition winner will be determined, but to ensure that the competition is conducted fairly, this must be made clear to the audience. In this case, listeners choosing to enter did so on the basis that they had a fair and equal chance of winning, irrespective of which entry route they used. In fact, they did not. The competition had not therefore been conducted fairly and was in breach of Rule 2.11 of the Code.

In recent years, Ofcom has recorded numerous breaches of Rule 2.11 and imposed statutory sanctions on several broadcasters. We have also issued extensive guidance on how broadcast competitions should be handled to ensure their compliance with the Code. Ofcom has made it abundantly clear that it expects all broadcasters to exercise particular caution when inviting audiences to enter broadcast competitions, particularly where they are required, or have the option, to pay a premium rate to participate.

In this case, Ofcom found no evidence that Talksport sought to mislead listeners deliberately. Nevertheless, it appeared to us that there were insufficient procedures in place to ensure the competition's compliance with Rule 2.11.

We are particularly concerned with Talksport's view that the promotion and operation of this competition raised no compliance issues. Ofcom is therefore requiring the licensee to attend a meeting to discuss its compliance procedures in relation to the conduct of listener competitions.

Breach of Rule 2.11

In Breach

Just Great Songs

Southend Radio, January to March 2010, 10:00

Introduction

Southend Radio is part of the Adventure Radio Network. From January to March 2010, Southend Radio, the licensee, ran a competition called 'Tracie's Mystery Voices' during its daily programme *Just Great Songs*.

Listeners were played three short clips, each containing the voice of a celebrity, and were invited to contact the studio by text message or via the broadcaster's website to identify the mystery voices. Text message entrants were charged their standard network rate and online entries were free. The competition was also conducted across the three other radio stations on the Adventure Radio Network.

The presenter advised listeners that the entrant who was first to identify any of the celebrity voices correctly would win £500. The entrant who identified one of the two remaining mystery voices correctly would win £1,000. The competition's on-air promotion also stated that the jackpot of £5,000 would be awarded to the entrant who named the final mystery voice successfully.

Ofcom received a complaint from a listener who said that neither the competition's on-air description, nor the terms and conditions (available on the station's website) stated that it was being run on three other stations and therefore entrants' chances of winning were less than implied. The complainant was also concerned that there was a lack of clarity regarding the value of the jackpot as the terms and conditions indicated that it would increase each day until the competition was won. This conflicted with the information given on air about the jackpot being £5,000.

Although part of the Adventure Radio Network, Southend Radio itself oversees the compliance of the station's content. Ofcom therefore asked Southend Radio for its comments under Rule 2.15 of the Code which states that:

"Broadcasters must draw up rules for a broadcast competition or vote. These must be clear and appropriately made known. In particular, significant conditions that may affect a viewer's or listener's decision to participate must be stated at the time an invitation to participate is broadcast."

Response

Southend Radio explained that the presenter was informed incorrectly that information regarding the competition's availability to listeners of other stations only had to be stated once during each programme. Therefore, there were several occasions when there was no mention of this element of the competition.

The broadcaster said that, upon receipt of Ofcom's correspondence on 5 February 2010, it edited all pre-recorded material relating to the competition and gave further instructions to the presenter to ensure all subsequent promotions contained clear information about the other stations' involvement.

Southend Radio admitted that the original draft of the competition's terms and conditions did not refer to it being open to listeners across the Adventure Radio Network. However, the terms and conditions had subsequently been amended to include this information, prior to their publication on Southend Radio's website.

In relation to the size of the jackpot, Southend Radio explained that the original intention was to increase the prize value each day and this had been referred to in the terms and conditions. However, to "add to the impact and desirability of the prize", it later decided to add larger amounts periodically. On 1 February 2010, the jackpot was increased to £6,000.

Unfortunately, when amending the terms and conditions to reflect this change to the size of the jackpot, the original draft of the terms and conditions that did not contain the reference to the Adventure Radio Network was used in error. Therefore, the reference to the Adventure Radio Network did not feature in the published terms and conditions from 1 February 2010, until the broadcaster was made aware of the issue on 5 February 2010 when appropriate amendments were made.

Additionally, the broadcaster recognised that the reference to the daily accumulative nature of the jackpot prize in the terms and conditions was incorrect. This was also amended on 5 February 2010.

While Southend Radio accepted full responsibility for these administrative errors, it maintained it never had any intention to mislead nor did it consider that the errors resulted in any listener being disadvantaged. It added that in future, competition terms and conditions "will be proofed in weekly management meetings prior to being uploaded to websites".

Decision

A competition conducted across a number of stations will result in a greater audience size and therefore a greater potential number of competition entries. Ofcom considers this to be a significant condition that may influence a listener's decision to enter a competition. Ofcom's published guidance¹ on Rule 2.16 states that in the interest of fairness, "it has to be made clear that other services are participating. This should be done both on air and in any written rules, whenever the competition or its results are run."

Similarly, as is clear from Rule 2.15, a competition's rules should "be clear and appropriately made known".

In this case, Ofcom noted that several on-air promotions for the competition were broadcast which did not contain any reference to other Adventure Radio Network stations' participation. This element was also omitted from the published terms and conditions between 1 February and 5 February 2010.

Furthermore, while the on-air descriptions of the value of the jackpot on offer were accurate, the terms and conditions included an incorrect condition stating that the jackpot would increase daily when this was not, in fact, the case.

Therefore, Ofcom considered that the rules of this competition were not clear or appropriately made known to listeners, in breach of Rule 2.15.

¹ http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/section2_2009.pdf

It was a matter of concern to Ofcom that the competition had been running for approximately one month before the licensee's errors were drawn to its attention by means of the complaint to Ofcom.

Ofcom accepted that the broadcaster did not seek to mislead listeners and noted that as entries were either free or the price of a standard rate text message, the competition did not generate any revenue for the station. It also noted the remedial action undertaken by Southend Radio to ensure both the on-air descriptions and terms and conditions were accurate.

Nevertheless, Ofcom has made clear on numerous occasions that it expects broadcasters to exercise particular care when inviting audiences to enter competitions. Ofcom does not expect any future recurrence of such errors by Southend Radio.

Breach of Rule 2.15

In Breach

Mike James

Dee 106.3 (Chester), 19 January 2010, 10:00

Introduction

During Dee 106.3's mid-morning show, the presenter trailed and ran a listener competition to win pairs of tickets to the 'Ultimate Ladies Night' at a local nightclub called Level Two.

Both the trail and the competition itself featured the presenter in discussion with a DJ from the Level Two nightclub. In the trail for the competition, the DJ described the prize (by giving details of 'Ultimate Ladies Night'). Later in the programme, he read out the competition question that listeners were invited to answer and added:

"...Can I just mention about tickets, Mike? If people do want tickets, they can phone us on [telephone number] or they can have a look on our Facebook page, which is at [Facebook reference]..."

A listener was concerned that "an advertiser plugging his nightclub ... was supposed to be a competition for tickets and ended up as a live advertisement for his club."

The broadcaster said that Level Two had donated competition prizes (pairs of tickets) to Dee 106.3 but it had not sponsored the competition. However, the nightclub had just ended an advertising campaign on Dee 106.3.

Ofcom asked the broadcaster for its comments on the complainant's concern, with regard to the following Code rules:

- Rule 10.3 – "Products and services must not be promoted in programmes..."; and
- Rule 10.4 – "No undue prominence may be given in any programme to a product or service."

Response

Dee 106.3 said that it took its compliance responsibilities very seriously, adding that it had not intended to breach the Code and, before the broadcast, it had reminded the guest from Level Two not to refer on air to promotional material, such as ticket lines etc. The broadcaster apologised for featuring a representative of Level Two nightclub in the trail for the broadcast competition and the competition itself.

Dee 106.3 said that, having now further considered Ofcom's guidance to Section Ten of the Code, it had introduced the following measures to assist future compliance:

- Where possible, interviews were now pre-recorded so that any commercial messages included in such material could be separated from editorial in advance of broadcast;
- Programming that featured representatives of local businesses were now "focussed only on the editorially justifiable aspects...", referring only incidentally, if at all, to their businesses and/or brands; and

- Programme meetings with presenters were now concluded with reminders of the need to consider Code requirements at all times.

Decision

Ofcom noted that Dee 106.3 said it had reminded the interviewee featured in its mid-morning show not to refer on air to promotional material, such as ticket lines. Nevertheless, the representative of Level Two nightclub was permitted to do so, when he said:

“...Can I just mention about tickets, Mike? If people do want tickets [for the nightclub’s ‘Ultimate Ladies Night’], they can phone us on [telephone number] or they can have a look on our Facebook page, which is at [Facebook reference]...”

Level Two’s services were therefore promoted in the programme, in breach of Rule 10.3 of the Code.

Whether references to products or services in programming are unduly prominent (in breach of Rule 10.4 of the Code) is generally determined by the editorial justification for such references and the way in which they are broadcast. For example, where a listener competition prize has been donated, a passing credit to the donor is editorially justified and unlikely to give it undue prominence (e.g. “...courtesy of Y” or “...with special thanks to Y”).

In this instance, Ofcom noted that Level Two nightclub had recently completed an advertising campaign on Dee 106.3. Subsequently, this broadcast trail and competition in the mid-morning show featured discussions with a representative of the organisation donating the competition prize – a DJ from Level Two. This extended reference to the donor and its services appeared to have no editorial purpose other than to promote an advertiser, further to its recent campaign on Dee 106.3.

The programme gave undue prominence to Level Two and its services, in breach of Rule 10.4 of the Code.

Ofcom therefore welcomed the action taken by the broadcaster to avoid recurrence.

Breaches of Rules 10.3 and 10.4

In Breach

Sponsorship of Gareth Stewart's Afternoon Drive

Cool FM (Northern Ireland), 9 February 2010, 14:00

Introduction

A sponsorship credit for Norfolkline Irish Sea Ferry Services ("Norfolkline") stated:

"Cool FM Drivetime with Norfolkline. Sail to Liverpool from only twenty-nine ninety-nine return for a foot passenger. Book now at Norfolkline.com – conditions apply"

A listener was concerned that he was "unable to actually obtain the advertised fare of £29.99 return for a foot passenger between Belfast and Liverpool with Norfolkline."

Bauer Media ("Bauer"), which owns Cool FM, said that the sponsorship credit had been approved by the Radio Advertising Clearance Centre ("RACC") – the industry clearance body responsible for the approval of advertisement and sponsorship credit scripts prior to broadcast.

Rule 9.3 of the Code requires, among other things, that "Sponsorship on radio ... must comply with ... advertising content ... rules...".

Section 2 (General Rules) Rule 3(b) (Misleadingness) of the BCAP Radio Advertising Standards Code¹ ("BCAP Code") requires that "advertisements [and, therefore, sponsorship credits] must clarify any important limitations or qualifications, without which a misleading impression of a product or service might be given."

We therefore sought comments from Bauer, RACC and Norfolkline (the sponsor), with regard to the complainant's concern and these rules.

Response

Bauer reiterated that the sponsorship credit had been cleared for broadcast by RACC. It also provided a copy of the RACC-approved script and a statement from Norfolkline that detailed its £29.99 return fare offer and associated terms and conditions. The terms and conditions stated, among various other things that, "fuel surcharge applies – £8/€10 per adult, £1/€1 per child single leg." Bauer added that it had sent this material to RACC.

Norfolkline said that the substantiation sought by RACC had "contained all the terms and conditions that were pertinent to the fare, including a reference to the fuel surcharge". It added that the RACC had therefore advised it to note that "conditions apply" in the sponsorship credit. The sponsor added that it had "acted at all times in good faith with RACC and [had] never intended to mislead the general public on the prices offered..."

RACC said it had "received substantiation [from Norfolkline] that confirmed that 10% of the foot passenger return fares would be at the price quoted - £29.99." It added that, "although the substantiation letter also [referred] to a fuel surcharge, [it had]

¹ <http://bcap.org.uk/The-Codes/BCAP-Code.aspx>

understood this to be included in the base price given.” RACC assured Ofcom that, as it now appeared (from Norfolkline’s comments) that “the mandatory fuel surcharge was additional to the base price quoted, which the total quoted in the ad should have included”, it would “ensure in future that mandatory fuel surcharges are inclusive in the total price quoted in sponsorship credits.”

Decision

Broadcasters are reminded that the primary purpose of a radio sponsorship credit is to inform the listener of the sponsorship arrangement. Nevertheless, while a radio sponsorship credit should not sound like a full advertisement, it may not only identify the sponsor and the sponsored output but also contain a limited amount of advertising content. Radio advertising content and scheduling rules therefore apply. It is important, for example, that listeners are not misled by price claims.

Ofcom noted that, in this case, RACC had obtained confirmation from Norfolkline that 10% of foot passenger return fares would be priced at £29.99 per person, reflecting copy advice concerning price availability issued by the Committee of Advertising Practice².

Nevertheless, RACC had interpreted Norfolkline’s fuel surcharge, as reflected in its terms and conditions, as being included in the quoted foot passenger return fare of £29.99. Therefore the sponsor credit stated that return fares were available “*from only twenty-nine ninety-nine [i.e. £29.99] return for a foot passenger*”.

However, Ofcom noted that no return journeys were actually available at this price, as the fuel surcharge was an additional cost levied on all passengers.

We therefore welcomed RACC’s assurance that it would ensure in future that fuel surcharges were included in quoted prices.

Ofcom concluded that the complainant and other listeners had been misled, in breach of Section 2 (General Rules), Rule 3(b) of the BCAP Code and therefore Rule 9.3 of the Code.

Breach of Rule 9.3 of the Code

Breach of Section 2 (General Rules) Rule 3(b) (Misleadingness) of the BCAP Code

² Advice available at: <http://copyadvice.co.uk/Ad-Advice/Advice-Online-Database/Travel-Marketing-Availability.aspx>

In Breach

First Half Forum

Talksport (National), 7 March 2010, 14:23

Introduction

First Half Forum is a four minute feature that is broadcast during the half-time break in live football match coverage. It is sponsored by the internet betting exchange, Betfair.

During routine monitoring, Ofcom noted that the presenter interviewed a representative of the sponsor, who was introduced as “*Betfair’s voice of football betting...*” They discussed the latest odds available on various forthcoming football matches.

We sought Talksport’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

Talksport said that, other than in the opening sponsorship credit (“*First Half Forum on Talksport with Betfair – click betfair.com now for all the latest in-play football odds*”) and the introduction of the guest (“*Say good afternoon to Betfair’s voice of football betting, [name]*”), “there was no mention of Betfair either specifically or generically, nor was there any mention of [the guest] (other than his first name) or his job either specifically or generically.”

The broadcaster noted that the studio guest was “an acknowledged expert and former sports journalist.” It added that, while latest odds were discussed, “Betfair is not a bookmaker but a betting exchange. As such, Betfair does not set its own odds ... the odds are set by the punters who bet against each other and not against Betfair ... Consequently, the odds quoted ... [were] not Betfair odds ... but indications on the odds that may be available across a range of bookmakers.”

Talksport therefore considered that the content of the feature was editorially justified “as part and parcel of the football-driven show”, adding that “a betting expert would have been invited to be interviewed on the odds of forthcoming matches whether a sponsor was involved or not.” The broadcaster also considered that the sponsor had not influenced the content and/or scheduling of the programme in such a way as to impair Talksport’s editorial independence.

Decision

Broadcasters often use - in their programming - regular on-air experts from various organisations. This is a legitimate editorial technique. However, on occasions care may be needed to ensure that undue prominence is not given to the expert’s organisation (or product/service).

Further, if an organisation is the sponsor of the programming in which its credited representative is featured, the broadcast is most likely to breach Rule 9.5 of the Code, which permits only non-promotional references to the sponsor (and/or “its name, trademark, image, activities, services or products or to any of its other direct or indirect interests”) that are “editorially justified and incidental”. Irrespective of whether such a reference to the sponsor is considered non-promotional and editorially justified, it is most unlikely to be incidental.

In this case a representative of Betfair was featured in programming sponsored by Betfair. Ofcom does not consider that featuring a credited representative of Betfair was an incidental reference to the sponsor.

In addition, while Ofcom accepts that the odds provided in the broadcast by the sponsor’s representative were “not Betfair odds ... but indications on the odds that may be available across a range of bookmakers”, we consider that such information was an indirect interest of the sponsor. Latest indicative odds would have been valuable to any individual choosing to use Betfair’s betting exchange services, as “punters who bet against each other”. Ofcom therefore considers that the broadcast of these odds promoted an indirect interest of the sponsor and was likely to encourage listeners to use Betfair’s service.

The broadcast was therefore in breach of Rule 9.5 of the Code.

Breach of Rule 9.5

In Breach

Bible Medicine

Genesis TV, 4 January 2010, 19:30

Introduction

Genesis TV is a UK-based Christian channel that features a range of programmes with a religious theme.

On 4 January 2010, it broadcast *Bible Medicine*, a programme produced and presented by an academic named Dr. John Grinstein. In the programme Dr Grinstein presented his approach to the prevention and treatment of cancer, which was proposed as an alternative to invasive surgery or traditional medicine. Ofcom received a complaint that this programme provided advice “giving people false expectations about...health issues” and in particular “claim[ing] to cure cancer”.

Dr Grinstein named his approach GC100. GC100 is founded on the belief that cancer and other neurological conditions¹ can be prevented and cured by tackling the problem of DNA² deterioration, through the eating of specific fruits and vegetables that naturally prevent and inhibit DNA deterioration or repair existing DNA damage.

The programme consisted of two parts:

- the first was a 10 minute personal testimonial (“the Testimonial”) by the Greer family from North Carolina. It explained that the head of the family, Mr. Herschel Greer, had been diagnosed with cancer in February 2007. Since then the cancer had been treated with both chemotherapy and the GC100 approach, with varied results. However, the cancer was still present and had spread to Mr. Hershel Greer’s neck region. The family explained that after much prayer and thought, it had decided that it would use the GC100 approach instead of the “*more aggressive chemotherapy*” recommended by their doctors because they believed strongly that it is more effective.
- the second part was a 20 minute presentation (“the Presentation”) by Dr. Grinstein about the causes of cancer, the benefits of eating particular foods that research has found to prevent or repair DNA deterioration, and the benefits of the GC100 approach.

The programme contained numerous comments by the Greer family and Dr Grinstein about the benefits of using the GC100 approach. Some of these suggested that the GC100 approach could not merely help prevent or delay cancer, but cure it. All these comments were juxtaposed with statements about the ineffectiveness and negative side-effects of traditional medical treatments for cancer. In light of these, Ofcom sought the broadcaster’s comments in relation to Rule 2.1 of the Code. This states:

¹ Including Parkinson’s disease, Alzheimer’s and all “*neurodegenerative and degenerative conditions*”

² DNA is present in every living cell and controls heredity at the molecular level. DNA in human cells can become damaged or deteriorate over time. Sometimes this can lead to the creation of a cancerous tumour.

“Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material”.

Response

In response to the complaint, Genesis TV said that Dr Grinstein is a “serious academic and is not the CEO/sales person of a Company that is seeking to promote a product in order to make money”.

The broadcaster provided Ofcom with information about Dr. Grinstein’s qualifications and also a package of information put together by Dr. Grinstein himself. This package contained research reports and selected articles from peer reviewed scientific publications.

In relation to Rule 2.1, Genesis TV said that Dr. Grinstein, through his research, “has developed his belief and thinking on the treatment of cancer by alternative means to invasive surgery and treatment”. According to the broadcaster, the term GC100 relates to “a change of lifestyle and the eating of natural ingredients”. In addition, Dr. Grinstein was advocating an approach to living, based on his research and “backed up by statements from leading universities and medical journals from many different countries around the world”, on “how to avoid developing cancer”. Genesis TV maintained that Dr. Grinstein “is very thorough in his research [and in] keeping with the Ofcom Code he seeks to be factual and not misleading in any statement that he makes to the public”. Therefore, according to the broadcaster the programme was not in breach of Rule 2.1 of the Code.

Decision

The coverage of scientific and medical topics will be a matter that will be of interest to audiences. As a result, we recognise that broadcasters will want the editorial freedom to explore and analyse scientific evidence surrounding particular treatments and to make this information available to their viewers and listeners. However, we also recognise that licensees must take special care and act responsibly when broadcasting discussions of treatments for serious or potentially terminal medical conditions because of the harm that may result.

In this case, the programme consisted of two parts: the 10 minute Testimonial from a family, one of whose members had used the GC100 approach; and the 20 minute Presentation, in which Dr. Grinstein summarised a range of academic studies which in his opinion, showed the role that eating fruit and vegetables can have in repairing DNA, and thus ensuring that “*a cancer cell can become a normal cell*”.

We considered whether the programme presented any potential issues under Rule 2.1 of the Code. We noted that during the programme there were references to: the GC100 approach, and scientific studies that seem to support the premise that it is built upon, namely, that it is possible that the consumption of fruit and vegetables can help to repair cell DNA and therefore “*a cancer cell can become a normal cell*”.

Ofcom considered that referring to the lifestyle approach (GC100), based as it is on certain fruit and vegetables, is not in itself harmful. Nor is it necessarily harmful for a broadcaster to refer to and explain research which may show that eating particular fruits and vegetables may help repair and/or prevent DNA damage. Whilst the reporting and discussion of scientific research in support of particular scientific theories may be controversial, broadcasters should not be prevented from discussing

such theories, as long as they comply with the Code. To do otherwise would be an unacceptable infringement of the broadcaster's right to freedom of expression and the audience's right to receive information and ideas³. In this regard we note that Section 3 of the Communications Act 2003 states that Ofcom should set standards on harm and offence in a way which best guarantees freedom of expression.

We also recognise that in discussing established medical treatments, such as chemotherapy, it is a legitimate editorial decision to highlight the potential detrimental effects of such treatments e.g. the strain that radiation, when delivered through radiotherapy, has on the body. For example, at one point Christie Greer said:

"He had a sister that died of bone cancer, and she went through a lot of sickness from chemo and radiation. And he's seen what she went through and her husband also went through and my Mom went through. And all of those folks took the radiation, took the chemo. It just prolongs life, but that quality of life is not good."

However, during the programme Ofcom also noted that there were several statements that were potentially harmful in two respects.

Firstly, we noted that there were statements which seemed to suggest that the GC100 approach might be preferable to established medical treatments for cancer, such as chemotherapy. For example, during the Testimonial Christie Greer said the following:

"[Herschel Greer] took one brief round of chemotherapy and responded well to that...After taking the GC product, the spleen actually shrunk and the size went down to 12.7 centimetres in February of 2008...Because of the good health that Herschel had enjoyed, he stopped the GC100 product in February 2009. Unfortunately, by June of 2009, he had noticed some nodules behind his neck region, and went back to his oncologist...which showed that the tumours had grown at that time. They did recommend again starting chemotherapy, which he did, and he responded with moderate effects; he had some growth in tumours and some shrinking. And they're now recommending more aggressive chemotherapy, which, with much thought and prayer, we have decided to try the GC100 product again because he had such good results before. We do not regret not continuing on that".

"We just wanted to thank you for your time watching us today, and to hold us in your prayers, and that we hope that we are a product of curing cancer through a more natural cause and we want to thank Dr Grinstein for his time and efforts and thank you for...GC 100."

In addition, during the Presentation, Dr. Grinstein made some comments suggesting that the GC100 approach could cure cancer. For example he said:

"And also, if you induce these kinds of molecules to work hard and you prepare concentrates and ways to enhance the ingestion of these molecules, you can even cure cancer by enhancing the DNA repair system".

"So, it's an easy and an elegant way to realise if something that you are eating will cause your DNA to suffer less damage. So if you have less DNA damage you get, of course, less [inaudible] to develop cancer and neurological conditions".

³ As enshrined in Article 10 of the European Convention on Human Rights.

“We...[are] just struggling to maintain this the only medicinal extract⁴ that is able to repair DNA produced today in the world. We are the only one producing. Why there are not another 100,000 people producing similar medicinal extracts and curing all the cancers of the world! So we just have to pray that the people on this group of viewers have this connection with the creator, the Heaven above Creator, and then we need to pray that something will come one day soon in our lifetimes to change this terrific, tremendous error in medicine today.”

Second, we noted that there were statements that could be construed as referring to traditional medical cancer treatments in negative terms and as being uniformly ineffective, and could be construed as either directly or indirectly encouraging viewers to stop using traditional medical for serious medical conditions such as cancer. For example, during the Testimonial, Barry Greer (son of Herschel Greer), said:

“It’s not the diseases that’s killing a lot of people, it’s the medicines that our doctors are prescribing to treat them that are killing the people. My Mom died of brain cancer. It wasn’t the brain cancer that killed her. The Decadron, some high-powered steroids, killed her before the cancer did. If we could have gotten her on some natural medicines, remedies, before the end, she may be here today. She passed away two years ago.”

In addition, during the Presentation, Dr. Grinstein said:

“So I say it’s the people who are dying because of this condition that should take some action, because they are the ones that are given, you know, useless drugs while this beneficial treatment is at hand now for everyone to live and not to die!”

Ofcom notes that official Government health advice advocates the consumption of fruit and vegetables to help prevent cancer.⁵ However, we considered that, overall, the programme made unsubstantiated and potentially dangerous medical claims regarding the efficacy of the GC100 approach in relation to other established anti-cancer treatments. In particular, the statements endorsing the use of the GC100 approach to the detriment of established forms of medical treatment, and the cumulative effect of the views espoused in both the Testimonial and Presentation, created a potential risk of viewers with treatable cancers from dispensing with orthodox medical treatment in favour of the GC100 approach. Ofcom considered that this resulted in inadequate protection being provided to viewers against this risk and so a failure to apply generally accepted standards. We considered that the advocacy of GC100 as an anti-carcinogenic strategy had a clear potential to cause some members of the audience – especially vulnerable ones – very serious (and possibly

⁴ There were some suggestions in the programme – such as in this extract – that Dr Grinstein had in the past produced a medicinal extract based on specific fruit and vegetables based on the GC100 approach. Comments from the broadcaster and research by Ofcom appear to confirm however that such an extract is no longer being produced or available.

⁵For example, see the NHS Choices website (<http://www.nhs.uk/Conditions/Cancer/Pages/Prevention.aspx>), which states: “There is no single food that will dramatically reduce, or increase, your risk of developing cancer. It is the overall content of your diet that is important, particularly your consumption of fruit and vegetables. In fact, many experts believe that after quitting smoking, eating regular portions of fruit and vegetables is the second best way to prevent cancer”.

life-threatening) harm. The programme was therefore in breach of Rule 2.1 of the Code.

Ofcom takes very seriously the issue of broadcasters providing content that dispenses potentially misleading advice on serious illnesses, and in particular cancer. This partly reflects the fact that legislation⁶ exists that makes it a criminal offence for anyone to publish an “advertisement” offering to treat any person with cancer or prescribe any remedy or to give any advice in connection with the treatment of cancer. Parliament has therefore made clear that any public “advertisement” or advice on how to treat cancer must be very carefully regulated in the public interest.

In considering the current case, Ofcom is aware of the need to take account of the individual circumstances. There is a spectrum of advice associated with broadcasters allowing their programmes to be used as a vehicle to give potentially harmful medical information to their viewers or listeners. Advice can cover how to help prevent, delay or cure illnesses. The purpose of advice can also vary widely: a charlatan for example whose intention is to hoodwink the public for profit clearly has different motives to a practitioner of alternative medicine who may genuinely believe in the efficacy of his remedies.

We also noted previous decisions⁷ of Ofcom’s Content Sanctions Committee (“the Committee”), where broadcasters received statutory sanctions for broadcasting misleading health advice in relation to serious illnesses, and in particular cancer. However, on balance Ofcom concluded the current case was sufficiently different taking account of all the circumstances from these previous sanctions decisions that it did not merit consideration for a sanction. These circumstances included for example that: the two sanctions decisions dealt with alternative medical practitioners giving advice during interviews, without being backed up by any reputable scientific evidence; and these practitioners gave their advice as part of promoting their commercial services or products on commercial channels. In comparison, the present case involved a programme broadcast on a religious channel which principally included an academic (Dr. Grinstein) outlining a range of academic articles that appeared to support his views on what he considered to be the anti-carcinogenic properties of fruit and vegetables. We recognise these views have a measure of support from the health authorities in the UK. Further, there is no evidence that this item on the programme or Dr Grinstein’s advice were motivated by a desire to promote a particular commercial product or service.

Although, on balance, we did not recommend this case for consideration of a statutory sanction, we put Genesis TV on notice that we may consider recommending any future similar breach for consideration of a statutory sanction.

Broadcasters are of course able to transmit discussions or references to ‘alternative’ forms of treatment or palliative techniques in relation to serious medical conditions. However, if broadcasters do refer to such matters, they must be responsible when

⁶ See section 4 of the Cancer Act 1939. An “advertisement” is defined very broadly as “any announcement made orally or by any means of producing or transmitting sounds”.

⁷ See Sanctions decisions against: ARY Digital UK Limited concerning its channel ARY Digital, dated 1 November 2007, http://www.ofcom.org.uk/tv/obb/ocsc_adjud/ary_digital.pdf, (“the ARY Digital Sanction Decision”); and DM Digital Television Limited concerning its channel DM Digital, dated 4 December 2008, http://www.ofcom.org.uk/tv/obb/ocsc_adjud/dmdigital.pdf, (“the DM Digital Sanction Decision”).

transmitting such potentially harmful material. In particular, broadcasters must provide adequate context, such as appropriate references to commonly accepted medical advice in such areas, to ensure members of the public are adequately protected.

Breach of Rule 2.1

In Breach

News

Al Jazeera, 9 February 2010, 21:04

Introduction

Al Jazeera is an international news channel, originating in the Middle-East but with different language versions being broadcast around the world. Ofcom received a complaint about the English-language version of Al Jazeera broadcast on the Sky platform and licensed by Ofcom.

The complainant objected to footage being shown in a news report on the channel concerning recent events in Nigeria. According to the complainant, in a news item, a number of people appeared to be shown being forced to lie down and then being shot dead by Nigerian security forces.

The report concerned the aftermath of hostilities between Nigerian police forces and members of a Muslim separatist group Boko Haram. In introducing the report, the studio presenter said:

“Pictures have emerged which appear to show Nigerian police carrying out extra-judicial killings... We must warn you that the images in Mike Hannah’s report are very disturbing.”

The footage included images of seven men, in three separate groups (one group of four, a group of two, and then an individual), being walked forward onto a road. All three sets of men were forced to lie face down on the ground. They were then shown being shot a number of times in the back of their bodies.

In total, the sequences of the shootings lasted just under a minute. Several of the men who were shot were shown twitching after the first bullets entered their bodies. The second group (of two men) who were executed were shown being made to walk forward on their crutches prior to being shot. Commentary over the footage provided translations of some of the things being said by the Nigerian security forces carrying out the killings, including:

“One of the officers called out: ‘Shoot him in the chest, not the head. I want his hat’ ”.

“This man is told: ‘Sit properly, we want to take your picture’ ”.

Ofcom asked Al Jazeera for its comments under Rule 2.3 (offensive material must be justified by the context) of the Code.

Response

Al Jazeera apologised for causing any offence but stated its belief that the inclusion of the footage in the report was editorially justified. The broadcaster said that the report concerned extra-judicial killings in Northern Nigeria, and that given the strong nature of the footage, the decision to broadcast this content “was not taken lightly or without due consideration of our internal editorial guidelines and our obligations under...the Code, both of which we take extremely seriously”.

In its response, Al Jazeera outlined the steps that it had taken upon receiving the material, to decide whether, and in what manner, to broadcast it, including senior editorial staff and experts in Nigerian politics viewing the content.

The broadcaster said that the events depicted in the footage indicated that “a clear crime and human rights violations had occurred”, and therefore merited a full report. According to Al Jazeera, there was “a vigorous inclusive discussion among senior editorial staff in which it was decided that, on balance taking into account the Channel’s obligations under the Code and to our audience, the gravity of the crime and the public interest in accurate and full reporting warranted showing the point of death images”.

In reaching its decision to broadcast the footage, Al Jazeera said that it believed its approach was “broadly consistent with the approach Ofcom has previously viewed as compliant with the Code” in relation to coverage of previous news stories, such as the 7/7 London bombings (“the 7/7 Finding”)¹ and the execution of Saddam Hussein (“the Saddam Hussein Finding”)².

In particular, the broadcaster pointed to what it believed were contextual factors which justified the broadcast of the material, including that:

- the material was needed within the context of an in-depth report in order to “give weight and proof to the to the (disputed) claims of extra-judicial killings in Northern Nigeria by the Nigerian police and army...[and] to fully convey the cold-blooded nature of the actions by the police and army”;
- it was in the public interest to bring the footage to wider attention, and, according to the broadcaster, “it would not have been possible to present to viewers the true nature of the actions of the police and army officers without the inclusion of the [footage]”;
- the report of which the footage was part was presented in a “measured, balanced and editorially considered package” in line with the Channel’s Code of Ethics and internal editorial guidelines;
- according to the broadcaster the footage depicting the “moment of death” sequence: was only shown once within the report; was not presented in a gratuitous or sensationalised manner; and was sufficiently limited within the five-minute report, which placed the killings featured in the Footage in context; and
- the broadcast of the footage was in line with audience expectations for a 24 hour rolling news network.

In summary, the broadcaster stated that: “the material showing the actual moment of death was presented in an editorially justified manner”.

Decision

¹ See Resolved Finding on *Coverage of London terrorist attacks*, Ofcom Broadcast Bulletin 44, dated 26 September 2005, http://www.ofcom.org.uk/tv/obb/prog_cb/obb44/.

² See Not in Breach Finding on *Coverage of the Execution of Saddam Hussein*, Ofcom Broadcast Bulletin 84, dated 8 May 2007, http://www.ofcom.org.uk/tv/obb/prog_cb/obb84/.

We carefully reviewed the material complained of as described above. The images were certainly extremely disturbing and graphic, showing at length the summary execution of a number of men. The murders were cold-blooded and ruthless. It is important that the news is not sanitised and broadcasters are free to report the reality of war and other atrocities – in line with the broadcaster's and the audience right to freedom of expression. The Code does not prohibit the broadcast of offensive or challenging material but requires that any potential offence must be justified by the context. However, in line with the Communications Act 2003 and the Code when transmitting such footage, broadcasters must also ensure that it applies generally accepted standards.

There is no absolute prohibition, in the Code, on showing images depicting 'point of death' – since there may be occasions when such footage can be editorially justified. However, such images do require exceptional circumstances and must be treated with extreme care and should always be used in context. The stronger the images the greater the editorial justification is required. Without such justification, material can appear to be offensive.

Ofcom therefore considered the context in which this material was transmitted. First, this item was clearly a matter of significant public interest. It was reported in a serious manner and was not sensationalised. The footage itself was documentary evidence demonstrating alleged human rights crimes and atrocities. It was transmitted on a news channel where an audience, likely to be predominantly adult and self-selecting, would expect material to be challenging. Further there was a warning given by the news presenter just before the report.

However, the material was transmitted just after the watershed, when viewers would not expect to see the most graphic material. The images showed the callous killing of a group of men from the very moment they were shepherded onto a public highway and told to lie down in order to be executed. The three sets of men were then shot a number of times in their backs. The cumulative effect of the detailed and relatively close-up images of the shootings, contained within the footage, was clearly extremely disturbing. In particular, we considered that there were a number of factors that heightened the likely level of offence in this case. These included: the length of the footage; the fact that it consisted of long, unedited shots; the actual act of execution and the immediate effects of the bullets entering the men's bodies were shown at relatively close range; the ruthless behaviour of the Nigerian security forces undertaking the shootings; and the fact that none of the victims was shown resisting his captors (and two of them were on crutches).

We considered also that the sequence of images included in the footage could be differentiated on the facts from the two Ofcom Findings cited by the broadcaster. Whilst Al Jazeera acknowledged the Footage included images of 'point of death', we noted that in the case of the 7/7 Finding, a victim of the 7/7 bombings featured in a report by different news programmes on different channels was shown clearly seriously injured, but he was not shown at the point of death. In addition, in the case of the Saddam Hussein Finding we noted that "the footage was curtailed to events surrounding the execution [of Saddam Hussein and] the moment of death was never shown".

In addition, we also considered a further decision³ not referred to by the licensee (“the Bulldozer Finding”) involving footage shown after 22:00 of a Palestinian man in Jerusalem driving a bulldozer after he had killed three people. The footage in that case showed distant images of the driver of the bulldozer at the moment of him being shot dead by Israeli security forces. Further it was not prolonged.

We recognise there might be at times editorial justification for particularly disturbing images being shown to illustrate serious news stories, including the point of death. In this case, we considered that Al Jazeera was intending to broadcast journalism with a serious purpose that included footage of events with a strong public interest. There was no intention to cause offence unnecessarily. However, despite this serious editorial approach, we considered that the sheer length and graphic nature of the images (as described above) went beyond generally accepted standards and could not be sufficiently justified by the context. In particular, while we appreciate that the editorial narrative may have required a certain amount of documentary evidence and actuality, the manner it was presented went beyond generally accepted standards in this case. We note that there are a range of techniques that exist that broadcasters can employ, when necessary, which can ensure that an appropriate level of challenging material is broadcast to verify legitimate stories but also ensure compliance with the Code.

Breach of Rule 2.3

³ See Resolved Finding on *BBC News*, Ofcom Broadcast Bulletin 117, dated 15 September 2008, http://www.ofcom.org.uk/tv/obb/prog_cb/obb117/.

In Breach

Bath FM and 3TR FM

February 2010

Introduction

Ofcom has a general statutory duty to ensure “a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests.” For local commercial radio we also have a specific duty to secure a range and diversity of services and to ensure that each station maintains a specific character. One way Ofcom attempts to secure these benefits to listeners is to require our radio licensees to broadcast in accordance with their published Format. Each station’s Format includes a description of the output that the licensee must provide, based on the promises made in its original application to win the licence. Formats may be varied over time, but only with the approval of Ofcom.

In January 2010, Ofcom received a complaint that the stations Bath FM and 3TR FM were not broadcasting in accordance with their respective Formats.

The licences for Bath FM and 3TR FM are owned by Bath Radio Ltd and Three Towns Radio Ltd respectively. Bath Radio Ltd and Three Town Radio Ltd (“the Licensees”) are in turn owned by the company South West Radio Ltd. South West Radio Ltd and the Licensees are all in administration.

In order to assess the complaint, on 2 February 2010 Ofcom requested from the Licensees recordings of output for specific days in January 2010. This was to be provided by 5pm on 6 February 2010. The Licensees failed to supply the requested recordings by this deadline.

Licence Condition 8(2)(b) contained in Part 2 of the Schedule of the local commercial radio licences held by the Licensees states:

“The Licensee shall:

- (a) make and retain, for a period of 42 days from the date of its inclusion therein, a recording of every programme included in the Licensed Service together with regular time reference checks.
- (b) at the request of Ofcom forthwith produce to Ofcom any such recording for examination and reproduction.”

Ofcom wrote to the Licensees asking for their comments in relation to a possible breach of Condition 8(2)(b) for failure to provide the recordings requested by Ofcom.

Response

The Licensees did not make any representations to Ofcom in relation to Condition 8(2)(b).

Decision

The failure by the Licensees to supply “forthwith” the recordings when requested by Ofcom is a serious and significant breach of Condition 8(2)(b) of their licences. This breach will be held on record.

Breach of Licence Condition 8(2)(b) contained in Part 2 of the Schedule to the Bath local commercial radio licence AL248 by Bath Radio Ltd.

Breach of Licence Condition 8(2)(b) contained in Part 2 of the Schedule to the Warminster local commercial radio licence AL268 by Three Towns Radio Ltd.

Not in Breach

Afternoon Live

Sky News, 3 February 2010, 15:30

Introduction

Afternoon Live is a live rolling news programme with a focus on the human interest angle of news stories. This programme included a live interview by presenter Kay Burley of the pop singer Peter Andre. The interview took place on the day it was announced that the singer's former wife, and mother of his children, Katie Price, had married her partner Alex Reid.

Kay Burley explained to viewers at the start of the interview that Peter Andre had been booked to come onto the programme a week earlier to discuss his new album. However, the presenter introduced the interview by saying they would "talk about the [Katie Price/Alex Reid] wedding anyway". She then proceeded to ask Peter Andre questions about the wedding and how that might change the childcare arrangements for his children. The presenter commented that Peter Andre was responding cautiously to the questions. Kay Burley then stated that Peter Andre had been "pre-warned" that the programme had earlier interviewed the father of Katie Price's first child, footballer Dwight Yorke. A clip from that interview was played in which Dwight Yorke criticised Peter Andre's interest in adopting Dwight Yorke's son by Katie Price.

Following the clip Peter Andre responded angrily to the criticisms made about him by Dwight Yorke. Kay Burley said she wanted to show Mr Andre the clip "*because we were wondering how you might feel if Alex Reid said he wanted to adopt your kids*". Peter Andre, who then appeared visibly upset, replied that he did not wish to talk about the issue, explained that he was not expecting the comments from Mr Yorke, despite being pre-warned it would be shown, and asked for the interview to be concluded.

Ofcom received 881 complaints from viewers who expressed concern about the way in which Kay Burley conducted the interview. The majority of complainants were concerned by the intrusive manner in which Peter Andre was interviewed by the presenter. They believed that the line of questioning about his personal life had made him distressed. In effect, these complaints appeared to have been complaints of unfair treatment or unwarranted infringement of privacy made on Peter Andre's behalf. Other complainants suggested that Kay Burley was bullying and intimidating; and that the interview was upsetting and offensive to watch given the obvious distress it caused Peter Andre.

Decision

Sections 7 and 8: Fairness and Privacy

The Code contains rules to protect people participating in programmes from unfair treatment and unwarranted infringements of privacy. These are set out in Sections 7 and 8 of the Code. However, Ofcom will normally only consider complaints of unfair treatment or unwarranted infringement if they are made by "the person affected" – that is the individual or organisation who believes that they themselves have been treated unfairly or to have had their privacy infringed.

In this case, neither Peter Andre, nor anyone authorised to act on his behalf, made a complaint of unfair treatment or unwarranted infringement of privacy to Ofcom. There were also no exceptional circumstances which required Ofcom to consider fairness or privacy issues in this case in the absence of such a complaint.

Ofcom, however, notes from the substantial volume of complaints received that a number of viewers were concerned about the conduct of the interview on Peter Andre's behalf and found it offensive. Therefore, Ofcom considered the material with reference to Rule 2.3 of the Code.

Rule 2.3: Offence

Rule 2.3 requires that, in applying generally accepted standards, broadcasters must ensure that material which may cause offence must be justified by the context. Such material includes humiliation, distress and violation of human dignity. Context covers a variety of factors such as the editorial content of the programme, the degree of offence likely to be caused, and audience expectations.

First we considered complaints that Kay Burley was bullying and intimidating and that the interview was upsetting and offensive to watch due to the obvious distress it caused Peter Andre.

Ofcom reviewed whether the language used by the presenter and the manner in which the presenter behaved towards their guest had the potential to cause offence to viewers. Next, Ofcom assessed whether the material was appropriately handled by the broadcaster so as to ensure that any potential offence was justified by the context.

The interview was part of the *Afternoon Live* programme which is broadcast on a dedicated news channel and combines rolling news coverage with live studio interviews which have a human interest angle. In Ofcom's opinion, it was in keeping with the established editorial line of the programme for the presenter to ask Peter Andre questions about the new marriage of his former wife given that it was a major news story on that day. Further, it was understandable that the presenter focussed on the human interest angle of the wedding by asking Peter Andre for his reaction, and how it would impact on their children. In Ofcom's view, the audience could therefore reasonably have expected the presenter to ask him about the wedding, and the implications of it, given that the interview was taking place on a rolling news programme on the same day that the wedding featured as a major news item.

Although Peter Andre had chosen to appear on the programme to discuss his latest album and was not originally invited on the programme to answer specific questions about his former wife's wedding and his children, he made clear that he had been made aware of the wedding the evening before. Sky News has also informed Ofcom that Kay Burley consulted Peter Andre prior to the interview and told him that he would be asked questions about the wedding and related issues. He therefore knew that the wedding had taken place, was a major news story, and that he would be asked questions about it when he agreed to proceed with the interview.

Ofcom then considered (assessing the language and approach of the presenter) whether the interview style and line of questioning was likely to have been perceived as bullying and intimidating and therefore, in the absence of appropriate context, beyond the expectations of the audience. Ofcom noted that Peter Andre was clearly sensitive to questions about his children and told Kay Burley at several points during the interview when he did not wish to be drawn into a response. For example, at the start of the interview he said he would not discuss the care arrangements for his

children for *“legal reasons.”* Later when asked about the care of his children following the remarriage, he said *“I don’t want to talk about this, ok”* and he made the decision to stop the interview and communicated this to the presenter by saying, *“I’d rather just stop this”*.

Ofcom acknowledges viewers’ concerns that Kay Burley’s interview style was persistent and probing. This was generally in response to Peter Andre choosing not to reply to her questions. In Ofcom’s view, however, she remained overall measured in her tone throughout and did not put inappropriate pressure on Peter Andre for a response. She also expressed concern about his well being and apologised for any upset the broadcast may have generated. Ofcom also notes that although he appeared upset to some extent by the style of interviewing, Peter Andre is a well known professional singer with considerable experience of the media, who had agreed to appear on the programme to promote his album knowing that the wedding of his former wife was a topical news story. Overall, therefore, we concluded that the style of interview did not breach generally accepted standards.

Secondly, Ofcom looked at the specific lines of the questioning to determine whether or not they were of such a personal and private nature as to be unduly intrusive and a violation of Mr Andre’s human dignity, and therefore offensive to viewers.

Kay Burley referred to comments made about Peter Andre by Dwight Yorke in an earlier interview on Sky News, and said Dwight Yorke *“...was talking about when you [Peter Andre] said you wanted to adopt Harvey”* [Dwight Yorke’s son by Katie Price]. Peter Andre replied that he had not seen the interview. The Dwight Yorke clip was then broadcast and his critical comments repeated.

In Ofcom’s view, Kay Burley therefore informed Peter Andre about the nature of Dwight Yorke’s comments before they were re-broadcast and the presenter sought his response. Further, although Peter Andre had not previously seen the Dwight Yorke/Sky News interview, we note that these critical comments were already in the public domain. Regarding questions about his marriage to, and his children by, Katie Price, Ofcom noted that Peter Andre had previously talked candidly and frequently in public (including in television programmes) about his relationship with his former wife and his children. Therefore the subject of his family and his marriage breakdown has been previously brought to public attention on several occasions and it would not in Ofcom’s opinion have exceeded viewer expectations for questions on these subjects to be put to him in the context of a programme with a populist news agenda.

In conclusion, taking all the circumstances into account, Ofcom considered that in the context of a news programme which focuses on the human interest angle the broadcaster applied generally accepted standards to the interview with Peter Andre. There was no breach of Rule 2.3 of the Code. Kay Burley’s approach was persistent and probing, but in Ofcom’s view it could not reasonably be described as bullying and intimidating.

Not in breach of Rule 2.3

Fairness and Privacy Cases

Upheld

Complaint by Mr David Edwards on behalf of Mrs Lisa Edwards

EastEnders, BBC1 (repeated on BBC3), 7 September 2009

Summary: Ofcom has upheld this complaint of unwarranted infringement of privacy made by Mr David Edwards on behalf of Mrs Lisa Edwards.

In an episode of *EastEnders*, Ricky received a text message from his ex-wife, Sam, who had been on the run in Brazil. A close up shot of Ricky's mobile telephone showing Sam's message was broadcast. Immediately above her message, two further messages were visible, along with the mobile telephone number they were from. This number was seen on screen for approximately four seconds. The telephone number shown was that of Mrs Edwards' business mobile telephone.

In summary, Ofcom found that Mrs Edwards would not have expected her business mobile telephone number to appear on screen during an episode of a soap opera. In the absence of information about the extent to which Mrs Edwards had made her number publicly available at the time of the broadcast and in the absence of any justification for its inclusion, Ofcom found that the footage was an unwarranted infringement of Mrs Edwards' privacy.

Introduction

On 7 September 2009, BBC1 broadcast an episode of its regular soap opera, *EastEnders*. In this episode Sam, Ricky's ex-wife, arrived in Albert Square unexpectedly, having been "on the run" in Brazil. Surprised by her visit and wary that she may be re-arrested after being seen by regulars drinking in the Queen Vic, some members of her family pretended that she had flown back to Brazil that evening. However, viewers were made aware that this was a "cover up" when Ricky was shown reading a text message from Sam, indicating that she was still in the country.

To explain this part of the storyline, a close up shot of Ricky's mobile telephone showing the text message from Sam was broadcast. Immediately above this text message the first parts of two further messages were visible, along with the mobile telephone number they were from. Ricky's phone was seen on screen for approximately four seconds. The telephone number shown was that of Mrs Lisa Edwards' business mobile telephone.

The Complaint

Mrs Edwards' case

In summary, Mr Edwards complained on behalf of Mrs Edwards that her privacy was unwarrantably infringed in the programme as broadcast in that her business mobile telephone number was broadcast in close up as part of one of the programme's storylines, when Ricky's mobile telephone displayed Mrs Edward's business mobile number alongside two different text messages that she had previously sent to two clients.

By way of background, this had led to a series of unwanted and abusive telephone calls and texts being received by Mrs Edwards, further added to after the repeat broadcast of the programme later that evening on BBC3.

The BBC's case

The BBC said that the on screen appearance of the mobile telephone number was an error, and that, whatever the circumstances that led to this number being in the *EastEnders* prop phone in question, it should not have been broadcast. The BBC had apologised to Mrs Edwards orally and in writing for this error.

The BBC said that the programme team had tried to find out how the number came to be in one of the programme's prop phones, but that they did not have the information needed to provide an explanation with any certainty. They did not have access to itemised billing for the number and so could not eliminate the possibility that the *EastEnders* prop phone was dialled from that number, for example if Mr or Mrs Edwards had misdialled a number similar to that of the prop phone. Nor could the programme makers establish whether there was a network fault which meant that a call could have been misdirected to the prop phone number, as the telephone company in question would not discuss its customers' accounts with third parties.

The BBC said that on the afternoon of 8 September 2009 Mrs Edwards told a member of BBC staff that she had spoken to The Sun newspaper. The BBC issued an official apology to Mrs Edwards in response to enquiries from The Sun newspaper, which published an article the following morning. The BBC said that when one of the *EastEnders* prop phone numbers was displayed on screen a number of viewers invariably called it, but that this was never more than a few dozen people. The BBC said that the 2,800 texts Mr Edwards said had been received could be partly explained by the inclusion of a screen grab of the phone, clearly showing the number, in The Sun's report on the story (published on 9 September).

The BBC said that the *EastEnders* team was alert to issues in connection with the appearance of mobile phone numbers on screen and that there were procedures in place to guard against any untoward consequences of showing them. The incident involving Mrs Edwards had resulted in the production team revising its record-keeping in relation to the purchase, use and disposal of sim cards to enable more effective data retrieval. In order to safeguard against any non-production number appearing on screen in the future, the production team now routinely cleared all stored numbers from all phones during the preparation period for each episode and phones were rechecked immediately before their use on set to eliminate any numbers that had appeared since they were cleared.

The BBC said that, without sight of Mr and Mrs Edwards' itemised bill for the period in question, and in the absence of any information from their mobile telephone provider, it was not possible to shed any further light on how the situation could have arisen. However, with reference to Mr Edwards' point that the phone displayed two different messages sent to two different clients, the BBC said that it was improbable that two different numbers would be misdialled with the same result. Nevertheless, it should have been noticed that the display on Ricky's phone was of a number from which the production team could not have sent messages, and the BBC very much regretted that this was not noticed.

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.

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

Ofcom considered the complaint that Mrs Edwards' privacy was unwarrantably infringed in the programme as broadcast in that her mobile telephone number was broadcast in close up as part of one of the programme's storylines.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing right of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies 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 Mrs Edwards' privacy was unwarrantably infringed in the programme, Ofcom first considered the extent to which Mrs Edwards could reasonably have expected that the information would not be disclosed without her prior consent.

In this case, Mrs Edwards' telephone number was broadcast without her prior knowledge or consent. Her number was clearly visible on screen for approximately four seconds. Her number was accompanied on screen by the first lines of two text messages. One of the messages said *"Hi babe phoning for huge"* and the other said *"Hi babe got your facial b"*.

Ofcom noted that neither Mr and Mrs Edwards nor the BBC had been able to explain how Mrs Edwards' telephone number and parts of the two messages had appeared on screen on Ricky's mobile telephone. Ofcom also noted that the BBC had apologised to Mrs Edwards and that the programme team had made changes to its procedures relating to the use of telephones as a result of this incident.

Ofcom considered that Mrs Edwards would have had no reason to expect that her mobile telephone number would appear on screen during an episode of a soap opera. Ofcom takes the view that normally a mobile telephone number, which is unlikely to be readily accessible to the public, would be understood to be personal information which the holder decides to disclose or not disclose as they see fit.

In this case, the number was for Mrs Edwards' business mobile telephone rather than her personal mobile telephone. It is likely that there would be a greater expectation of privacy in relation to a personal mobile telephone number and a lower expectation for a business or work number. Although the extent to which a business or work number would be considered to be private would depend on the extent to which the number was already in the public domain and the individual circumstances of each case. In this case, Ofcom had no information suggesting that Mrs Edwards made her business telephone number widely available to the public, prior to the broadcast. Ofcom did note that Mrs Edwards' telephone number appeared in The Sun newspaper, together with her name and a photograph of her, after the broadcast. However, this publication was after the broadcast and therefore could not impact upon her expectation of privacy at the time of broadcast.

Ofcom considered the broadcaster's right to broadcast Mrs Edward's business mobile telephone number in the programme, noting that the BBC acknowledged that Mrs Edwards' telephone number was shown in error and did not suggest that there was any justification for its inclusion. In all the circumstances, Ofcom did not consider that there was any justification for broadcasting the information.

Ofcom therefore concluded that Mrs Edwards' privacy was unwarrantably infringed.

Accordingly Ofcom has upheld Mrs Edwards' complaint of unwarranted infringement of privacy in broadcast of the programme.

Other Programmes Not in Breach

Up to 5 April 2010

Programme	Transmission Date	Broadcaster	Categories	Number of complaints
Advertising	n/a	The Africa Channel	Advertising Scheduling	1
Advertising	n/a	Fitness TV	Advertising Scheduling	1
Advertising	n/a	VH1	Advertising Scheduling	1
Advertising	n/a	Wedding TV	Advertising Scheduling	1
Advertising	n/a	Bravo 2	Advertising Scheduling	1
Ant and Dec's Push the Button	20/03/2010	ITV1	Religious Offence	1
Ask the Chancellors	29/03/2010	Channel 4	Due Impartiality/Bias	1
Bang Babes	21/02/2010	Tease Me TV (Freeview)	Sex/Nudity	1
Brainiac: Science Abuse	19/03/2010	Sky 3	Sex/Nudity	1
Ceefax Page 118	22/03/2010	BBC 1	Generally Accepted Standards	1
Channel 4 News	17/03/2010	Channel 4	Offensive Language	1
Cheltenham Festival	19/03/2010	Channel 4	Generally Accepted Standards	1
Chris Rock: Never Scared	27/03/2010	Comedy Central	Generally Accepted Standards	1
Coach Trip	10/03/2010	Channel 4	Animal Welfare	1
Coach Trip	17/03/2010	Channel 4	Generally Accepted Standards	1
Come Dine with Me	21/03/2010	Channel 4	Offensive Language	1
Coronation Street	25/03/2010	ITV1	Sex/Nudity	1
Cracker	28/02/2010	ITV3	Religious Offence	1
Dancing on Ice	21/03/2010	ITV1	Use of Premium Rate Numbers	1
Dancing on Ice Final	28/03/2010	ITV1	Generally Accepted Standards	10
Deal or No Deal	21/03/2010	Channel 4	Generally Accepted Standards	1
Doctors	19/03/2010	BBC 1	Sex/Nudity	1
Doctors	23/03/2010	BBC 1	Sex/Nudity	1
Early Bird	16/03/2010	Tease Me TV (Freeview)	Sex/Nudity	1
Early Bird	19/03/2010	Tease Me TV (Freeview)	Sex/Nudity	1
EastEnders	25/03/2010	BBC 1	Generally Accepted Standards	1
EastEnders	25/03/2010	BBC 1	Sex/Nudity	1
EastEnders	29/03/2010	BBC 1	Generally Accepted Standards	1
Elite Days	05/01/2010	Elite	Sex/Nudity	1
Elite Nights	22/12/2009	Elite	Sex/Nudity	1
Embarrassing Bodies	14/03/2010	Channel 4	Generally Accepted Standards	1
Emmerdale	18/03/2010	ITV1	Substance Abuse	1
Emmerdale	25/03/2010	ITV1	Generally Accepted Standards	4
Extreme Fishing with Robson Green	25/03/2010	Fiver	Animal Welfare	1

GMTV	25/03/2010	ITV1	Due Impartiality/Bias	1
Harry Hill's the Best of TV Burp	27/03/2010	ITV1	Animal Welfare	1
Harry Hill's TV Burp	21/03/2010	ITV1	Generally Accepted Standards	2
Harry Potter and the Philosopher's Stone	20/03/2010	ITV1	Offensive Language	1
Hastey Hastey	30/01/2010	Star India Gold	Generally Accepted Standards	1
Heart Breakfast competition	09/03/2010	Heart 96.1 FM (Colchester)	Commercial References	1
Hostel: Part II	22/03/2010	Five	Generally Accepted Standards	3
House on Fire	24/03/2010	BBC Radio 4	Offensive Language	1
Kia Motors sponsorship of Law & Order	26/03/2010	Five	Generally Accepted Standards	1
Lady Gaga - Telephone ft. Beyoncé	13/03/2010	The Box	Inaccuracy/Misleading	1
Little Otik	19/03/2010	Film4	Generally Accepted Standards	1
Live from Studio Five	17/03/2010	Five	Generally Accepted Standards	1
Live!	10/03/2010	Sky Movies Comedy	Violence	1
Maltesers' sponsorship of Ant and Dec's Push the Button	20/03/2010	ITV1	Generally Accepted Standards	1
Maltesers' sponsorship of Loose Women	22/03/2010	ITV1	Generally Accepted Standards	1
Manchester United V Fulham	14/03/2010	Sky Sports 1	Offensive Language	1
MasterChef	26/03/2010	BBC 1	Generally Accepted Standards	1
Moddhorater Khobor	14/03/2010	NTV	Generally Accepted Standards	1
Monsters Inside Me (trailer)	04/03/2010	Discovery Real Time	Generally Accepted Standards	1
News	14/03/2010	Sky News	Sex/Nudity	1
News	21/03/2010	Sky News	Due Impartiality/Bias	1
News	25/03/2010	Smooth Radio North West	Elections/Referendums	1
Newsbeat	24/03/2010	BBC Radio 1	Generally Accepted Standards	1
Only Fools and Horses	27/03/2010	Gold	Offensive Language	1
Party	31/03/2010	BBC Radio 4	Offensive Language	1
Press Preview	10/03/2010	Sky News	Offensive Language	1
Programme	20/03/2010	Brick FM Community Station	Offensive Language	1
Regional News and Weather	07/03/2010	BBC 1	Generally Accepted Standards	1
Road Wars	19/03/2010	Sky2	Generally Accepted Standards	1
Shameless	24/03/2010	Channel 4	Animal Welfare	1
Sport Relief 2010	19/03/2010	BBC 1	Generally Accepted Standards	1
Tarbiyat e Aowlad	16/01/2010	Hidayat TV	Commercial References	1
The Alan Titchmarsh Show	19/03/2010	ITV1	Due Impartiality/Bias	181
The Alan Titchmarsh Show	24/03/2010	ITV1	Sex/Nudity	1

The Biggest Loser Australia	24/03/2010	Sky1	Generally Accepted Standards	1
The Breakfast Club	05/01/2010	Elite	Sex/Nudity	1
The Wright Stuff	23/03/2010	Five	Generally Accepted Standards	1
Top Gear	03/03/2010	Dave	Offensive Language	1
Top Gear	21/03/2010	BBC 2	Generally Accepted Standards	4
Top Gear	28/03/2010	BBC 2	Offensive Language	1
Traffic Cops	22/03/2010	Watch	Offensive Language	1