

Ofcom Broadcast Bulletin

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Introduction

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives¹, Ofcom must include these standards in a code or codes. These are listed below.

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes, as well as licence conditions with which broadcasters regulated by Ofcom are required to comply. These include:

- a) Ofcom's Broadcasting Code ("the Code"), which, can be found at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>.
- b) the Code on the Scheduling of Television Advertising ("COSTA") which 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://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/advert-code/>.
- c) certain sections of the BCAP Code: the UK Code of Broadcast Advertising, which relate to those areas of the BCAP Code for which Ofcom retains regulatory responsibility. These include:
 - the prohibition on 'political' advertising;
 - sponsorship and product placement on television (see Rules 9.13, 9.16 and 9.17 of the Code) and all commercial communications in radio programming (see Rules 10.6 to 10.8 of the Code);
 - 'participation TV' advertising. This includes long-form advertising predicated on premium rate telephone services – most notably chat (including 'adult' chat), 'psychic' readings and dedicated quiz TV (Call TV quiz services). Ofcom is also responsible for regulating gambling, dating and 'message board' material where these are broadcast as advertising².

The BCAP Code is at:

<http://www.bcap.org.uk/Advertising-Codes/Broadcast-HTML.aspx>

- d) other licence conditions which broadcasters must comply with, such as requirements to pay fees and submit information which enables Ofcom to carry out its statutory duties. Further information on television and radio licences can be found at: <http://licensing.ofcom.org.uk/tv-broadcast-licences/> and <http://licensing.ofcom.org.uk/radio-broadcast-licensing/>.

Other codes and requirements 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://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/>

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.

¹ The relevant legislation is set out in detail in Annex 1 of the Code.

² BCAP and ASA continue to regulate conventional teleshopping content and spot advertising for these types of services where it is permitted. Ofcom remains responsible for statutory sanctions in all advertising cases.

Standards cases

In Breach

Psychic Today

Psychic Today, 6 May 2012, 23:21

Big Deal, 6 May 2012, 23:21

Sumo TV, 6 May 2012, 23:21

Introduction

The Psychic Today service is advertising content offering psychic readings to callers. This channel is broadcast 24 hours a day on the Sky digital satellite platform (on Sky Channel 886). It consists of promotions for premium rate telephone services (“PRS”), both voice and text, by which psychic readings can be obtained, and a facility for viewers to pay for these by credit card. Callers can select to be connected to a psychic off air, or to the presenter in the studio – in which case the reading is broadcast live, subject to the psychic’s availability. The channel Psychic Today gives different names to segments of its psychic reading advertising content broadcast at various times, and the name of the programming broadcast late in the evening on 6 May 2012 was also *Psychic Today*.

Background to the services

The licence for the Psychic Today service is held by Majestic TV Limited (“Majestic TV”).

Ofcom is aware that on 6 May 2012 at 23:21 *Psychic Today* was also broadcast on two other channels: Big Deal and Sumo TV. Big Deal is broadcast on the Digital terrestrial platform Freeview on Channel 32 and is owned and operated by the licensee Square 1 Management Limited (“Square 1”). Sumo TV broadcasts on the Sky digital satellite platform (on Sky Channel 198¹) and the licence for this service is held by Sumo TV Limited (“Sumo”).

Chronology of events

Following a complaint to Ofcom that claims of accuracy were made for psychic readings on the Big Deal channel on 6 May 2012, on 29 May 2012 Ofcom requested a recording from Square 1 of psychic reading advertising content broadcast late in the evening on the service Big Deal on 6 May 2012. On 14 June 2012 we also requested a recording from Majestic TV of the material broadcast on the same date and at the same time from the service Psychic Today.

A third party entity, Peripatos Limited (“Peripatos”), acting on behalf of both Majestic TV and Square 1, confirmed to Ofcom in an email dated 28 June 2012 that when the Psychic Today output was being broadcast on Big Deal the psychic reading advertising content on each service was “identical”. We understand that Peripatos deals with any compliance issues in relation to the Psychic TV content output on behalf of these two licensees, as well as on behalf of Sumo.

¹ As of 18 February 2013, ‘Sumo TV’ broadcasting on Sky Channel 198 has been replaced with ‘The Horror Channel’.

On the same day (28 June 2012) Ofcom wrote to Peripatos on behalf of Majestic TV and Square 1 asking how certain material broadcast on 6 May 2012 (see below) complied with Rules 15.5.2 and 15.5.3 of the BCAP Code. On 11 July 2012 Peripatos responded to Ofcom's request on behalf of both Majestic TV and Square 1.

On 21 August 2012 Ofcom wrote to Peripatos and asked it to confirm in general the dates and services on which, and times at which, Psychic Today content was simulcast on other services (i.e. services other than the Psychic Today channel) during the period of 6 May 2012 to 30 June 2012 inclusive. On 29 August 2012 Peripatos said in response that the Psychic Today output was also broadcast on Big Deal and Sumo TV², but not "simulcast" on these other services because there were "differences in the audiovisual output on each".

On 30 August 2012 Ofcom wrote to Peripatos requesting that it set out in detail what the audiovisual differences were (if any) on the various services broadcasting Psychic Today content. Peripatos acknowledged Ofcom's request and advised that it would respond in due course.

On 10 September 2012 Ofcom wrote to Peripatos and asked it to confirm exactly on which services Psychic Today had been broadcast on 6 May 2012 at around 23:21. In that letter we again requested that Peripatos set out in detail what the audiovisual differences were in the Psychic Today content when broadcast on other channels.

On 11 September 2012 Peripatos confirmed to Ofcom that on 6 May 2012 at around 23:21 Psychic Today content was also broadcast on Big Deal and Sumo TV. Peripatos said it would respond separately on the matter of differences in audiovisual output across the services broadcasting Psychic Today content.

Ofcom sent its Preliminary View on the issues dealt with in the current case to Peripatos (acting on behalf of Majestic TV), Square 1 and Sumo on 9 October 2012. Ofcom had not by that time received information from Peripatos that clarified whether there were any material differences between Psychic Today content when broadcast on that channel on 6 May 2012 at around 23:21 and when broadcast at the same time on Big Deal and Sumo TV.

In response to Ofcom's Preliminary View, on 25 October 2012, Peripatos (on behalf of each Majestic TV, Square 1 and Sumo) apologised for the delay in providing the requested information and confirmed that "the only material difference was the premium rate telephone number which varied according to the channel on which the content appeared".

Ofcom therefore considers that the material broadcast on Psychic Today, Big Deal and Sumo TV on 6 May 2012 at around 23:21 was identical for the purposes of considering compliance with the BCAP Code.

Complaint

After watching *Psychic Today* psychic reading advertising content on Big Deal on 6 May 2012 in the late evening, a viewer complained to Ofcom that it contained claims of accuracy. On viewing the relevant material, Ofcom noted that a photo of a psychic

² In the same correspondence, Peripatos stated that Psychic Today was in addition broadcast on another channel, Fitness TV. However, Peripatos confirmed to Ofcom on 11 September 2012 that Psychic Today was not broadcast on the Fitness TV channel on 6 May 2012 at around 23:21, and it is therefore is not included in this Ofcom Finding.

was shown on screen. Her name (“Mollie”) was printed beside the photo together with the following text:

“I have been giving readings from a young age and I have always known my gift was there. I am very accurate and precise in giving guidance for positive outcome in present situations.”

While this advertisement was broadcast on screen, viewers heard the voice of “Mollie” off screen (she was not in the studio) giving a psychic reading to a viewer who had sent in a text asking for a reading. At the bottom of the screen the PRS number for viewers to contact was shown throughout.

Ofcom considered this matter raised issues warranting investigation under Rules 15.5.2 and 15.5.3 of the BCAP Code.

Rule 15.5.2 states:

“Advertisements for personalised and live services that rely on belief in astrology, horoscopes, tarot and derivative practices are acceptable only on channels that are licensed for the purpose of the promotion of such services and are appropriately labelled: both the advertisement and the product or service itself must state that the product or service is for entertainment purposes only.”

Rule 15.5.3 sets out that:

“Advertising permitted under rule 15.5 may not:

- Make claims for efficacy or accuracy;
- Predict negative experiences or specific events;
- Offer life changing advice directed at individuals – including advice related to health (including pregnancy) or financial situation;
- Encourage excessive use.”

On 28 June 2012 Ofcom sought representations from Peripatos (on behalf of Majestic TV) and Square 1 as to how the material complied with these rules.

As explained above Peripatos later confirmed that this same Psychic Today psychic reading advertising content was also broadcast on Sumo TV on 6 May 2012 at around 23:21. Ofcom therefore did not seek comments from Sumo (as regards Sumo TV) before preparing its Preliminary View. However, Sumo had an opportunity to provide comments in response to Ofcom’s Preliminary View before Ofcom reached its decision set out below.

Response

On 11 July 2012 Peripatos provided representations in response to Ofcom’s initial request for formal comments, on behalf of both Majestic and Square 1, with regard to this content and its compliance with Rules 15.5.2 and 15.5.3 of the BCAP Code.

Peripatos said that the producers, presenters and psychics on these services undergo regular training to ensure full and complete compliance with the BCAP Code and this training programme has been extended to all staff involved in the production of promotional material or information which appears on *Psychic Today*. It added that it has implemented an urgent review of the descriptions of all psychics who are broadcast to ensure that any outdated scripts are removed.

In response to Ofcom's Preliminary View Peripatos responded on behalf of Majestic TV, Square 1 and Sumo on 25 October 2012.

Rule 15.5.3

In response to Ofcom's initial request for formal comments, Peripatos argued that the mention of accuracy in the psychic's description was an attempt to establish the psychic's credentials and did not relate to a specific reading. As such, it did not consider this description breached this rule. Peripatos added: "Changes have now been implemented such that the requisite wording is regularly repeated on screen as well as being referred to in any onscreen advertisement."

In response to Ofcom's Preliminary View, Peripatos conceded that the advertisements should not have used the terms "accurate" or "precise". It added: "We believe this is an isolated incident...All advertising has been reviewed to ensure that there is no repetition."

Rule 15.5.2

In response to Ofcom's initial request for formal comments, Peripatos said that changes have been implemented to ensure that all onscreen advertisements contain a reference to the content being for entertainment purposes only. However, it believed that viewers of *Psychic Today* are a "self-selecting and knowledgeable audience" who, having seen the frequent references "to the programme being an advertisement", would have understood that all the services promoted were for the purposes of entertainment.

In response to Ofcom's Preliminary View, Peripatos said that Ofcom did not take account of its representations made to Ofcom on 17 August 2011 on Ofcom's draft guidance to broadcasters in regard of psychic television services predicated on PRS. Peripatos also said that it had "tried unsuccessfully to engage Ofcom in debate" regarding the application of the final form of this guidance (published in December 2011³) and the application of BCAP Rule 15.5.2. It agreed that onscreen text should not be relied on to ensure that viewers are aware that psychic advertising content is for entertainment purposes only, however to conclude "as Ofcom appears to, that such labelling should appear at SPECIFIC times, is moving the regulatory goalposts". Peripatos said that the precedent cases⁴ referenced in Ofcom's Preliminary View did not address in detail the labelling requirements of BCAP Rule 15.5.2. Peripatos further argued that Ofcom's guidance published in December 2011 is not "clear and

³ See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/psychic-tv-guidance.pdf>.

⁴ Issue 180 of Ofcom's Broadcast Bulletin, 20 April 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb180/obb180.pdf>; and issue 184 of Ofcom's Broadcast Bulletin, 20 June 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb184/obb184.pdf>.

unambiguous” and the need for further clarity in respect of the relevant rules in Section 15 of the BCAP Code had been raised previously.

Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that “the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented”. These standards objectives are contained in the BCAP Code.

On 1 September 2010 new Ofcom rules came into force with the effect that channels and content predicated on the promotion of PRS (“participation television” or “PTV”) from then on were treated as advertising and subject to the BCAP Code. At the same time, the revised BCAP Code allowed PRS-based live and personalised psychic services on channels licensed for that purpose (previously the BCAP Code had prohibited such services). The BCAP Code provides that the investigation of issues in relation to PTV remains a matter for Ofcom, rather than the Advertising Standards Authority, and that Ofcom will determine whether particular material broadcast on PTV breaches the BCAP Code.

In December 2011, Ofcom published guidance⁵ to broadcasters in respect of psychic television services predicated on PRS. This guidance states that such material must not contain explicit and implicit claims of efficacy or accuracy. Additionally, it provides that broadcasters should not solely rely on an onscreen message stating the psychic material is for entertainment purposes but that this principle should be reflected in the content as a whole.

When setting and applying standards in the BCAP Code to provide adequate protection to members of the public from harmful or offensive material, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention on Human Rights, as incorporated in the Human Rights Act 1998. However, the advertising content of psychic services has much less latitude than is typically available to editorial material in respect of context and narrative. The primary intent of advertising is to sell products and services, and consideration of acceptable standards will take that context into account.

Ofcom first considered whether the service had contained claims of efficacy and accuracy (Rule 15.5.3) on this channel, and then assessed whether it had been “appropriately labelled” to make clear that it was intended for entertainment purposes only (Rule 15.5.2).

Rule 15.5.3

Ofcom noted that the text of this onscreen advertising content promoting psychic readings with “Mollie” (to be contacted by means of the PRS number shown on screen at the same time) included the descriptions “very accurate” and “precise”. The use of these words in the description of this psychic’s abilities would, in Ofcom’s view, have been widely and reasonably interpreted as a claim of accuracy (and so also of efficacy). Ofcom did not accept Peripatos’ argument that a psychic using these words to establish the psychic’s credentials, but not referring to any specific psychic readings, would not constitute such a claim. However, we noted that in

⁵ See footnote 4.

response to Ofcom's Preliminary View Peripatos later agreed the advertisements should not have included the terms "accurate" or "precise".

Therefore, the material breached Rule 15.5.3 of the BCAP Code.

As regards Peripatos' assurance on 25 October 2012 in response to Ofcom's Preliminary View that "[a]ll advertising [for the Psychic Today output] has been reviewed to ensure that there is no repetition", Ofcom examined material broadcast on Psychic Today on 25 October 2012 at 10:12, 31 October 2012 at 13:53, and 7 December 2012 at 16.22, and noted the following onscreen references respectively:

Suzi: "...has been a psychic all her life. She is a compassionate, accurate reader who gives lots of validations..."

Grace: "...she is very accurate with her readings and will give you answers to your questions..."

Manalix: "...can provide accurate and sensitive advice..."

Ofcom was concerned that despite the above assurances similar content was subsequently broadcast.

Ofcom is particularly concerned that in this case Peripatos and the licensees involved in this case did not carry out a thorough investigation of compliance before responding to Ofcom's Preliminary View. Broadcasters are reminded of their obligations under their licences to provide accurate and timely information to Ofcom to enable it to carry out its functions. The provision of inaccurate and potentially misleading information to Ofcom is a very serious matter.

Rule 15.5.2

Ofcom then considered this advertising content against the requirements of Rule 15.5.2. As required by Rule 15.5.2 Ofcom noted that this service is licensed for the promotion of psychic services. Rule 15.5.2 also requires that "the advertisement and the product or service itself must state that the product or service is for entertainment purposes only". Ofcom examined the material broadcast from 23:05 to 23:35 and found that it did not contain any reference (either verbally or in onscreen text) to the service being for entertainment purposes only. Ofcom did not accept Peripatos' argument that "viewers of Psychic Today are a self-selecting and knowledgeable audience who clearly saw the frequent references to the programme being an advertisement and would have understood that the programme content was for entertainment purposes only". Further, Ofcom does not require references (verbal or onscreen) to the service being for entertainment purposes only to be broadcast at specific times. For the avoidance of doubt, it should be noted that the audiovisual output taken as a whole should reflect the principle that the service is for entertainment purposes only. In this case the reliance on "frequent references to the programme being an advertisement" to fulfil the requirement of Rule 15.5.2 was not sufficient. Ofcom did not accept Peripatos' argument that "the precedent cases referenced in Ofcom's Preliminary View do not address in detail the labelling requirements of BCAP Rule 15.5.2". We noted that the precedent cases included the following paragraph in both published Findings:

"We noted that the broadcast content was labelled [by way of scrolling onscreen text] on air as being for entertainment purposes. However, in view of the fact that the material featured repeated claims of efficacy and accuracy in

breach of Rule 15.5.3, as set out above, Ofcom judged that these claims contradicted the purpose of the mandatory labelling of this material as being merely entertainment. Therefore Ofcom also found the advertising in breach of Rule 15.5.2.”

Ofcom noted Peripatos’ argument that it has “tried unsuccessfully to engage Ofcom in debate” regarding the application of this rule. Ofcom met with Peripatos on 4 August 2011. At that meeting Ofcom made clear that this genre of advertising is only acceptable as entertainment and that BCAP Rule 15.5.2 underpins this principle. Further, at that meeting we invited Peripatos to submit their comments on the proposed Ofcom (December 2011) guidance, prior to its publication. Ofcom duly took account of the submission made by Peripatos to Ofcom dated 17 August 2011 on its draft guidance. We are aware that Peripatos submitted to Ofcom a subsequent request for a meeting on 12 July 2012; however, Peripatos was informed that it was not appropriate for Ofcom to meet with a licensee (or its representative) during the course of a formal investigation, particularly where in its opinion the subject of the complaint was inextricably linked to the issue the licensee has raised. Ofcom considered previous Findings published in Broadcast Bulletins 180⁶, 184⁷ and 212⁸ clearly illustrated that psychic reading PTV advertising content must be appropriately labelled and the remaining audiovisual output should not contradict that labelling. Further, Ofcom’s guidance clearly states that PTV advertising content can “be presented only as entertainment”. Ofcom considers the requirements of this rule are clear and unambiguous.

This advertising content was therefore clearly in breach of Rule 15.5.2.

In view of the fact that the material featured a implied claim of accuracy in breach of Rule 15.5.3, as set out above, and there was a failure to label the advertising content at all as being for entertainment purposes only, Ofcom judged that the broadcast of this material raised serious compliance issues. The purpose of Rules 15.5.2 and 15.5.3 is to help protect vulnerable viewers who might otherwise believe that paying for a PRS contact with a psychic via this service will provide them with accurate information about the future or influence them in making life-changing decisions. Breaches of these rules are potentially serious because they may result in consumer harm.

Ofcom published Code breach Findings in Broadcast Bulletins 180⁹ and 184¹⁰ against Majestic TV (regarding material on Psychic Today) and Square 1 (concerning Big Deal) respectively. The breaches recorded against Psychic Today and Big Deal in those Findings also concerned Rules 15.5.2 and 15.5.3. In those Decisions Ofcom

⁶ Issue 180 of Ofcom’s Broadcast Bulletin, 20 April 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb180/obb180.pdf>.

⁷ Issue 184 of Ofcom’s Broadcast Bulletin, 20 June 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb184/obb184.pdf>.

⁸ Issue 212 of Ofcom’s Broadcast Bulletin, 28 August 2012, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb212/obb212.pdf>.

⁹ See footnote 6.

¹⁰ See footnote 7.

formally put on notice both Psychic Today and Big Deal “that should compliance issues of this type arise in future, [Ofcom] will be likely to consider the imposition of statutory sanctions”. These Findings were in turn referenced in the guidance document that Ofcom published in December 2011. That guidance explicitly stated that: “Such [psychic reading advertising] material must not include claims for efficacy or accuracy – this covers both explicit and implicit claims....PTV advertising content [must] be presented only as entertainment. To be clear, it is not sufficient to rely on onscreen text to fulfil this requirement of Rule 15.5.3. The advertising as a whole must reflect this principle.”

In Ofcom’s view the December 2011 guidance was and is clear and unambiguous with regard to claims for efficacy and accuracy in, and appropriate labelling of, psychic reading PTV advertising content: each of Majestic TV, Square 1 and Sumo should have been in no doubt as to the requirements of Rules 15.5.2 and 15.5.3 at the time this material was broadcast on 6 May 2012.

In view of the earlier Findings referred to above and subsequent guidance, Ofcom is very concerned that Majestic TV and Square 1 have again broadcast psychic advertising content that has breached Rules 15.5.2 and 15.5.3 of the BCAP Code (also see other breaches recorded against Majestic TV and Square 1 on pp.13-20 and pp.21-30 of this Broadcast Bulletin). **Ofcom therefore puts these two licensees on notice that it will consider the breaches in this current Finding (together with the breaches recorded on pp.13-20 and pp.21-30) for the imposition of a statutory sanction.**

As regards Sumo TV, Ofcom notes that the holder of its licence (Sumo) used the same third party entity (Peripatos) for compliance as Majestic TV and Square 1 used for the Psychic Today and Big Deal services respectively. Further, we note that these breaches and those recorded on pp.21-30 of this Broadcast Bulletin occurred after the December 2011 guidance was published. However, Ofcom notes that these are the first such breaches recorded against Sumo and therefore Ofcom will not consider these breaches for the imposition of a statutory sanction at this time. However, Sumo is put on notice that any further similar contraventions of the BCAP Code by this licensee will be considered for further regulatory action by Ofcom.

Big Deal: Breach of BCAP Rules 15.5.2 and 15.5.3
Psychic Today: Breach of BCAP Rules 15.5.2 and 15.5.3
Sumo TV: Breach of BCAP Rules 15.5.2 and 15.5.3

In Breach

Psychic Today

Psychic Today, 2 June 2012, 23:00 to 23:15

Big Deal, 2 June 2012, 23:00 to 23:15

Fitness TV, 2 June 2012, 23:00 to 23:15

Introduction

The Psychic Today service is advertising content offering psychic readings to callers. This channel is broadcast 24 hours a day on the Sky digital satellite platform (on Sky Channel 886). It consists of promotions for premium rate telephone services (“PRS”), both voice and text, by which psychic readings can be obtained, and a facility for viewers to pay for these by credit card. Callers can select to be connected to a psychic off air, or to the presenter in the studio – in which case the reading is broadcast live subject to the psychic’s availability. The channel Psychic Today gives different names to segments of its psychic reading advertising content broadcast at various times, and the name of the programming broadcast late in the evening on 2 June 2012 was also *Psychic Today*.

Background to the services

The licence for the Psychic Today service is held by Majestic TV Limited (“Majestic TV”).

Ofcom is aware that on 2 June 2012 at 23:00 to 23:15 *Psychic Today* was also broadcast on two other channels: Big Deal and Fitness TV. Big Deal is broadcast on the Digital terrestrial platform Freeview on Channel 32 and is owned and operated by the licensee Square 1 Management Limited (“Square 1”). Fitness TV broadcasts on the Sky digital satellite platform (on Sky Channel 282) and the licence for this service is held by TV Worx Limited (“TV Worx”).

Chronology of events

Following a complaint to Ofcom that claims of accuracy were made for psychic readings on various dates on Big Deal, Ofcom requested a selection of recordings from Square 1 of psychic reading advertising content broadcast over the period highlighted by the complainant and more recent broadcast material to assess the serious issues raised by the complainant which included the material broadcast on 2 June 2012 between 23:00 and 23:15.

A third party entity (“Peripatos”), acting on behalf of both Majestic TV and Square 1, confirmed to Ofcom in an email dated 28 June 2012 that when the Psychic Today output was being simulcast on Big Deal the psychic reading advertising content on each service was “identical”. We understand that Peripatos deals with any compliance issues in relation to the Psychic TV content output on behalf of these two licensees.

On 25 July 2012 Ofcom wrote to Square 1 asking how certain material (see below) broadcast on 2 June 2012 complied with Rules 15.5.2 and 15.5.3 of the BCAP Code. On 7 August 2012 Square 1 responded to Ofcom’s request.

On 21 August 2012 Ofcom wrote to Peripatos and asked it to confirm in general the dates, times and services on which Psychic Today content was simulcast on other services (i.e. services other than the Psychic Today channel) during the period of 6 May 2012 to 30 June 2012 inclusive. On 29 August 2012 Peripatos said in response that the Psychic Today output was also broadcast on Big Deal and Fitness TV¹, but not “simulcast” on these other services because there were “differences in the audiovisual output on each”.

On 30 August 2012 Ofcom wrote to Peripatos requesting that it set out in detail what the audiovisual differences were (if any) on the various services broadcasting Psychic Today content. Peripatos acknowledged Ofcom’s request and advised that it would respond in due course.

On 10 September 2012 Ofcom wrote to Peripatos and asked it to confirm exactly on which services Psychic Today had been broadcast on 2 June 2012 between 23:00 and 23:15. In that letter we again requested that Peripatos set out in detail what the audiovisual differences were in the Psychic Today content when broadcast on other channels.

On 11 September 2012 Peripatos confirmed to Ofcom that on 2 June 2012 between 23:00 and 23:15 Psychic Today content was also broadcast on Big Deal and Fitness TV. Peripatos said it would respond separately on the matter of differences in audiovisual output across the services broadcasting Psychic Today content.

Ofcom sent its Preliminary View of the matter to Peripatos (on behalf of Majestic TV), Square 1 and TV Worx on 9 October 2012. Ofcom had not by that time received information from Peripatos that clarified whether there were any material differences between Psychic Today content when broadcast on that channel on 2 June 2012 between 23:00 and 23:15 and when broadcast at the same time on Big Deal and Fitness TV.

In response to Ofcom’s Preliminary View, on 25 October 2012, Peripatos (on behalf of Majestic TV and Square 1) apologised for the delay in providing the requested information and confirmed that “the only material difference was the premium rate telephone number which varied according to the channel on which the content appeared”. Ofcom therefore considers that the material broadcast on Psychic Today, Big Deal and Fitness TV on 2 June 2012 between 23:00 and 23:15 was identical for the purposes of considering compliance with the BCAP Code.

Complaint

As a result of a viewer complaining to Ofcom that, when Psychic Today teleshopping content was broadcast on various dates on Big Deal, claims for efficacy and accuracy were made, Ofcom noted the following exchange which took place on 2 June 2012 between a psychic called “Jenna” and the presenter hosting a programme segment which was called *Psychic Today*:

Host: “*How far into the future do you normally look at with the people that you speak to Jenna?*”

¹ In the same correspondence, Peripatos stated that Psychic Today was in addition broadcast on another channel, Sumo TV. However, Peripatos confirmed to Ofcom on 11 September 2012 that Psychic Today was not broadcast on the Sumo TV channel on 2 June 2012 between 23:00 and 23:15 and it is therefore is not included in this Ofcom Finding.

Jenna: *"It's different with every person. You made me think about someone many years ago, who I read [i.e. gave a psychic reading to], who became a very close friend to Michael Jackson and um, when we were very young, I was about 18 and he was, we were actually the same age. So I told him you will meet Michael [Jackson], and you will be quite close friends and you'll stay at Neverland and you'll write two books on him and then it will suddenly end for some reason, and it happened exactly like that and um, eventually we both met Michael and um, I remember he came up to me once in Windsor, this is my friend Adrian.... We are very close friends and he came up to me once in Windsor High Street and said I have an apology to make to you, because you told me I'd become friends with Michael [Jackson], and I didn't believe you and I've just got photographs to show you. And he had pictures of him and Michael in a recording studio and he was telling me that he had played him a song called Men in Black which actually turned out to be [the music track] Black or White. So they became friends for many years, and my friend, this person, now has the musical that's all around the world now."*

Host: *"Wow! That's amazing. It must be for lots of people when you are predicting so far in advance, it must be quite hard for people to sometimes you know, take that on board and believe it's going to happen. Especially if you're in a place where you know maybe things aren't going the way...that they want them to go at the moment."*

Ofcom considered this matter raised issues warranting investigation under Rules 15.5.2 and 15.5.3 of the BCAP Code. These rules are set out below.

Rule 15.5.2 states:

"Advertisements for personalised and live services that rely on belief in astrology, horoscopes, tarot and derivative practices are acceptable only on channels that are licensed for the purpose of the promotion of such services and are appropriately labelled: both the advertisement and the product or service itself must state that the product or service is for entertainment purposes only."

Rule 15.5.3 sets out that:

"Advertising permitted under rule 15.5 may not:

- Make claims for efficacy or accuracy;*
- Predict negative experiences or specific events;*
- Offer life changing advice directed at individuals – including advice related to health (including pregnancy) or financial situation;*
- Encourage excessive use."*

On 25 July 2012, Ofcom sought representations from Square 1 as to how the material complied with these rules.

As explained above Peripatos confirmed that this same Psychic Today psychic advertising content was also broadcast on Psychic Today and Fitness TV on 2 June 2012 between 23:00 and 23:15. Ofcom therefore did not consider it necessary to seek comments from Majestic TV (as regards Psychic Today) or TV Worx (concerning Fitness TV) before preparing its Preliminary View. However, Majestic TV and TV Worx had an opportunity to provide comments in response to Ofcom's Preliminary View before Ofcom reached its Decision set out below.

Response

With regard to Rule 15.5.2, Square 1 said on 7 August 2012 that the programme content was clearly labelled as an advertisement and that "the presenter's presentation style and the labelling made clear that this was pure entertainment".

With reference to Rule 15.5.3, Square 1 said that the reference by the psychic to Michael Jackson's friend was "merely a showbiz anecdote", and argued that the psychic revealing, as part of the entertainment, some information about her background and career away from direct psychic readings was still within the spirit of the rules in the BCAP Code.

Square 1 said that: "[R]evelations of past incidents and showbiz puffery would only become problematic if there was a specific claim that viewer involvement carried some sort of guarantee of emulation. There was no such claim in this matter." It added that: "Square 1 feels that it would be wrong if the interpretation of the [BCAP Code] rules meant that psychics were not allowed to say they were good at their job. We feel that in this matter that is all that has happened."

On 25 October 2012 Peripatos responded to Ofcom's Preliminary View on behalf of Square 1 and Majestic TV.

Rule 15.5.3

With regard to Rule 15.5.3, Peripatos said: "The reference to Michael Jackson was to a show business story stretching back many years and was not linked in any way to promotion of the type of services on offer at the time of the broadcast."

Rule 15.5.2

Peripatos said that Ofcom did not take account of its representations made to Ofcom on 17 August 2011 on Ofcom's draft guidance to broadcasters in regard of psychic television services predicated on PRS. Peripatos also said that it had "tried unsuccessfully to engage Ofcom in debate" regarding the application of the final form of this guidance (published in December 2011) and the application of BCAP Rule 15.5.2. It agreed that onscreen text should not be relied on to ensure that viewers are aware that psychic advertising content is for entertainment purposes only, however to conclude "as Ofcom appears to, that such labelling should appear at SPECIFIC times, is moving the regulatory goalposts". Peripatos said that the precedent cases² referenced in Ofcom's Preliminary View did not address in detail the labelling requirements of BCAP Rule 15.5.2. Peripatos further argued that Ofcom's guidance

² Issue 180 of Ofcom's Broadcast Bulletin, 20 April 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb180/obb180.pdf>; and issue 184 of Ofcom's Broadcast Bulletin, 20 June 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb184/obb184.pdf>.

(published in December 2011³) is not “clear and unambiguous” and the need for further clarity in respect of the relevant rules in Section 15 of the BCAP Code has been raised previously.

TV Worx, in response to Ofcom’s Preliminary View, said that it has an agreement in place with a third party entity for Psychic Today to broadcast its live feed on Fitness TV during dedicated late evening slots. TV Worx said that as the content is broadcast live, the agreement with the third party makes it extremely clear that Psychic Today must take full responsibility for compliance with the relevant Ofcom guidelines and the Code. TV Worx said that: “[We] understand the importance of Ofcom’s Code and guidelines and fully implement these. We are concerned to read how protracted the investigation has been and the response provided in reference to Rule[s] 15.5.2 and 15.5.3. We propose to review our arrangements with [the third party] as a result of this investigation.”

TX Worx added: “[T]his is the first potential breach to be made against TV Worx...Please could any final finding fairly reflect that any breach arose as a result of a failure committed by the third party entity and not Fitness TV’s management.”

Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that “the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented”. These standards objectives are contained in the BCAP Code.

On 1 September 2010 new Ofcom rules came into force with the effect that channels and content predicated on the promotion of PRS services (“participation television” or “PTV”) were from then on treated as advertising and subject to the BCAP Code. At the same time, the revised BCAP Code allowed PRS-based live and personalised psychic services on channels licensed for that purpose (previously the BCAP Code had prohibited such services). The BCAP Code provides that the investigation of complaints in relation to PTV remains a matter for Ofcom, rather than the Advertising Standards Authority, and that Ofcom will determine whether particular material breaches the BCAP Code.

In December 2011, Ofcom published guidance⁴ to broadcasters in respect of psychic television services predicated on PRS. This guidance states that such material must not contain explicit and implicit claims of efficacy or accuracy. Additionally, it provides that broadcasters should not solely rely on an onscreen message stating the psychic material is for entertainment purposes but that this principle should be reflected in the content as a whole.

When setting and applying standards in the BCAP Code to provide adequate protection to members of the public from harmful or offensive material, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention on Human Rights, as incorporated in the Human Rights Act 1998. However, the advertising content of psychic services has much less latitude than is typically available to editorial material in respect of context and narrative. The

³ See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/psychic-tv-guidance.pdf>.

⁴ See footnote 3.

primary intent of advertising is to sell products and services, and consideration of acceptable standards will take that context into account.

Ofcom first considered whether the service had contained claims of accuracy and efficacy (Rule 15.5.3) on this channel, and then assessed whether it had been “appropriately labelled” to make clear that it was intended for entertainment purposes only (Rule 15.5.2).

Rule 15.5.3

Ofcom noted that during the broadcast the psychic referred to a previous reading she claimed to have given many years earlier to a friend, i.e. that the friend would meet and become “quite close friends” “for many years” with a very famous pop star, Michael Jackson, stay at his house, write two books about him, and that the friendship would end suddenly for some reason. By referring to that reading the psychic therefore purported to have correctly predicted a number of events that had since occurred, and referred to her friend producing evidence (such as photographs of the friend with Michael Jackson in private locations such as his recording studio) to confirm that her predictions had come true. These remarks by the psychic would, in Ofcom’s view, have been widely and reasonably interpreted as an implied claim of accuracy (and so efficacy) for her predictions.

Ofcom did not accept the argument submitted by Square 1 that it is within the spirit of the relevant BCAP Code rules for a psychic to claim he or she is “good at their job” or, as Peripatos claimed, that the psychic’s anecdote “was not linked in any way to promotion of the type of services on offer at the time of the broadcast”. Ofcom’s guidance makes clear that explicit or implicit claims of accuracy or efficacy by psychics are strictly prohibited. Further, Ofcom has made clear that references in PTV psychic advertising content to previous readings may constitute an implied claim of accuracy or efficacy⁵. Ofcom considered these comments made by the psychic in advertising content clearly implied her predictions were accurate and efficacious.

Therefore, the material breached Rule 15.5.3 of the BCAP Code.

Rule 15.5.2

Ofcom then considered this advertising content against the requirements of Rule 15.5.2. As required by Rule 15.5.2 Ofcom noted that this service is licensed for the promotion of psychic services. Rule 15.5.2 also requires that “the advertisement and the product or service itself must state that the product or service is for entertainment purposes only”. Ofcom examined the material broadcast from 23:00 to 23:30 and found that it did not contain any reference (either verbally or in onscreen text) to the service being for entertainment purposes only. Ofcom did not accept Square 1’s argument that “the presenter’s presentation style and the labelling made clear that this was pure entertainment”. We do not require references (verbal or onscreen) to the service being for entertainment purposes only to be broadcast at specific times. For the avoidance of doubt, it should be noted that the audiovisual output taken as a whole should reflect the principle that the service is for entertainment purposes only. In this case the reliance on “the presenter’s presentation style” and onscreen references to the content being advertising were not sufficient to fulfil the requirement of Rule 15.5.2. Further, Ofcom did not accept Peripatos’ argument that “the

⁵ Psychic Line, *Good Morning Psychic*, issue 212 of Ofcom’s Broadcast Bulletin, 28 August 2012, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb212/obb212.pdf>.

precedent cases referenced in Ofcom's Preliminary View do not address in detail the labelling requirements of BCAP Rule 15.5.2". We noted that the precedent cases included the following paragraph in the decisions published in Bulletins 180 and 184⁶:

"We noted that the broadcast content was labelled [by way of scrolling onscreen text] on air as being for entertainment purposes. However, in view of the fact that the material featured repeated claims of efficacy and accuracy in breach of Rule 15.5.3, as set out above, Ofcom judged that these claims contradicted the purpose of the mandatory labelling of this material as being merely entertainment. Therefore Ofcom also found the advertising in breach of Rule 15.5.2."

Ofcom noted Peripatos' argument that it has "tried unsuccessfully to engage Ofcom in debate" regarding the application of this rule. Ofcom met with Peripatos on 4 August 2011. At that meeting Ofcom made clear that this genre of advertising is only acceptable as entertainment and that BCAP Rule 15.5.2 underpins this principle. Further, at that meeting we invited Peripatos to submit their comments on the proposed guidance, prior to its publication. Ofcom duly took account of the submissions made by Peripatos to Ofcom dated 17 August 2011 on its draft guidance. We are aware that Peripatos submitted a subsequent request for a meeting on 12 July 2012; however, Peripatos was informed that it was not appropriate for Ofcom to meet with a licensee (or its representative) during the course of a formal investigation, particularly where in its opinion the subject of the complaint was inextricably linked to the issue the licensee has raised. Ofcom considers previous Findings published in Broadcast Bulletins 180⁷, 184⁸ and 212⁹ clearly illustrate that psychic reading PTV advertising content must be appropriately labelled and the remaining audiovisual output should not contradict that labelling. Further, Ofcom's guidance clearly states that PTV advertising content can "be presented only as entertainment". Ofcom considers the requirements of this rule are clear and unambiguous.

This advertising content was therefore clearly in breach of Rule 15.5.2.

In view of the fact that the material featured a clear implied claim of accuracy (and so efficacy) in breach of Rule 15.5.3, as set out above, and there was a failure to label the advertising content at all as being for entertainment purposes only, Ofcom judged that the broadcast of these remarks by the psychic raised serious compliance issues. The purpose of Rules 15.5.2 and 15.5.3 is to help protect vulnerable viewers who might otherwise believe that paying for a PRS contact with a psychic via this service will provide them with accurate information about the future or influence them in making life-changing decisions. Breaches of these rules are potentially serious because they may result in consumer harm.

⁶ See footnote 2.

⁷ Issue 180 of Ofcom's Broadcast Bulletin, 20 April 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb180/obb180.pdf>.

⁸ Issue 184 of Ofcom's Broadcast Bulletin, 20 June 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb184/obb184.pdf>.

⁹ Issue 212 of Ofcom's Broadcast Bulletin, 28 August 2012, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb212/obb212.pdf>.

Ofcom published Code breach Findings in Broadcast Bulletins 180¹⁰ and 184¹¹ against Majestic TV (regarding material on Psychic Today) and Square 1 (concerning Big Deal) respectively. The breaches recorded against Psychic Today and Big Deal in those Findings also concerned Rules 15.5.2 and 15.5.3. In those Decisions Ofcom formally put on notice each of Psychic Today and Big Deal “that should compliance issues of this type arise in future, [Ofcom] will be likely to consider the imposition of statutory sanctions”. These findings were in turn referenced in the guidance document that Ofcom published in December 2011. That guidance explicitly stated that: “Such [psychic reading advertising] material must not include claims for efficacy or accuracy – this covers both explicit and implicit claims...PTV advertising content [must] be presented only as entertainment. To be clear, it is not sufficient to rely on onscreen text to fulfil this requirement of Rule 15.5.3. The advertising as a whole must reflect this principle.”

In Ofcom’s view the December 2011 guidance was and is clear and unambiguous with regard to claims for efficacy and accuracy in, and appropriate labelling of, psychic reading PTV advertising content: each of Majestic TV, Square 1 and TV Worx should have been in no doubt as to the requirements of Rules 15.5.2 and 15.5.3 at the time this material was broadcast on 2 June 2012.

In view of these earlier Findings and subsequent guidance, Ofcom is very concerned that Majestic TV and Square 1 have again broadcast psychic advertising content that has breached Rules 15.5.2 and 15.5.3 of the BCAP Code (also see the other breaches on pp.5-12 and page pp.14-21 of this Broadcast Bulletin). **Ofcom therefore puts these two licensees on notice that we will consider these breaches for the imposition of a statutory sanction.**

As regards Fitness TV, Ofcom notes that the holder of its licence (TV Worx) argued that it was broadcasting a live feed of Psychic Today. This does not absolve the licensee of responsibility for ensuring material broadcast on its service is compliant. Further we note that these breaches and those recorded on pp.14-21 of this Broadcast Bulletin occurred after the December 2011 guidance was published. Ofcom notes that these are the first such breaches recorded against TV Worx and therefore Ofcom will not consider these breaches for the imposition of a statutory sanction at this time. However, the licensee is put on notice that any further similar contraventions of the BCAP Code will be considered for further regulatory action by Ofcom.

Big Deal: Breach of BCAP Rules 15.5.2 and 15.5.3
Psychic Today: Breach of BCAP Rules 15.5.2 and 15.5.3
Fitness TV: Breach of BCAP Rules 15.5.2 and 15.5.3

¹⁰ See footnote 7.

¹¹ See footnote 8.

In Breach

Psychic Today

Psychic Today, 20 June 2012, 22:30 to 22:45

Big Deal, 20 June 2012, 22:30 to 22:45

Fitness TV, 20 June 2012, 22:30 to 22:45

Sumo TV, 20 June 2012, 22:30 to 22:45

Introduction

The Psychic Today service is advertising content offering psychic readings to callers. This channel is broadcast 24 hours a day on the Sky digital satellite platform (on Sky Channel 886). It consists of promotions for premium rate telephone services (“PRS”), both voice and text, by which psychic readings can be obtained, and a facility for viewers to pay for these by credit card. Callers can select to be connected to a psychic off air, or to the presenter in the studio – in which case the reading is broadcast live subject to the psychic’s availability. The channel Psychic Today gives different names to segments of its psychic reading advertising content broadcast at various times, and the name of the programming broadcast late in the evening on 20 June 2012 was also *Psychic Today*.

Background to the services

The licence for the Psychic Today service is held by Majestic TV Limited (“Majestic TV”).

Ofcom is aware that on 20 June 2012 between 22:30 and 22:45 *Psychic Today* was also broadcast on three other channels: Big Deal, Sumo TV and Fitness TV. Big Deal is broadcast on the Digital terrestrial platform Freeview on Channel 32 and is owned and operated by Square 1 Management Limited (“Square 1”). Sumo TV is broadcast on the Sky digital satellite platform (Sky Channel 198¹) and the licence for this service is held by Sumo TV Limited (“Sumo”). Fitness TV also broadcasts on the Sky digital satellite platform (on Sky Channel 282) and the licence for this service is held by TV Worx Limited (“TV Worx”).

Chronology of events

Following a complaint to Ofcom that claims of efficacy and accuracy were made regarding the involvement of a psychic in a police investigation during a broadcast on 20 June 2012 between 22:30 and 22:45 on Psychic Today, Ofcom requested a recording of this psychic reading advertising content from Psychic Today.

A third party entity, Peripatos Limited (“Peripatos”), acting on behalf of both Majestic TV and Square 1, Peripatos confirmed to Ofcom in an email dated 28 June 2012 that when the Psychic Today output was being simulcast on Big Deal the psychic reading advertising content on each service was “identical”. Ofcom understands that Peripatos deals with compliance issues in relation to the Psychic TV content output on behalf of these licensees, as well as Sumo TV.

¹ As of 18 February 2013, ‘Sumo TV’ broadcasting on Sky Channel 198 had been replaced with ‘The Horror Channel’.

On 19 July 2012 Ofcom wrote to Peripatos (on behalf of Majestic TV) asking how certain material broadcast on 20 June 2012 (see below) complied with Rules 15.5.2 and 15.5.3 of the BCAP Code. On 2 August 2012 Peripatos responded to Ofcom's request.

On 21 August 2012 Ofcom wrote to Peripatos and asked it to confirm in general the dates, times and services on which Psychic Today content was simulcast on other services (i.e services other than the Psychic Today channel) during the period of 6 May 2012 to 30 June 2012 inclusive. On 29 August 2012 Peripatos said in response that the Psychic Today output was also broadcast on Big Deal, Sumo TV and Fitness TV, but not "simulcast" on these other services because there were "differences in the audiovisual output on each".

On 30 August 2012 Ofcom wrote to Peripatos requesting that it set out in detail what the audiovisual differences were (if any) on the various services broadcasting Psychic Today content. Peripatos acknowledged Ofcom's request and advised that it would respond in due course.

On 10 September 2012 Ofcom wrote to Peripatos and asked it to confirm exactly on which services Psychic Today had been broadcast on 20 June 2012 between 22:30 and 22:45. In that letter we again requested that Peripatos set out in detail what the audiovisual differences were in the Psychic Today content when broadcast on other channels.

On 11 September 2012 Peripatos confirmed to Ofcom that on 20 June 2012 between 22:30 and 22:45 Psychic Today content was also broadcast on Big Deal, Sumo TV and Fitness TV. Peripatos said it would respond separately on the matter of differences in audio visual output across the services broadcasting Psychic Today content.

Ofcom sent its Preliminary View of the matter to Peripatos (on behalf of Majestic TV), Square 1, Sumo and TV Worx on 9 October 2012. Ofcom had not by that time received information from Peripatos that clarified whether there were any material differences between Psychic Today content when broadcast on that channel on 20 June 2012 between 22:30 and 22:45 and when broadcast at the same time on Big Deal, Sumo TV and Fitness TV.

In response to Ofcom's Preliminary View, Peripatos apologised for the delay in providing the requested information and confirmed that "the only material difference was the premium rate telephone number which varied according to the channel on which the content appeared".

Ofcom therefore considers that the material broadcast on Psychic Today, Big Deal, Sumo TV and Fitness TV on 20 June 2012 between 22:30 and 22:45 was identical for the purposes of considering compliance with the BCAP Code.

Complaint

A viewer complained to Ofcom that the content broadcast on Psychic TV on 20 June 2012 contained claims of efficacy and accuracy regarding the involvement of a psychic, called "Crystal", in a high-profile police investigation. On viewing the relevant material, Ofcom noted the following exchange:

- Host: [Speaking over a full screen image of Crystal] *"If someone really wants to know, you know, what somebody is doing at this point in time, can you remote view where they might be and what they're up to?"*
- Crystal: [Speaking over a full screen image of Crystal] *"Yes. Yep. I'm nosey. Um, I have actually been called the "psychic ferret" as well because I do go rooting. I'm very nosey and I will burrow and burrow and burrow until I, er, until I get the answers that I want for you guys [gestures to camera and the viewers]."*
- Host: [Speaking over a full screen image of Crystal] *"You actually use your remote viewing professionally for, um, the Police. Now I know we can't talk too much about what you do because it is strictly confidential. But they actually, um, employ you now on several different cases that have gone cold don't they?"*
- Crystal: [Speaking over a full screen image of Crystal] *"Um. Yeah. Um. On a couple of. Uh. One of the cases that's actually um, signed, sealed and delivered and got the seal on it. Um. Was the um, oh crikey, uh the Milly Dowler case. Uh, that was going on for quite some time but um, that was actually wrapped up and um, and been put, put to closure now. Um, I think it was early this year or last year. I can't remember. But, um, but yeah, I was the one that um, dealt with that one. Yeah."*
- Host: [Speaking over a full screen image of Crystal] *"Ah, well, we are going to be finding out a little bit more about what makes you tick later on. Thank you very much Crystal. Bye."*
- Crystal: [Speaking over a full screen image of Crystal] *"Bye."*
- Host: [Speaking over a full screen image of Crystal] *"So Crystal works very closely with uh, with several police constabularies, don't you know and what they actually do is when a case has gone cold, when they have no where to look to turn to find out information, they actually consult psychics and they consult Crystal. She has worked on many, many different things; she's remote viewed lots of different cases. Some of which she can talk about, a few that are still ongoing that she can't talk about, [cut to full screen image of the Host] but she would love to inspire you today, to see what's really going on, what is going on with something. A lot of people as well text the show or call up because they need to find missing glasses. You've got the perfect person today; you've got Crystal logging in on option number 2 and Sam there logging in on option number 1."*

Ofcom considered this matter raised issues warranting investigation under Rules 15.5.2 and 15.5.3 of the BCAP Code. These rules are set out below.

Rule 15.5.2 states:

"Advertisements for personalised and live services that rely on belief in astrology, horoscopes, tarot and derivative practices are acceptable only on channels that are licensed for the purpose of the promotion of such services and are appropriately labelled: both the advertisement and the product or service itself must state that the product or service is for entertainment purposes only."

Rule 15.5.3 sets out that:

“Advertising permitted under rule 15.5 may not:

- Make claims for efficacy or accuracy;
- Predict negative experiences or specific events;
- Offer life changing advice directed at individuals – including advice related to health (including pregnancy) or financial situation;
- Encourage excessive use.”

On 19 July 2012 Ofcom asked Peripatos (on behalf of Majestic TV) how the material complied with these rules.

As explained above, Peripatos confirmed that this same Psychic Today psychic reading advertising content was also broadcast on Big Deal, Sumo TV and Fitness TV on 20 June 2012 between 22:30 and 22:45. Ofcom did not seek comments from Square 1 (as regards Big Deal), Sumo (as regards Sumo TV) or TV Worx (as regards Fitness TV) before preparing its Preliminary View. However, Square 1, Sumo and TV Worx had an opportunity to provide comments on Ofcom’s Preliminary View before Ofcom reached its decision set out below.

Response

On 2 August 2012 Peripatos responded on behalf of Majestic TV in response to Ofcom’s initial formal request for comments.

With regard to Rule 15.5.2 Peripatos said: “We feel it is fair to say that viewers of Psychic Today are a self-selecting and knowledgeable audience who clearly saw the frequent references to the programme being an advertisement and would have understood that the programme content was for entertainment purposes only.” It stated that following advice from Ofcom it had amended the onscreen text to reflect that the broadcast content was an advertisement, however due to a misunderstanding it failed to also label the content “for entertainment purposes only”. Peripatos added that changes have now been implemented to ensure that the “requisite wording is regularly repeated on screen as well as being referred to in any on screen advertisement”.

With regard to Rule 15.5.3, Peripatos said the content contained no explicit claims, “other than as part of a background piece on this psychic – to say she helped police in the past”. It argued that: “Given that the psychic made no mention of success or otherwise regarding any of the cases, we cannot see how efficacy or accuracy play any part...Mention of cases involving the police was fleeting, deliberately low key and with no mention of results. It helped build background for the psychic concerned, and nothing else.”

In response to Ofcom’s Preliminary View, Peripatos responded on behalf of Majestic TV, Square 1 and Sumo on 25 October 2012.

Peripatos said that Ofcom did not take account of its representations made to Ofcom on 17 August 2011 on Ofcom’s draft guidance to broadcasters in respect of psychic television services predicated on PRS. Peripatos also said that it had “tried

unsuccessfully to engage Ofcom in debate” regarding the application of the final form of this guidance (published in December 2011²) and the application of BCAP Rule 15.5.2. It agreed that onscreen text should not be relied on to ensure that viewers are aware that psychic advertising content is for entertainment purposes only, however to conclude “as Ofcom appears to, that such labelling should appear at SPECIFIC times, is moving the regulatory goalposts”. Peripatos said that the precedent cases³ referenced in Ofcom’s Preliminary View do not address in detail the labelling requirements of BCAP Rule 15.5.2. Peripatos further argued that Ofcom’s guidance published in December 2011 is not “clear and unambiguous” and the need for further clarity in respect of the relevant rules in Section 15 of the BCAP Code had been raised previously with Ofcom.

With regard to Rule 15.5.3, Peripatos said: “We absolutely refute that in stating her [Crystal’s] services have been used by the police the psychic is even approaching making a claim of efficacy or accuracy. She is relating what is to all intents and purposes part of her background... [Crystal] clearly didn’t want to imply anything at all – which is why she drew that bit of the interview to a clear halt. She was acutely aware of the rules and made sure she did not contravene them...Ofcom does not know what police forces felt about the psychic’s service – or indeed how many used her.”

Peripatos argued: “For Ofcom to quote guidelines which are all-embracing by virtue of their ambiguity (and, of course, one cannot be held in breach of guidelines) and claim accuracy is “implied” leaves a situation whereby accuracy can effectively be implied in the very act of psychic reading per se.”

Peripatos added: “Cut-and-paste references to previous cases do not sensibly reflect or mirror the case under consideration but imply regular non-compliance, which is not a fair conclusion.”

A regards Fitness TV, in response to Ofcom’s Preliminary View, TV Worx said that it has an agreement in place with a third party entity for Psychic Today to broadcast its live feed on Fitness TV during dedicated late evening slots. TV Worx said that as the content is a live feed, its agreement with the third party “makes it extremely clear” that Psychic Today must take full responsibility for compliance with the relevant Code and guidelines. TV Worx said that: “[We] understand the importance of Ofcom’s Code and guidelines and fully implement these. We are concerned to read how protracted the investigation has been and the response provided in reference to Rules[s] 15.5.2 and 15.5.3. We propose to review our arrangements with [the third party] as a result of this investigation.”

TX Worx said: “[T]his is the first potential breach to be made against TV Worx...Please could any final finding fairly reflect that any breach arose as a result of a failure committed by the third party entity and not Fitness TV’s management.”

² See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/psychic-tv-guidance.pdf>.

³ Issue 180 of Ofcom’s Broadcast Bulletin, 20 April 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb180/obb180.pdf>; and issue 184 of Ofcom’s Broadcast Bulletin, 20 June 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb184/obb184.pdf>.

Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that “the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented”. These standards objectives are contained in the BCAP Code.

On 1 September 2010 new Ofcom rules came into force with the effect that channels and content predicated on the promotion of PRS (“participation television” or “PTV”) was from then on treated as advertising and subject to the BCAP Code. At the same time, the revised BCAP Code allowed PRS-based live and personalised psychic services on channels licensed for that purpose (previously the BCAP Code had prohibited such services). The BCAP Code provides that the investigation of complaints in relation to PTV remains a matter for Ofcom, rather than the Advertising Standards Authority, and that Ofcom will determine whether particular material broadcast on PTV breaches the BCAP Code.

In December 2011, Ofcom published guidance⁴ to broadcasters in respect of psychic television services predicated on PRS. This guidance states that such material must not contain explicit and implicit claims of efficacy or accuracy. Additionally, it provides that broadcasters should not solely rely on an onscreen message stating the psychic material is for entertainment purposes but that this principle should be reflected in the content as a whole.

When setting and applying standards in the BCAP Code to provide adequate protection to members of the public from harmful or offensive material, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention on Human Rights, as incorporated in the Human Rights Act 1998. However, the advertising content of psychic services has much less latitude than is typically available to editorial material in respect of context and narrative. The primary intent of advertising is to sell products and services, and consideration of acceptable standards will take that context into account.

Ofcom first considered whether the service had contained claims of accuracy and efficacy (Rule 15.5.3) on this channel, and then assessed whether it had been “appropriately labelled” to make clear that it was intended for entertainment purposes only (Rule 15.5.2).

Rule 15.5.3

Ofcom noted that both the host and the psychic (Crystal) referred to Crystal’s direct involvement with various police investigations, including the investigation into the abduction and murder of Milly Dowler. We noted in particular various references made by the host: “*You actually use your remote viewing professionally, for, um, the Police*” and “[T]hey [the police] *actually, um, employ you [Crystal] now on several different cases that have gone cold don’t they?*” and Crystal’s response “*One of the cases that’s actually um, signed, sealed and delivered and got the seal on it. Um. Was the um, oh crikey, uh the Milly Dowler case...I was the one that dealt with that one. Yeah.*” The host later added: “*So Crystal works very closely with uh, with several police constabularies, don’t you know and what they actually do is when a*

⁴ See footnote 2.

case has gone cold, when they have no where to look to turn to find out information, they actually consult psychics and they consult Crystal. She has worked on many, many different things; she's remote viewed lots of different cases."

These remarks implied in summary that the psychic had been employed by various UK police forces to assist them to solve 'cold' cases, including the Milly Dowler case. The investigation of all unsolved criminal cases by the police, and especially murder cases, is a very serious matter. The clear implication of these comments was that various UK police forces had employed Crystal to assist them and that the police would only employ Crystal if they believed that the information she might provide as a psychic would be accurate and efficacious. To suggest on air through various remarks that UK police forces had employed Crystal in this way constituted making claims of accuracy for the psychic's predictions. Ofcom did not accept Peripatos' argument that as that the psychic made no mention of success or otherwise regarding any of the cases, there were no explicit claims for efficacy or accuracy in the material. Ofcom considered this material meant to show that the psychic could provide reliable and substantiated readings as demonstrated by her experience of working closely with various UK police forces to help them solve 'cold' cases.

This material therefore breached Rule 15.5.3 of the BCAP Code.

Rule 15.5.2

Ofcom then considered this advertising content against the requirements of Rule 15.5.2. As required by Rule 15.5.2 Ofcom noted that this service is licensed for the promotion of psychic services. Rule 15.5.2 also requires that "the advertisement and the product or service itself must state that the product or service is for entertainment purposes only". Ofcom examined the material broadcast from 22:15 to 22:45 and found that it did not contain any reference (either verbally or in on screen text) to the service being for entertainment purposes only. Ofcom did not accept Peripatos' argument that "viewers of Psychic Today are a self-selecting and knowledgeable audience who clearly saw the frequent references to the programme being an advertisement and would have understood that the programme content was for entertainment purposes only". Ofcom does not require references to the service being for entertainment purposes only to be broadcast at specific times. For the avoidance of doubt, it should be noted that the audiovisual output taken as a whole should reflect the principle that the service is for entertainment purposes only. In this case Ofcom found no reference (either verbally or in onscreen text) to the service being for entertainment purposes only. Further, Ofcom did not accept Peripatos' argument that "the precedent cases referenced in Ofcom's Preliminary View do not address in detail the labelling requirements of BCAP Rule 15.5.2". We noted that the precedent cases included the following paragraph in the decisions published in Bulletins 180 and 184⁵:

"We noted that the broadcast content was labelled [using scrolling onscreen text] on air as being for entertainment purposes. However, in view of the fact that the material featured repeated claims of efficacy and accuracy in breach of Rule 15.5.3, as set out above, Ofcom judged that these claims contradicted the purpose of the mandatory labelling of this material as being merely entertainment. Therefore Ofcom also found the advertising in breach of Rule 15.5.2."

⁵ See footnote 2.

Ofcom noted Peripatos' argument that it has "tried unsuccessfully to engage Ofcom in debate" regarding the application of this rule. Ofcom met with Peripatos on 4 August 2011. At that meeting Ofcom made clear that this genre of advertising is only acceptable if clearly labelled as entertainment and BCAP Rule 15.5.2 underpins this principle. Further, at that meeting we invited Peripatos to submit their comments on the proposed guidance, prior to its publication. Ofcom duly took account of the submission made by Peripatos to Ofcom dated 17 August 2011 on its draft guidance. We are aware that Peripatos submitted a subsequent request for a meeting on 12 July 2012; however, Peripatos was informed that it was not appropriate for Ofcom to meet with a licensee (or its representative) during the course of a formal investigation, particularly where in its opinion the subject of the complaint is inherently linked to the issues the licensee has raised. Ofcom's policy approach and likely interpretation of BCAP Rule 15.5.2 is set out in the guidance is further illustrated by relevant precedent cases, such as the Findings published in Broadcast Bulletin's 180⁶, 184⁷ and 212⁸ which clearly illustrate that psychic reading PTV advertising content must be appropriately labelled and the remaining audiovisual output should not contradict that labelling. Further, Ofcom's guidance clearly states that PTV advertising content can "be presented only as entertainment".

We noted Peripatos' argument that "accuracy can effectively be implied in the very act of psychic reading per se". Ofcom disagrees with this interpretation of the guidance. The guidance (which directly reflects the relevant rules in Section 15 of the BCAP Code) prohibits explicit or implied claims which suggest that psychic content is anything but entertainment and this is the basis on which this genre is permitted to advertise. In Ofcom's view psychic advertising content that suggests that the service provided is reliable or substantiated inherently contradicts the requirement that the content is for entertainment purposes only. In Ofcom's opinion while psychic advertising content is permitted to be broadcast, it requires that broadcasters take care, particularly with regard to long-form teleshopping content, to ensure that presenters and psychics are careful not to make explicit or implied claims of efficacy or accuracy, and as appropriate make clear that the material broadcast is for entertainment only. We also noted Peripatos's argument that the service has since amended the content of Psychic Today to reflect the requirements of Rule 15.5.2. However, Ofcom considers the requirements of this rule are clear and unambiguous.

This advertising content was clearly in breach of Rule 15.5.2.

In view of the fact that the material featured a implied claim of efficacy (and so accuracy) in breach of Rule 15.5.3, as set out above, and there was a failure to label the advertising content at all as being for entertainment purposes only, Ofcom judged that the broadcast of these remarks by the psychic raised serious compliance issues. The purpose of Rules 15.5.2 and 15.5.3 is to help protect vulnerable viewers who might otherwise believe that paying for a PRS contact with a psychic via this service

⁶ Issue 180 of Ofcom's Broadcast Bulletin, 20 April 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb180/obb180.pdf>.

⁷ Issue 184 of Ofcom's Broadcast Bulletin, 20 June 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb184/obb184.pdf>.

⁸ Issue 212 of Ofcom's Broadcast Bulletin, 28 August 2012, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb212/obb212.pdf>.

will provide them with accurate information about the future or influence them in making life-changing decisions.

Ofcom published Code breach Findings in Broadcast Bulletins 180⁹ and 184¹⁰ against Majestic TV (regarding material on Psychic Today) and Square 1 (concerning Big Deal) respectively. The breaches recorded against Psychic Today and Big Deal in those findings also concerned Rules 15.5.2 and 15.5.3. In those decisions Ofcom formally put on notice each of Psychic Today and Big Deal “that should compliance issues of this type arise in future, [Ofcom] will be likely to consider the imposition of statutory sanctions”. These Findings were in turn referenced in the guidance document that Ofcom published in December 2011. That guidance explicitly stated that: “Such [psychic reading advertising] material must not include claims for efficacy or accuracy – this covers both explicit and implicit claims...PTV advertising content [must] be presented only as entertainment. To be clear, it is not sufficient to rely on onscreen text to fulfil this requirement of Rule 15.5.3. The advertising as a whole must reflect this principle.”

In Ofcom’s view the December 2011 guidance was and is clear and unambiguous with regard to claims for efficacy and accuracy in, and appropriate labelling of, psychic reading PTV advertising content: each of Majestic TV, Square 1, Sumo and TV Worx should have been in no doubt as to the requirements of Rules 15.5.2 and 15.5.3 at the time this material was broadcast on 20 June 2012.

In view of these earlier findings and subsequent guidance, Ofcom is very concerned that Majestic TV and Square 1 have again broadcast psychic advertising content that has breached Rules 15.5.2 and 15.5.3 of the BCAP Code (also see the other breaches recorded against Majestic TV and Square 1 on pp.5-12 and pp.13-20 of this Broadcast Bulletin). **Ofcom therefore puts these two licensees on notice that we will consider the breaches in this current finding together with those recorded on pp.5-12 and pp.13-20 of this Broadcast Bulletin for the imposition of a statutory sanction.**

As regards Sumo TV, Ofcom notes that the holder of its licence (Sumo) uses the same third party entity (Peripatos) for compliance as Majestic TV and Square 1 use for the Psychic Today and Big Deal services respectively; and that these current breaches and those recorded on pp.5-12 of this Broadcast Bulletin occurred after the December 2011 guidance was published. However, Ofcom notes that these are the first such breaches recorded against Sumo and therefore Ofcom will not consider these breaches for the imposition of a statutory sanction at this time. However, Sumo is put on notice that any further similar contraventions of the BCAP Code will be considered for further regulatory action by Ofcom.

With regard to Fitness TV, Ofcom notes that the holder of its licence (TV Worx) argued that it was broadcasting a live feed of Psychic Today. This does not absolve the licensee of responsibility for ensuring material broadcast on its service is compliant. Further we note that these breaches and those recorded on pp.13-20 of this Broadcast Bulletin occurred after the December 2011 guidance was published.

⁹ Issue 180 of Ofcom’s Broadcast Bulletin, 20 April 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb180/obb180.pdf>.

¹⁰ Issue 184 of Ofcom’s Broadcast Bulletin, 20 June 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb184/obb184.pdf>.

However, Ofcom notes that these are the first such breaches recorded against TV Worx and therefore Ofcom will not consider these breaches for the imposition of a statutory sanction at this time. However, TV Worx is put on notice that any further similar contraventions of the BCAP Code will be considered for further regulatory action by Ofcom.

Psychic Today: Breach of BCAP Rules 15.5.2 and 15.5.3

Big Deal: Breach of BCAP Rules 15.5.2 and 15.5.3

Fitness TV: Breach of BCAP Rules 15.5.2 and 15.5.3

Sumo TV: Breach of BCAP Rules 15.5.2 and 15.5.3

In Breach

Studio 66 Nights

Studio 66 TV4 (Channel 927), 10 October 2012, 21:00 to 21:30

Introduction

Studio 66 Nights is a segment of interactive ‘adult chat’ advertising content broadcast on the licensed service known as Studio 66 TV4 (Sky Channel 927). The service is freely available without mandatory restricted access and is situated in the ‘adult’ section of the Sky electronic programme guide (“Sky EPG”). Viewers are invited to contact onscreen presenters via premium rate telephony services (“PRS”). The female presenters dress and behave in a sexually provocative way while encouraging viewers to contact the PRS numbers.

The licence for Studio 66 TV2 is owned and operated by 965 TV Limited (“965 TV” or “the Licensee”).

Ofcom received a complaint that content on this service, broadcast between 21:00 and 21:30, contained explicit sexual images that were too strong to be shown at this time.

Ofcom noted that the advertising content featured a female presenter onscreen but, from approximately 21:07 onwards, the presenter was replaced with an advertisement shown full screen for three minute “uncensored videos”, downloadable to a mobile phone. The advertisement, which was repeated three times between 21:07 and 21:30, comprised a series of short clips taken from these “uncensored videos”, which included the following images:

- full screen close ups of bare breasts being massaged with oil and rubbed together;
- full screen close ups of a woman’s buttocks being massaged with oil and cream and being slapped, and of women pulling down thongs between their buttocks;
- two females kissing and touching each other’s breasts and buttocks;
- naked images of female presenters with their legs open or bending over to camera with a “censored” overlay placed on the genitals and anal area;
- naked images of presenters with hands or legs concealing the genital area; and
- an image of a presenter pulling down her bikini pants with a “censored” overlay which only partially covered her genital area.

The clips were accompanied by advertising straplines including: “*get this filthy video*”; “*xxx content and more*”; and “*get this video uncensored*”. These images were also accompanied by shortcode numbers which viewers could text to receive pictures and

video content of the women such as “XXX 899**¹”, “CVID1 899**”, “CARA3 899**” and “XXX2 899**”.

Given that these onscreen promotional references and shortcodes could potentially lead the viewer to “uncensored” content equivalent to ‘adult sex material’², Ofcom considered that these promotions raised issues warranting investigation under BCAP Code Rule 30.3, which states:

“Advertisements for products coming within the recognised character of pornography are permitted behind mandatory restricted access on adult entertainment channel only.”

Response

The Licensee’s comments as regards Rule 30.3 of the BCAP Code are detailed below.

965 TV explained that the onscreen promotional video containing the clips taken from the “uncensored videos” was broadcast as a result of two errors. The first related to the promotional content that was broadcast and the other related to the product that was advertised.

In terms of the promotional content shown in the onscreen clips, the broadcaster said that it categorised promotional content into what was appropriate before 22:00 (“pre-10”) and after 22:00 (“post-10”). In this case it appeared that the content broadcast on 10 October 2012 (a limited extract³ of which was also broadcast on the 965 TV service Studio 66 TV2 on 25 October 2012 and is detailed in a separate Decision on pp.38-44) was a post-10 trailer and was broadcast at approximately 21:07–21:30 by mistake. This content was now stored separately and the Licensee said that this should “eliminate or at the very least substantially reduce the risk of this [compliance mistake] recurring”. The Licensee also stated it had reviewed and changed all of its promotional material to ensure that it meets “a higher level of compliance”.

With regard to the fact that the shortcodes which appeared onscreen enabled the viewer to access material within the recognised character of pornography, the Licensee stated that it was “a genuine mistake” to have broadcast this advertising content and “a result of human error”, and at no time was this content intended for broadcast as a TV promotion. Following a previous Ofcom investigation, published in Broadcast Bulletin 223, regarding the use of the same onscreen shortcodes, the Licensee was aware that the onscreen shortcodes on its service enabled viewers to access pornography⁴. Consequently, as soon as Ofcom had alerted the Licensee to

¹ In quoting from these promotions Ofcom has substituted asterisks for the promoted numbers throughout this Decision.

² See Rule 1.18 of the Ofcom Broadcasting Code, where ‘adult sex material’ is described as “material that contains images and/or language of a strong sexual nature...for the primary purpose of sexual arousal or stimulation”.

³ The limited extract broadcast on 25 October 2012 was of approximately 20 seconds in duration and did not contain the same strength of images as this broadcast on 10 October 2012.

⁴ Issue 223 of Ofcom’s Broadcast Bulletin, 4 February 2013, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb223/obb223.pdf>.

this issue, 965 TV it had “suspended the service in question” while a full investigation was conducted. The Licensee had not been notified of Ofcom’s concerns with regard to Rule 30.3 in time to suspend the service in time for this broadcast on 10 October 2012.

The Licensee said that these more sexually explicit products were available on the Licensee’s website as “part of a range of content available on a subscription basis” and that downloadable content for the website and mobile downloads advertised on the broadcast service were stored on a central server. However, “due to a human error the content intended for download via the broadcast service was inadvertently replaced by the stronger content intended for download via the website”. 965 TV explained that it had now implemented a number of compliance measures to ensure a similar mistake did not happen again. These included: storing the content intended for internet and TV users on separate servers; ensuring two appropriately trained and different people are responsible for uploading the two types of content to each server; and ensuring all new content uploaded to the servers is checked and signed off by a manager before the service goes live and any advertisement is made on TV.

Finally, 965 TV said that it deeply regretted that an error of this nature occurred and offered its sincerest apologies. The Licensee added that although it fully accepted responsibility for this error and totally shared Ofcom’s concerns, it wished to make it clear that the downloadable pornographic content could only have been received by a handset which was age-verified with the network operator.

Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that “the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented”. This objective is reflected in the rules set out in the BCAP Code.

The BCAP Code contains rules which permit ‘adult chat’ services to be advertised (and so broadcast) within prescribed times and on free-to-air channels that are specifically licensed by Ofcom for that purpose, but which carefully circumscribe their content to exclude inappropriate material. These rules apply to both daytime and ‘adult chat’ services.

When setting and applying standards in the BCAP Code to provide adequate protection to members of the public from serious or widespread offence, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention on Human Rights, as incorporated in the Human Rights Act 1998. However, the advertising content of ‘adult chat’ services has much less latitude than is typically available to editorial material in respect of context and narrative. A primary intent of advertising is to sell products and services, and consideration of acceptable standards will take that context into account.

Rule 30.3 of the BCAP Code states that:

“Advertisements for products coming within the recognised character of pornography are permitted behind mandatory restricted access on adult entertainment channels only.”

Advertisement of a product

In applying BCAP Code Rule 30.3, Ofcom considered first whether these onscreen promotions for downloadable video clips were advertisements for products.

The BCAP Code classifies 'adult chat' advertising content as 'Participation TV', i.e. "long form advertising for direct-response, remote entertainment services that typically include the possibility of interacting with broadcast content" (see Introduction to BCAP Code, paragraph n.⁵).

Ofcom's view is that these onscreen promotions for downloadable video clips were separate to the 'adult chat' advertising content usually onscreen on this interactive 'adult chat' service. In this case we noted the material consisted of short video clips of women showing, for example, oil and cream being rubbed into their bare breasts and buttocks, accompanied by a series of shortcode numbers such as "XXX 899**"; "CVID1 899**", "CARA3 899**" and "XXX2 899**" which viewers could text to receive pictures and video content of the women.

In Ofcom's view these promotions were for standalone downloadable products different to the 'adult chat' advertising content: short downloadable clips or photographs which could be bought for £3.00 and then viewed on the buyer's mobile phone or computer. Ofcom considered the references and onscreen material broadcast were clearly advertising these products.

Recognised character of pornography

Ofcom then considered if this material was for a product that came within the "recognised character of pornography".

As set out in the Introduction, the images in these advertisements showed women with bare breasts and buttocks and engaged in sexualised actions such as bending over to camera, and rubbing and massaging cream and oil into their buttocks and breasts. Some of the images of naked women included an overlay with the words "censored" placed over their genital and anal areas. In addition, the images were accompanied by text which included: "Get this video uncensored. TXT XXX2 to 899**"; "XXX Content and More. TXT XXX1 to 899**"; and "Get this filthy video. TXT XXX to 899**".

This in Ofcom's view clearly indicated to the viewer that if they texted the relevant word or term to the onscreen shortcode number they would be provided with access to explicit adult material.

To assess the product being advertised, Ofcom sent a text message to a sample of the shortcodes shown onscreen with the same number 899**. As a result, Ofcom was sent details of a URL which gave access to explicit video and explicit still images. Some of these images were in close up. Ofcom notes that the Licensee has stated this content could only have been received by a handset which was age-verified by the mobile network operator. Indeed, Ofcom did receive a text message requesting age verification but we were still able to access the explicit sexual content without being required to provide any proof of age and this would have also been the case had a person under the age of eighteen used an adult's mobile phone to call the

⁵ The BCAP Code: <http://www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20BCAP%20pdf/BCAP%20Code%200712.ashx>.

onscreen shortcode. In Ofcom's opinion, this explicit sexual material was clearly equivalent to 'adult sex material'⁶ or stronger content such as that which would be given a British Board of Film Classification ("BBFC") R18⁷ rating. Both R18 equivalent content and 'adult sex material' are clearly "within the recognised character of pornography".

Any advertisement for this type of content is prohibited on a free-to-air service without mandatory restricted access.

Mandatory restricted access

Under Rule 30.3 advertisements for products within the recognised character of pornography are permitted behind mandatory restricted access on adult entertainment channels only. Section 30 of the BCAP Code states that:

““Behind mandatory restricted access on adult entertainment channels” is interpreted with reference to rule 1.18 of the Ofcom Broadcasting Code.”

Rule 1.18 of the Broadcasting Code carefully restricts the broadcast of 'adult sex material' to channels operating with mandatory restricted access and underlines that for this access to be appropriate "measures must be in place to ensure that the subscriber is an adult".

The service in this case was within the 'adult' section of the Sky EPG (and so was an adult entertainment channel), and broadcast promotional references to products within the recognised character of pornography where there were no appropriate protections to protect children from accessing explicit pornographic material (i.e. mandatory restricted access). Rule 1.18 of the Broadcasting Code makes clear in giving the meaning of "mandatory restricted access" that this must consist of "a PIN protected system (or other equivalent protection) which cannot be removed by the user, that restricts access solely to those authorised to view [i.e. adults]". As Ofcom's assessment of the onscreen promotions demonstrated (see above), we were able to freely access the explicit sexual content which was being advertised without being required to provide any proof of age. These advertisements for products within the recognised character of pornography were therefore shown on these channels without mandatory restricted access as required by Rule 30.3 of the BCAP Code.

For the reasons set out above, these onscreen promotions of downloadable clips or photographs clearly breached Rule 30.3 of the BCAP Code.

Ofcom noted that in the information provided by the Licensee, as detailed in the Response above, this material was broadcast in error and should have been scheduled post 22:00. However, this advertisement is a clear breach of Rule 30.3 which prohibits the advertising of pornography on any service unless it is an adult entertainment service and there is mandatory restricted access in place. Ofcom is of the view that advertising for pornographic content is not suitable for broadcast **at any time** on any interactive 'adult chat' service available free-to-air, regardless of the type of images broadcast as part of the advertising content.

⁶ See footnote 2.

⁷ The BBFC defines 'R18' material as: a special and legally restricted classification primarily for explicit works of consenting sex or strong fetish material involving adults.

In addition, Ofcom was extremely concerned to note the Licensee's argument, in the Response above, that had the onscreen shortcodes *not* provided access to pornographic material and therefore *not* been in breach of Rule 30.3, this onscreen promotion was a suitable promotion for broadcast "post-10", i.e. from 22:00 onwards on this free-to-air service.

Having reviewed the numerous onscreen images shown in this video promotion (which included: close-up images of bare breasts and buttocks with oil, mud and cream being applied and massaged into bare skin and the women's nipples; women slapping their buttocks; and naked women touching and kissing one another intimately), Ofcom is of the view that this material broadcast as part of an 'adult chat' service would have breached BCAP Code Rule 32.3 if broadcast before 22:00 (as in this case), but, even if it had been broadcast after 22:00, it would potentially have been in breach of Rule 4.2.

Rule 32.3 states that:

"Relevant timing restrictions must be applied to advertisements that, through their content, might harm or distress children...or that are unsuitable for them."

Rule 4.2 states that:

"Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards."

Ofcom published revised guidance on the advertising of telecommunications-based sexual entertainment services and PRS daytime chat services (the "Chat Service Guidance"⁸) in July 2011 which clearly sets out what Ofcom considers to be acceptable to broadcast on these services post-watershed. In particular the Chat Service Guidance states that 'adult chat' broadcasters should:

- at no time include shots of presenters spitting onto their or others' bodies, or include shots of presenters using other liquids, such as oil and lotions on their genital or anal areas;
- at no time broadcast shots of presenters using liquids of a sort or in a way which suggests the liquid is ejaculate;
- at no time broadcast invasive shots of the presenter's bodies, particularly physically intrusive, intimate shots of any duration; and
- take particular care if two or more presenters appear together onscreen. If there is any contact between the presenters of an erotic nature (for example kissing, stroking, or contact between thighs, breasts or genital areas) there is a high risk of causing serious or widespread offence against generally accepted standards.

Therefore many of the clips used in this promotional material were not consistent with this guidance on the images appropriate for a free-to-air sexual entertainment services and even if broadcast post 22:00 would have had the potential to cause widespread offence against generally accepted standards which would be breach of

⁸ See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/bcap-guidance.pdf>.

Rule 4.2. The Licensee and other licensees of chat services are therefore advised that promotional material broadcast on telecommunications-based sexual entertainment services must follow the latest Chat Service Guidance.

As with the breaches of BCAP Code Rules 30.3 and 32.3 recorded elsewhere in this issue of the Broadcast Bulletin against 965 TV (see pp.38-44), this is a serious breach of the BCAP Code. **Ofcom therefore puts the Licensee on notice that it is minded to consider a statutory sanction if there is any recurrence of this, or similar, compliance failings.**

Breach of BCAP Code Rule 30.3

In Breach

Studio 66 Nights

Studio 66 TV2 (Channel 938), 25 October 2012, 21:00 to 21:30

Introduction

Studio 66 Nights is a segment of interactive ‘adult chat’ advertising content broadcast on the service Studio 66 TV2 (Sky Channel 938). The service is freely available without mandatory restricted access and is situated in the ‘adult’ section of the Sky electronic programme guide (“Sky EPG”). Viewers are invited to contact onscreen presenters via premium rate telephony services (“PRS”). The female presenters dress and behave in a sexually provocative way while encouraging viewers to contact the PRS numbers.

The licence for Studio 66 TV2 is owned and operated by 965 TV Limited (“965 TV” or “the Licensee”).

Ofcom received a complaint that content on this service, broadcast for a period from 21:00, was sexually explicit and inappropriate on a free-to-air service.

Ofcom noted that at 21:04 a female presenter appeared on screen sitting on a desk in an office style set. The presenter was wearing a black skirt, black tights, a thong and a peach coloured blouse which was unbuttoned at her chest to reveal a thin white see-through lacy bra. Ofcom further noted that:

- from 21:11 the presenter lay on her front on the desk and lifted her skirt up to reveal the cheeks of her buttocks, albeit covered by translucent black tights, and rocked her hips from side to side;
- at 21:12 the presenter lifted her blouse to the side to reveal her lacy bra so a breast and nipple were visible, and she proceeded to gently stroke her breast and thighs as the camera panned close up to her breast and then along her body;
- at 21:15 the presenter lifted her skirt over her buttocks again and moved onto her side where she opened her legs to camera and proceeded to touch her pubic area and stroke her upper thighs, albeit over her translucent tights and thong. The camera panned close up into the presenter’s pubic area. While in this position the presenter then pulled back both of her bra cups to show her bare breasts to camera and she massaged and squeezed them.

Ofcom considered the material raised issues warranting investigation under BCAP Code Rule 32.3, which states:

“Relevant timing restrictions must be applied to advertisements that, through their content, might harm or distress children of particular ages or that are otherwise unsuitable for them.”

We therefore requested comments from the Licensee as to how this material complied with this rule.

Following the presenter's exposure of her bare breasts, the usual format of the adult service was abruptly replaced with an onscreen promotion, of approximately 20 seconds in duration, for downloadable video clips for purchase at £3.00 per clip. This full screen onscreen promotion included short clips of women in various poses such as bending over in front of the camera, with their breasts and buttocks fully overlaid with a banner reading "censored". The onscreen text included: "Get this hot vid now. Text FVID7 to 899**¹". This clip was an extract from the same onscreen promotion broadcast in full on Studio 66 TV4 on 10 October 2012 and reported on pp.31-37 of this Broadcast Bulletin but given its limited duration the images shown were not as strong as those broadcast in the full version. Following this clip the broadcast returned to the previous presenter and the usual format.

Throughout both the normal 'adult chat' advertising content and the onscreen promotion, Ofcom noted that, while the female 'adult chat' presenter and the promotional material filled most of the screen, there were two graphics boxes at the bottom left-hand and bottom right-hand corners of the screen featuring shortcode numbers which viewers could text to receive pictures and video content. For example:

- in the bottom left-hand corner box the onscreen text included the following: "Get 2 XXX pics. Pic XXX to 899**"; "XXX Text Chat. Chat XXX to 899**"; and "2 Hard Core XXX vids. Hard XXX to 899**"; and
- in the bottom right-hand corner box the text was accompanied by still images of women all of whom were topless and in some cases naked, although their genitals were obscured, and included the following examples of text: "2 Caty XXX vids. Text to Caty XXX to 899**"; "Dirty Sex Chat. Text Chat to 899**"; and "Get 2 dirty vids. Text Vid to 899**".

Given that these onscreen promotional references and shortcodes could potentially lead the viewer to content equivalent to 'adult sex material'², Ofcom considered that these promotions raised issues warranting investigation under BCAP Code Rule 30.3, which states:

"Advertisements for products coming within the recognised character of pornography are permitted behind mandatory restricted access on adult entertainment channels only."

Response

The Licensee's comments as regards Rule 30.3 and Rule 32.3 of the BCAP Code are detailed below.

Rule 32.3

965 TV agreed that the presenter's performance, "when combined with the overall flavour of the broadcast, fell short of Ofcom's published guidance". However it argued that "the likelihood that any children may have been watching, taking into account the

¹ In quoting from these promotions Ofcom has substituted asterisks for some of the promoted numbers throughout this Decision.

² See Rule 1.18 of the Ofcom Broadcasting Code, where 'adult sex material' is described as "material that contains images and/or language of a strong sexual nature...for the primary purpose of sexual arousal or stimulation".

time (post-watershed) and the channel's positioning within the adult section of the EPG, would have been minimal". This resulted in a limited possibility of the broadcast causing harm or distress to children. Nonetheless, the Licensee stated it had "re-trained its production teams and again issued to staff both Ofcom's and our own guidance in relation to post-watershed content".

Rule 30.3

With regard to the clip of the onscreen promotion for downloadable video clips, which appeared abruptly onscreen after the 'adult chat' presenter revealed her breasts to camera at 21:16, 965 TV explained that this was broadcast as a result of two errors. The first related to the promotional content that was broadcast and the other related to the product that was advertised.

In terms of the promotional content shown in the onscreen promotional clip, the broadcaster said that it categorised promotional content into what was appropriate before 22:00 ("pre-10") and after 22:00 ("post-10"). In this case it appeared that the content broadcast on 25 October 2012 was a post-10 trailer and was broadcast between 21:00 and 21:30 by mistake. This content was now stored separately and the Licensee explained that this should "eliminate or at the very least substantially reduce the risk of this [compliance mistake] recurring". The Licensee also stated it had reviewed and changed all of its promotional material to ensure that it meets "a higher level of compliance".

With regard to the fact that the shortcodes which appeared onscreen enabled the viewer to access material within the recognised character of pornography, the Licensee stated that it was "a genuine mistake" to have broadcast this advertising content and "a result of human error", and at no time was this content intended for broadcast as a TV promotion. Following a previous Ofcom investigation, published in Broadcast Bulletin 223, regarding the use of the same onscreen shortcodes, the Licensee was aware that the onscreen shortcodes on their service enabled viewers to access pornography³. Consequently, as soon as Ofcom had alerted the Licensee to this issue, 965 TV said it had "suspended the service in question" while a full investigation was conducted. The Licensee had not been notified of Ofcom's concerns with regard to Rule 30.3 in time to suspend the service in time for this broadcast on 25 October 2012.

The Licensee said that these more sexually explicit products were available on the Licensee's website as "part of a range of content available on a subscription basis" and that downloadable content for the website and mobile downloads advertised on the broadcast service were stored on a central server. However, "due to a human error the content intended for download via the broadcast service was inadvertently replaced by the stronger content intended for download via the website". 965 TV explained that it had now implemented a number of compliance measures to ensure a similar mistake did not happen again. These included: storing the content intended for internet and TV users on separate servers; ensuring two appropriately trained and different people are responsible for uploading the two types of content to each server; and ensuring all new content uploaded to the servers is checked and signed off by a manager before the service goes live and any advertisement is made on TV.

³ Issue 223 of Ofcom's Broadcast Bulletin, 4 February 2013, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb223/obb223.pdf>.

Finally, 965 TV said that it deeply regretted that an error of this nature had occurred and offered its sincerest apologies. The Licensee added that although it fully accepted responsibility for this error and totally shared Ofcom's concerns, it wished to make it clear that the downloadable pornographic content could only have been received by a handset which was age-verified with the network operator.

Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that "the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented". This objective is reflected in the rules set out in the BCAP Code.

The BCAP Code contains rules which permit 'adult chat' services to be advertised within prescribed times and on free-to-air channels that are specifically licensed by Ofcom for that purpose, but which carefully circumscribe their content to exclude inappropriate material. These rules apply to both daytime and 'adult chat' services.

When setting and applying standards in the BCAP Code to provide adequate protection to members of the public from serious or widespread offence, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention on Human Rights, as incorporated in the Human Rights Act 1998. However, the advertising content of 'adult chat' services has much less latitude than is typically available to editorial material in respect of context and narrative. The primary intent of advertising is to sell products and services, and consideration of acceptable standards will take that context into account.

Rule 30.3

This rule states that:

"Advertisements for products coming within the recognised character of pornography are permitted behind mandatory restricted access on adult entertainment channels only."

Advertisement of a product

In applying BCAP Code Rule 30.3, Ofcom considered first whether the onscreen text promotions for downloadable video clips and still images and the one minute onscreen promotion for a downloadable clip which was broadcast at 21:15 were advertisements for products.

The BCAP Code classifies 'adult chat' advertising content as 'Participation TV' i.e. "long form advertising for direct-response, remote entertainment services that typically include the possibility of interacting with broadcast content" (see Introduction to BCAP Code, paragraph n.⁴).

During this broadcast Ofcom noted: (a) three separate onscreen graphic promotions, which appeared while the main presenter was featured onscreen; and (b) a separate

⁴ The BCAP Code: <http://www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20BCAP%20pdf/BCAP%20Code%200712.ashx>

promotional clip of approximately one minute in duration with the three separate onscreen promotions also visible but with no presenter.

Ofcom's view is that these were all onscreen promotions for downloadable video clips and still images, and were separate to the 'adult chat' advertising content that normally filled the rest of the screen. In this case we noted the onscreen graphics consisted of: still images of topless and in some cases naked women (although their genitals were obscured) and a series of shortcode numbers which viewers could text to receive pictures and video content of the women, and a short video clip of a female presenter with "censored" overlays partially covering her buttocks and breasts indicating that the material available for purchase would be uncensored.

In Ofcom's view these promotions were for standalone downloadable products different to the 'adult chat' advertising content: short downloadable clips or photographs which could be bought for £3.00 and then viewed on the buyer's mobile phone or computer. Ofcom considered the onscreen references and material broadcast were clearly advertising these products.

Recognised character of pornography

Ofcom then considered if this material was advertising products that came within the "recognised character of pornography".

As set out in the Introduction, the still graphics included in these advertisements comprised text, and text with still images of women (all of whom were topless and in some cases naked), as well as text with moving images with "censored" overlays over the breasts and buttocks of the featured female presenter. In addition, the onscreen graphics were accompanied by text which included: "2 Hard Core XXX vids. Hard XXX to 899**". This in Ofcom's view clearly indicated to the viewer that if they texted the relevant word or term to the on screen shortcode number they would be provided with access to explicit adult material.

To assess the product being advertised, Ofcom sent a text message to a sample of the shortcodes shown onscreen with the same number 899**. As a result Ofcom was sent details of a URL which gave access to explicit video and still images. Some of these images were in close up. Ofcom notes that the Licensee has stated this content could only have been received by a handset which was age-verified by the mobile network operator. Indeed, Ofcom did receive a text message requesting age verification but we were still able to access the explicit sexual content without being required to provide any proof of age and this would have also been the case had a person under the age of eighteen used an adult's mobile phone to call the onscreen shortcode. In Ofcom's opinion, this explicit sexual material was clearly equivalent to 'adult sex material'⁵ or stronger content such as that which would be given a British Board of Film Classification ("BBFC") R18⁶ rating. Both R18 equivalent content and 'adult sex material' are clearly "within the recognised character of pornography".

Any advertisement which leads viewers to this type of content is prohibited on a free-to-air service without mandatory restricted access.

⁵ See footnote 2.

⁶ The BBFC defines 'R18' material as: a special and legally restricted classification primarily for explicit works of consenting sex or strong fetish material involving adults.

Mandatory restricted access

Under Rule 30.3 advertisements for products within the recognised character of pornography are permitted behind mandatory restricted access on adult entertainment channels only. Section 30 of the BCAP Code states that:

““Behind mandatory restricted access on adult entertainment channels” is interpreted with reference to rule 1.18 of the Ofcom Broadcasting Code.”

Rule 1.18 of the Broadcasting Code carefully restricts the broadcast of ‘adult sex material’ to channels operating with mandatory restricted access and underlines that for this access to be appropriate “measures must be in place to ensure that the subscriber is an adult”.

The service in this case was within the ‘adult’ section of the Sky EPG (and so was an adult entertainment channel), and broadcast promotional references to products within the recognised character of pornography in which there were no appropriate protections to protect children from accessing explicit pornographic material (i.e. mandatory restricted access). Rule 1.18 of the Broadcasting Code makes clear in giving the meaning of “mandatory restricted access” that this must consist of “a PIN protected system (or other equivalent protection) which cannot be removed by the user, that restricts access solely to those authorised to view [i.e. adults]”. As Ofcom’s assessment of the onscreen promotions demonstrated (see above), we were able to freely access the explicit sexual content which was being advertised without being required to provide any proof of age. These advertisements for products within the recognised character of pornography were therefore shown on these channels without mandatory restricted access as required by Rule 30.3 of the BCAP Code.

Rule 30.3: Conclusion

For the reasons set out above, these onscreen promotions of downloadable clips or photographs clearly breached Rule 30.3 of the BCAP Code.

Ofcom is of the view that advertising for pornographic content is not suitable for broadcast **at any time** on any interactive ‘adult chat’ service available free-to-air, regardless of the type of images broadcast as part of the advertising content.

Rule 32.3

Rule 32.3 of the BCAP Code states: “Relevant timing restrictions must be applied to advertisements that, through their content, might harm or distress children of particular ages or that are otherwise unsuitable for them.”

Appropriate timing restrictions are judged according to factors such as: the nature of the content; the likely number of children in the audience; the likely age of those children; the time of the broadcast; the position of the channel in the relevant electronic programme guide (e.g. the ‘adult’ section); any warnings; and mandatory restricted access. Ofcom has also made clear in a number of published decisions the type of material that is unsuitable to be broadcast in ‘adult chat’ advertising content that is available without mandatory restricted access⁷.

On 27 July 2011 Ofcom published detailed guidance on the advertising of telecommunications-based sexual entertainment services and PRS daytime chat

services. This guidance clearly sets out what Ofcom considers to be acceptable for broadcast on these services, both pre- and post-watershed. For example, this guidance explicitly states that daytime chat broadcasters should ensure that:

“After 9pm any move towards stronger – but still very restrained – material containing sexual imagery should be gradual and progressive. There should not for example be any miming of sexual acts between 9pm and 10pm”.

Ofcom has also made clear in published decisions what sort of material is unsuitable to be broadcast in daytime interactive chat advertisements⁸. In applying BCAP Code Rule 32.3, Ofcom had first to decide if the broadcast material was unsuitable for children.

Ofcom noted that the female presenter removed the cups of her bra to reveal her bare breasts at 21:15 and repeatedly pulled her skirt over her buttocks to show her pubic area and buttocks, albeit covered by translucent tights and a thong. While wearing this outfit, the presenter acted in a sexualised manner: she was shown lying on her side with her legs open and on her back for prolonged periods of time, repeatedly rocking her hips so as to mimic sexual intercourse (albeit away from camera). She also touched, rubbed and stroked her upper thighs, pubic area, legs and buttocks in a sexually suggestive manner. In light of this behaviour and imagery, Ofcom concluded that this material was clearly unsuitable for children.

Ofcom then considered whether relevant timing or scheduling restrictions had been applied by the Licensee to this broadcast. Ofcom took account of the fact that the channel is in the ‘adult’ section of the Sky EPG. However, this material was broadcast on a channel without mandatory restricted access from 21:04, very shortly after the watershed when children may have still been available to view, some unaccompanied by an adult.

Ofcom also had regard to the likely expectations of the audience for programmes broadcast at this time of day on a channel in the ‘adult’ section of the Sky EPG without mandatory restricted access directly after the 21:00 watershed. In Ofcom’s opinion, viewers (and in particular parents) would not expect such material to be broadcast and available to view so soon after 21:00, particularly given that material broadcast on such services immediately prior to 21:00 should be non-sexual in tone and apparent intent. The broadcast of such sexualised content was inappropriate to advertise ‘adult sex’ chat so soon after the 21:00 watershed. This broadcast was therefore in breach of BCAP Code Rule 32.3.

As with the breach of BCAP Rule 30.3 against 965 TV reported earlier in this issue of the Broadcast Bulletin (see pp.31-37), these are serious breaches of the BCAP Code. **Ofcom therefore puts the Licensee on notice that it is minded to consider a statutory sanction if there is any recurrence of this, or similar, compliance failings.**

Breaches of BCAP Code Rules 30.3 and 32.3

⁸ For example: ChatGirl TV, Adult Channel (Channel 901), 4 November 2011, 21:00 to 21:30, in issue 201 of Ofcom’s Broadcast Bulletin, 5 March 2012, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb2001/obb201.pdf>.

In Breach

I Focus

Channel i, 12 and 26 April 2012, 2 May 2012, various times

Introduction

Channel i is a news and general entertainment channel broadcast in Bengali and serving a Bangladeshi audience. The licence for Channel i is held by Prime Bangla Limited (“Prime Bangla” or “the Licensee”).

A complainant drew Ofcom’s attention to what appeared to be advertisements placed on Channel i by various organisations. The complainant alleged that the advertisements promoted political groups in breach of the ban on political advertising contained within the Communications Act 2003 (“the Act”).

Ofcom examined 17 items. Each was broadcast in Bengali. The items were, like advertisements, self-contained messages apparently produced by the person or group whose message the item conveyed.

Ofcom commissioned independent translations of all the material.

Organisations and individuals featured in 14 of the items were:

- the Bangladesh Nationalist Party¹;
- the London Mohanagar Chhatra League (the London branch of the student wing of the Awami League²);
- the Jubo League (the youth wing of the Awami League);
- Faruk Ahmed (of the Awami League);
- M A Malek (of the Bangladesh Nationalist Party);
- the Bangladesh Awami League; and
- the Awami League, UK.

Geographical branches of these organisations, both from within the UK and abroad, were also represented (Bangladesh Nationalist Party branches in Scotland, Bradford and Italy, for example, the Cardiff branch of the Jubo League, and Italian branches of the Awami League.)

Text and audio within some of the items contained the following statements (the items are numbered for reference later in this Finding):

¹ The Bangladesh Nationalist Party is the largest opposition party in Bangladesh.

² The Awami League is presently the governing party in Bangladesh.

12 April 2012

1. *“A discussion meeting on the event of the Historic Mujibnagar³ Day and demanding the judicial trial of the war criminals⁴ has been arranged by a joint enterprise of the Cardiff City Jubo League and Bangabandhu Parishod.”*
(Item featuring the Cardiff City Jubo League)
2. *“An effective council of Bangladesh Nationalist Party in Scotland has been established to materialize the ideals of martyr Zia⁵, strengthen the hands of uncompromising leader Begum Khaleda Zia⁶ and to protest all the conspiracy and maligns against Tarek Zia⁷.”*
(Item featuring the Bangladesh Nationalist Party, Scotland Branch)
3. *“Do not be concerned, there is no place for Razakars⁸ in the independent land of Bangladesh. On behalf of the all the Bangladeshi expatriates who support the independence of Bangladesh, demanding the judicial trial of the war criminals and on behalf of Leicester Awami League.”*
(Item featuring the Bangladesh Awami League)

26 April 2012

4. *“A Very Big Demonstration Assembly. Protesting the conceal of peoples leader M Eliyas Ali⁹, the unbending student leader of anti-dictatorship movement of 1990, the pride of Sylhet, also the organizational secretary of the central committee of Bangladesh Nationalist Party, president of Sylhet District BNP and a demonstrator of the Tipaimukh Dam.”*
(Item by Bangladesh Nationalist Party, Brescia Branch, Italy)

³ Ofcom understands the term ‘Mujibnagar Day’ to be a reference to 17 April 1971, when it widely accepted that Bangladesh’s first government in exile was formed.

⁴ Ofcom understands this to be a reference to the ongoing legal attempts, under the aegis of the International Crimes Tribunal (“ICT”), set up by the current Awami League Government to investigate alleged war crimes committed during the 1971 war in which Bangladesh obtained its independence from Pakistan.

⁵ Ofcom understands this to be a reference to Ziaur Rahman, the seventh President of Bangladesh, who founded the Bangladesh Nationalist Party, and was assassinated in 1981.

⁶ Begum Khaleda Zia is a leading member of the Bangladesh Nationalist Party and was Prime Minister of Bangladesh from 1991 to 1996 and again from 2001 to 2006. She was also married to Ziaur Rahman (see footnote 4).

⁷ Tarek Zia is the son of Ziaur Rahman and Begum Khaleda Zia (see footnotes 4 and 5), and is also a leading member of the Bangladesh Nationalist Party. It is reported that in the past he has been charged in relation to allegations of money laundering.

⁸ Ofcom understands the term “Razakar” to refer to Bangladeshi forces who fought in support of Pakistan during the 1971 war in which Bangladesh obtained its independence from Pakistan.

⁹ Eliyas Ali is a Bangladesh Nationalist Party politician who disappeared in April 2012. It had been alleged by some in the Bangladesh Nationalist Party that he was kidnapped by Government agencies.

5. “UK Bangladesh Nationalist Party has arranged – A Demonstration Assembly – In front of No. 10 Downing Street, the office of British Prime Minister. Demanding Caretaker government and Search for Mr. M Eliyas Ali who was the organizational secretary of the central committee of Bangladesh Nationalist Party and the president of Sylhet District Bangladesh Nationalist Party, former MP and unbending leader of the movement against the dictatorship in 1990.”
(Item featuring Bangladesh Nationalist Party)

The non-political organisations featured in the other three items were: the Bangladesh Chhatra Union, a Bangladeshi student organisation; the Bangladesh Italian Welfare Organisation; and the Bangladesh Student Union UK. The messages from the student organisations were invitations to a reunion event; and the item on behalf of the Welfare Organisation announced new committee members.

On seeking the Licensee’s comments in respect of the items under the political advertising ban, Ofcom was told by Prime Bangla that the items were not in fact advertisements but were components of a programme, *I Focus*. We were told that this is a “community announcement programme” broadcast “to keep Bengali people aware of all community events happening in the UK or Europe”.

Prime Bangla said that it accepted no money or other consideration for broadcast of the items within *I Focus*.

However, Ofcom could not identify any conventional programme elements that identified the items as being part of programming: no credits were used, no presenter linked items, no discussion of the items took place. *I Focus* appeared to be simply strings of items in the manner of advertising. Ofcom did note, however, that the Sky electronic programme guide (EPG) listed *I Focus*.

The presentation of the items on the three days examined included the following:

12 April 2012, 22:00–22:35

Items appeared after a brief feature (of about 10 seconds) called *Music of Channel i*. The items followed on from each other. There were no programme credits, no branding and no other programme material such as commentary or interviews. After the uninterrupted succession of items – including messages from the Bangladesh Nationalist Party, the Jubo League and the Awami league – there was a further appearance of *Music of Channel i*.

26 April 2012, 22:15–22:45

An item (for the UK Jubo League) followed immediately after an advertisement for a biryani and grill restaurant. There was no indication whatever that the viewer was watching a programme called *I Focus*. Then following a drama called *Lonka Kando* and some five seconds of *Music of Channel i*, the items reappeared – again, including messages on behalf of the Bangladesh Nationalist Party and Awami League – uninterrupted, unbranded and without any other indication that they were part of a programme.

2 May 2012, 22:25–22:40

An item on behalf of the Awami League followed an advertisement for a book launch. Other items then followed until the start of a drama, *Aho Ratri Aho Din*. Again, there was nothing to indicate that the items were anything other than advertisements.

Given the Licensee’s assertion that the items constituted editorial content (i.e. formed part of Prime Bangla’s programming), and that no money was accepted for their broadcast, and the content (as set out in the translated quotes above) and presentation of the items, we considered that they raised issues warranting investigation under the following rules of the Code:

Rule 5.5 “Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole.”

Rule 9.1 “Broadcasters must maintain independent editorial control over programming.”

Rule 9.2 “Broadcasters must ensure that editorial content is distinct from advertising.”

“Note: For the definition of “advertising”, see Ofcom’s Code on the scheduling of television advertising (“COSTA”).”

We therefore sought Prime Bangla’s comments on how the items complied with the above rules.

Response

Rule 5.5 (due impartiality in matters of political or industrial controversy and matters relating to current public policy)

Prime Bangla repeated its explanation that *I Focus* is a community announcement programme that seeks to inform viewers of “what is happening locally and internationally in Bangladeshi current affairs”. Because of this, the Licensee told us, each of the items was brief – some 30 to 60 seconds – and attracted no editorial comment. The items merely provided information to the public “about what is happening and where”.

The Licensee said further that it did not support or promote any individual or political organisation. In respect of the statements set out above, the Licensee said that they were made by unrelated and opposing organisations: the Awami League is the ruling party in Bangladesh and the Bangladesh Nationalist Party is the opposition party in Bangladesh. This, the Licensee said, maintained impartiality.

Rule 9.1 (editorial independence must be maintained)

Prime Bangla said that its editorial team made the material so as to inform the public about events – their subject, the organisers, dates and so on. It said that its editorial team do research on the web, in local newspapers and use information received at the channel’s office. The Licensee said that, based on this, its editorial team will sometimes go out and shoot material, or they may use still shots from the internet or newspapers, to produce a short item with voiceover. Prime Bangla said further that

some items will use video material, but that it edits this and uses only what “is related to the programme”.

The Licensee told us that it treated the items subject to this investigation as short community announcements. If the items are too long, the Licensee said, “people get bored”.

As to the content of the items, Prime Bangla told us that it maintained the same standards for all “information programmes” and therefore there was no “promotion” of any one organisation or group. In this respect the Licensee pointed out that it had broadcast items for both the Bangladesh Nationalist Party and the Awami League and therefore, it maintained, no imbalance occurred.

Rule 9.2 (editorial content must be distinct from advertising)

Prime Bangla told us that it “never charged or asked any favour” from any of the organisations featured. *I Focus*, it said, was never treated as commercial material: it was a community announcement programme.

The Licensee said that it accepted that it had not made enough effort to make clear to viewers that *I Focus* was not advertising. The Licensee said further that it normally transmitted channel ‘promos’, ‘fillers’, programmes and advertisements in sequence and it had assumed that the public would understand the status of the various contents.

However, Prime Bangla told us that it would implement “strictly and immediately” any view of Ofcom’s about the need for clarity as to the status of *I Focus*.

Generally, Prime Bangla said that since being contacted by Ofcom about the items it had stopped broadcasting all directly political material in *I Focus* and that the Licensee was taking all necessary measures to comply with Ofcom regulation. The Licensee offered its sincere apologies if the content had conflicted with any Ofcom rules and promised to implement immediately any Ofcom requirements and take all necessary action to avoid any repetition.

Decision

Under the Act, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that the special impartiality requirements set out in section 320 of the Act are complied with. This standard is contained in Section Five of the Code. Broadcasters are required to ensure that the impartiality requirements of the Act are complied with, including that due impartiality is preserved on matters of political or industrial controversy and matters relating to current public policy (see above for the specific provisions).

Ofcom also has a statutory duty under the Act to ensure that “the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with”. Articles 20 and 23 of the EU Audiovisual Media Services Directive (“the AVMS Directive”) set out strict limits on the amount and scheduling of television advertising. The AVMS Directive also requires that advertising is distinguishable from other parts of the programme service: “Television advertising...shall be readily recognisable and distinguishable from editorial content...and...shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.” The purpose of this distinction is to prevent viewers being confused or misled about the status and purpose of the

material they are watching and to protect viewers from surreptitious advertising. It also prevents editorial content from being used to circumvent the restrictions on advertising minutage.

The AVMS requirements are therefore reflected in, among other Code rules, Rule 9.2, which requires that editorial content is kept distinct from advertising.

The Act also requires Ofcom to have regard to the “desirability of maintaining the independence of editorial control over programme content”. This is reflected in Rule 9.1 of the Code.

Ofcom therefore considered the items’ compliance with Rules 5.5, 9.1 and 9.2 of the Code.

Rule 5.5

This rule states:

“Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole.”

It is not part of Ofcom’s remit to question or investigate the validity of the political views expressed in a case like the current one, but to require the broadcaster to comply with the relevant standards in the Code. The Code does not prohibit broadcasters from discussing any controversial subject or including any particular point of view in a programme. To do so would be an unacceptable restriction on a broadcaster’s freedom of expression.

However, the broadcaster’s right to freedom of expression is not absolute. In carrying out its duties, Ofcom must balance the right to freedom of expression with the requirement in the Code to preserve “due impartiality” on matters relating to political or industrial controversy or matters relating to current public policy. Ofcom recognises that Section Five of the Code, which sets out how due impartiality must be preserved, acts to limit, to some extent, freedom of expression. This is because its application necessarily requires broadcasters to ensure that neither side of a debate relating to matters of political or industrial controversy and matters relating to current public policy is unduly favoured. Therefore, while any Ofcom licensee should have the freedom to discuss any controversial subject or include particular points of view in its programming, in doing so broadcasters must always comply with the Code.

In this case, Ofcom firstly had to ascertain whether the requirements of Section Five of the Code should be applied: that is, whether the content in this case was dealing with matters of political or industrial controversy and/or matters relating to current public policy. In this case, we noted that the items 1 to 5 were brief statements that, for instance, alerted viewers of Channel i to the existence of forthcoming meetings or demonstrations. Just because editorial content refers to political parties or politicians does not necessarily mean that the rules in Section Five are applicable. Furthermore, in judging the applicability of Section Five in any case, Ofcom will take into account the manner in which political issues are dealt with, and how they are presented within programming.

In this case, we considered that items 1 to 5, although brief, clearly touched on matters of political controversy and matters of current public policy in Bangladesh,

namely: the ongoing debate concerning the policy of the Awami League and ICT towards the investigations of war crimes allegedly committed during the 1971 war in which Bangladesh obtained its independence from Pakistan; the controversy surrounding charges brought against the Bangladesh Nationalist Party politician, Tarek Zia; and the controversy surrounding alleged political involvement in the disappearance of the Bangladesh Nationalist Party politician Eliyas Ali. We considered that all these statements could be characterised as articulating, sometimes using colourfully descriptive language, particular viewpoints on these controversial issues. In our view, the fact that the statements were presented as standalone pieces of editorial content articulating a single policy viewpoint would have helped to increase their likely effect on viewers, namely members of the Bangladeshi community in the UK and Europe.

In reaching this view, we considered that items 1, 4 and 5, in alerting the audience to forthcoming events, contained what could be characterised as political slogans giving particular viewpoints on politically controversial matters within Bangladesh and the Bangladeshi community in the UK and Europe. These were:

- a demand for *“the judicial trial of the war criminals”*; and
- calls for the locating of Elyias Ali, coupled with a demand for the introduction of a *“caretaker government”* in Bangladesh.

In addition, we considered that items 2 and 3 contained what also could be characterised as political slogans which: sought to rebut charges brought against the Bangladesh Nationalist Party politician, Tarek Zia; and demanded the investigation of war crimes allegedly committed by Bangladeshi forces, supportive of the Pakistani army during the 1971 war in which Bangladesh obtained its independence from Pakistan.

Given all the above, Ofcom therefore considered that this content dealt with matters of political controversy and matters relating to current public policy. Rule 5.5 was therefore applicable.

In assessing whether due impartiality has been preserved in this case, the term “due” is important. Under the Code, it means adequate or appropriate to the subject and nature of the programme. Therefore, “due impartiality” does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. Due impartiality may be preserved in a number of ways and it is an editorial decision for the broadcaster as to how it ensures due impartiality is maintained.

In this case, Ofcom considered that all five of the items under consideration could be characterised as self-contained expressions of specific viewpoints on particular matters of political controversy and matters relating to current public policy. These five items did not contain any alternative views, which could be reasonably and adequately classed as: (in the case of items 1 and 3), critical or counter to the ICT’s and Awami League’s policy on war crimes allegedly committed during the 1971 war in which Bangladesh obtained its independence from Pakistan; (in the case of item 2) critical of or counter to the Bangladesh Nationalist Party’s position relating to the controversy surrounding charges brought against the Bangladesh Nationalist Party politician, Tarek Zia; and (in relation to items 4 and 5) critical of or counter to the Bangladesh Nationalist Party’s position relating to the controversy surrounding alleged political involvement in the disappearance of the Bangladesh Nationalist Party politician Eliyas Ali.

As such we considered that these pieces of content, when considered alone, gave one-sided views on such matters and did not contain any alternative viewpoints. Furthermore, the broadcaster did not provide any evidence of alternative views on these issues in a series of programmes taken as a whole (i.e. more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience).

In reaching our decision, we took account of Prime Bangla's representations. Firstly, the Licensee said that *I Focus* was "community announcement" programming that sought to inform viewers of "what is happening locally and internationally in Bangladeshi current affairs". As a consequence, the items were short in duration and made without editorial analysis and challenge. Ofcom recognises that broadcasters serving particular communities, such as in this case the expatriate Bangladeshi community, will want to provide content that presents issues of topical interest to their target audience. However, in doing so such broadcasters must ensure that if editorial content touches on matters of political controversy and matters relating to current public policy, alternative viewpoints must be reflected, as appropriate.

Second, we noted the Licensee's argument that because both the ruling party, the Awami League, and the opposition, the Bangladesh Nationalist Party, had made announcements, this in itself had maintained due impartiality. We disagreed. Just because the viewpoints of two opposing political parties were included in Prime Bangla's programming on various and separate occasions, this did not ensure the provisions of Rule 5.5 were complied with in this case. This was because viewpoints by the different parties were being provided on different matters of political controversy and matters relating to current public policy on various occasions and dates.

Given the above, Ofcom therefore concluded that items 1 to 5 breached Rule 5.5.

Rule 9.1

This rule states:

"Broadcasters must maintain independent editorial control over programming."

Although in its response the Licensee indicated that it adopted even-handed "standards" for each of the organisations for which items appeared, Ofcom was concerned that, in the absence of any editorial treatment, programme time had effectively been donated to third party interests. Where a political message is included in programming (generally in news or current affairs programming) it will usually be clearly contextualised – for example to illustrate a party's or pressure group's stance – labelled and included only as far as editorial justification allows. This last consideration will generally mean both that the item (advertisement, campaign video, etc) will not be shown in full, and that the programme will offer a clear explanation for the reason for its inclusion.

In Ofcom's view, by broadcasting a number of messages of a political nature that apparently reflected political groups' interests – whether general aims or particular events and meetings – without any editorial context or analysis, Prime Bangla had failed to maintain independent editorial control. Ofcom therefore concluded that Rule 9.1 had been breached by all of the five items listed and numbered in the Introduction above.

Rules 9.2

This rule states:

“Broadcasters must ensure that editorial content is distinct from advertising.”

The 17 announcements were self-standing messages, of short duration, which appeared to be broadcast separately from, and between, other programme material, sometimes following on directly from advertising for businesses. As such, they resembled advertisements very strongly. In fact, in Ofcom’s view, they were very much more likely to be understood by viewers as advertisements than as parts of a programme.

In view of the items’ presentation within the Licensee’s schedule Ofcom concluded that they were not distinct as programme material and that Rule 9.2 had been breached by all 17 items examined by Ofcom.

This case is of considerable concern to Ofcom. Under section 321 of the Act, political bodies are banned from advertising altogether on Ofcom licensed services (both TV and radio). This ban applies to political bodies from anywhere in the world. In the course of Ofcom’s investigation Prime Bangla did not seek to argue that it was unaware of the political nature of the organisations mentioned in 14 of the 17 items. Further, Ofcom has reported previously on breaches of the prohibition on political advertising that concerned Bangladeshi political bodies¹⁰ and which the Licensee ought to have been aware of.

Ofcom noted the Licensee’s statements that it had stopped broadcasting all directly political material in *I Focus* once Ofcom had raised the investigation, that it had offered its sincere apologies if the content had conflicted with any Ofcom rules, and that it had promised to implement immediately any Ofcom requirements and take all necessary action to avoid any repetition.

However, Ofcom is putting Prime Bangla on notice that it would treat any similar future breaches as extremely serious, and that any future such breaches may be considered for the imposition of statutory sanctions.

Five breaches of Rules 5.5 and 9.1; 17 breaches of Rule 9.2

¹⁰ Bulletin 197, 12 January 2012, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb197/obb197.pdf>; and Broadcast Bulletin 202, 19 March 2012, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb202/obb202.pdf>.

In Breach

Deadly Deals

Vox Africa, 10 November 2012, 16:10

Introduction

Vox Africa is broadcast on the Sky digital satellite platform and describes itself as “the first Pan-African bilingual and independent TV channel”. The licence for this service is held by Vox Africa Plc (“the Licensee”).

Deadly Deals was a two-part drama. The two episodes were broadcast consecutively on the afternoon of Sunday, 10 November 2012.

A complainant alerted Ofcom to frequent use of the word “fuck” in this broadcast.

Ofcom noted a scene in which one character appeared wearing a t-shirt bearing the words, “*I am your worst fucking nightmare*”. We also noted that both episodes closed with a soundtrack of rap music which featured repeated uses of “*motherfucking*”, “*motherfucker*” and “*fucking*”.

Ofcom was unable to identify any other instances of offensive language in the programmes, but noted that there were several places in the recordings of both episodes supplied to Ofcom by Vox Africa Plc where the audio appeared to have been muted during character dialogue.

Ofcom considered that the material raised issues warranting investigation under the following rules of the Code:

Rule 1.14: “The most offensive language must not be broadcast before the watershed[.]”

Rule 2.3: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context[.]”

Ofcom therefore requested comments from the Licensee on how the inclusion of this language complied with these rules. Ofcom also requested confirmation from the Licensee that the recordings provided to Ofcom were of the programmes as broadcast on Vox Africa, and that the same dips in the sound happened in the material when transmitted on 10 November 2012.

Response

The Licensee did not provide any comments by Ofcom’s first deadline. Therefore Ofcom wrote to Vox Africa Plc to advise it that a response was still outstanding, and that comments should be provided by a new deadline. The Licensee did not provide any response by that date, and so Ofcom wrote to the Licensee noting this fact, and informing Vox Africa Plc that we were therefore proceeding to reach a Preliminary View. Ofcom sent a copy of the Preliminary View to the Licensee on 23 January 2013, at the same time giving the licensee the opportunity to provide written representations. The Licensee did not provide any comments.

Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that children are protected, and that generally accepted standards are applied so as to provide adequate protection for members of the public, from the inclusion of offensive and harmful material. These objectives are contained in Sections One and Two of the Code.

Rule 1.14

Rule 1.14 states that the most offensive language must not be broadcast before the watershed. Ofcom research on offensive language¹ clearly notes that the word “fuck” and other variations of this word are considered by audiences to be among the most offensive language. Such language is unacceptable before the watershed.

The broadcast of the word “fuck” and other variations of this word were clearly audible in the end credits of each episode and also visible on a character’s t-shirt in this programme broadcast in the daytime. This broadcast therefore breached Rule 1.14.

Rule 2.3

Rule 2.3 requires broadcasters to ensure that the broadcast of potentially offensive material must be justified by the context. Ofcom therefore considered first whether the language in this broadcast was potentially offensive; and, if so, whether the offence was justified by the context. Context includes for example: the editorial content of the programme, the service on which it is broadcast, the time of broadcast and the likely size and composition of the potential audience and the likely expectation of the audience.

As stated above, Ofcom’s research on offensive language indicates that the word “fuck” and other variations are considered by audiences to be among the most offensive language. The use of such language clearly had the potential to cause offence to the audience.

Ofcom went on to assess the context. In our opinion the majority of television viewers at this time on a Sunday afternoon do not expect programmes to contain the most offensive language. There appeared to Ofcom no sufficient reasons for including these examples of the most offensive language in this programme. Broadcast of this language was therefore not justified by the context and this material breached Rule 2.3 of the Code.

Condition 12 of Vox Africa Plc’s licence

In addition, Ofcom is concerned that the Licensee failed to confirm in writing to Ofcom whether the recordings provided to Ofcom were of the programmes as broadcast on Vox Africa, and that the same dips in the sound happened in the material when aired on 10 November 2012.

Condition 12 (General provision of information to Ofcom) of the Television Licensable Content Service licence held by Vox Africa plc requires, among other things, that:

¹ *Audience attitudes towards offensive language on television and radio*, August 2010, <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>.

“The Licensee shall furnish to Ofcom in such manner and at such times as Ofcom may reasonably require such...information...for the purpose of exercising the functions assigned to it.”

In view of the complainant’s statement that the episodes included frequent use of the word “fuck”, Ofcom needed to assess how often offensive language was broadcast in these programmes. It was therefore essential that Ofcom was sure that the recording of the programmes provided by the Licensee was as broadcast and full and complete. In the absence of the further information and confirmation about the recording sought by Ofcom from the Licensee, Ofcom was not able properly to exercise its functions of regulating standards in broadcast content and reach a definitive view of exactly how often the most offensive language was broadcast in these programmes. It is imperative that licensees have appropriate compliance procedures in place to deal with all such requests for information from Ofcom. Failure to meet this requirement was a significant breach of Licence Condition 12 of Vox Africa Plc’s licence.

This breach of Condition 12 raises serious concern. Ofcom puts Vox Africa Plc on notice that it will consider further regulatory action in the event of any further similar compliance failure in the future.

Breaches of Rules 1.14 and 2.3

Breach of Licence Condition 12 (General provision of information to Ofcom)

In Breach

Download Festival

Sky Arts1, 24 November 2012, 23:30

Introduction

Sky Arts 1 is a channel specialising in arts content, including music, literature and films. The licence for Sky Arts 1 is held by British Sky Broadcasting Ltd (“Sky” or “the Licensee”).

Download Festival featured pre-recorded and edited highlights of an annual rock music festival. A complainant alerted Ofcom to flashing images in the performance of *Take Me to the Hospital* by The Prodigy.

On assessing the material Ofcom noted that the programme was preceded by the warning: “*Expect strong language and flashing images throughout.*” The performance of *Take Me to the Hospital* was the first item to be broadcast in the second part of the programme. There was no additional warning preceding the second part of the programme or before the performance of this song.

Certain types of flashing images can trigger seizures in viewers who are susceptible to photosensitive epilepsy (“PSE”). Ofcom therefore carried out a technical assessment of the flashing images in the music video. We noted that there were prolonged, intense and rapid strobe lighting effects throughout the performance which at times significantly exceeded the maximum limits set out in Ofcom guidance to broadcasters on flashing images¹. The total duration of the sequences containing non-compliant flashing images was approximately one minute and 45 seconds, or nearly half the duration of the performance.

Ofcom considered the material raised issues warranting investigation under Rule 2.12 of the Code, which states:

“Television broadcasters must take precautions to maintain a low level of risk to viewers who have photosensitive epilepsy. Where it is not reasonably practicable to follow the Ofcom guidance, and where broadcasters can demonstrate that the broadcasting of flashing lights and/or patterns is editorially justified, viewers should be given an adequate verbal and also, if appropriate, text warning at the start of the programme or programme item.”

Ofcom therefore requested comments from the Licensee on how the programme material complied with this rule.

Response

The Licensee considered that while the programme material exceeded the maximum limits set out in Ofcom’s guidance regarding flashing images, there was editorial justification for its inclusion.

Sky explained that the programme was one of two highlight shows from the Download Festival 2012. The Prodigy performed at the Download Festival on 8 June

¹ See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/812612/section2.pdf>.

2012 and Sky Arts showed this highlight show on 20 and 21 July, 5 October and 24 November 2012.

Sky said that although the material was pre-recorded and edited, “it was pre-recorded ‘as live’: this was a highlights show of a live event”. It considered that “severely editing” such performances would mean that viewers would not be “able to view ‘as live’ events in the way the artists meant their work to be seen”.

Sky referred to the Ofcom guidance to broadcasters on flashing images which states: “[F]lashing images or regular patterns described in this Guidance Note as being potentially harmful can be expected to be obviously discernible. Such potentially harmful images occur only rarely during the course of programme material with scenes that appear natural or represent real life; examples include photographers’ flashlights or strobe lights in a disco. Part of the purpose of the Guidance Note is to assist programme producers to avoid inadvertently creating video effects that contain flashing images or patterns likely to be harmful.” The Licensee claimed this guidance supported its view that there was editorial justification for broadcasting this content with flashing images because the material represented “real life”, in this case an act in a live rock concert.

The Licensee added that Sky Arts broadcasts a great deal of programming such as events, gigs, concerts and festivals which can contain flashing images and, to date, it has assessed their editorial justification on a case-by-case basis. It considered the audience of a festival highlights programme would have certain expectations and knowledge regarding the lighting of these types of programmes, “as flashing images are an inherent part of these events”.

Sky said it intended to manage viewer expectations with a continuity announcement concerning flashing images at the beginning of the programme.

The Licensee said that while it believed that this announcement fulfilled Rule 2.12’s requirement to have a warning “at the start of the programme or programme item”, it acknowledged that having a second continuity announcement at the start of the second part of the programme, just before The Prodigy’s performance, may have managed viewer expectations more satisfactorily. It confirmed its scheduling system had been updated to ensure this signposting is reiterated at the start of this performance if and when it is broadcast again.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that “generally accepted standards are applied to the content 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”.

Given the significant potential for harm to viewers with PSE who are exposed to flashing images, Rule 2.12 makes clear that Ofcom expects broadcasters to maintain a low level of risk in this regard. Further, Ofcom’s guidance on flashing images, which was developed with input from medical experts, is intended to limit the incidence of seizures.

In this case, Ofcom’s technical assessment of this material found that it significantly exceeded the maximum limits set out in Ofcom guidance to broadcasters on flashing

images and therefore posed a significant risk of harm to viewers in the audience with PSE.

As Rule 2.12 makes clear there may be circumstances where “it is not reasonably practicable to follow the Ofcom [PSE] guidance”, and broadcasters can demonstrate that it is editorially justified to broadcast the problematic material, provided that an adequate warning is given at the start of the programme and/or programme item. In certain circumstances it may not be reasonably practicable to follow Ofcom’s PSE Guidance, for example during a live broadcast or in pre-recorded material where flashing images are demonstrably integral to the sequence, but it may be editorially justified nonetheless to broadcast material containing problematic flashing images. In such circumstances, it is essential that appropriate warnings are given to assist viewers with PSE to avoid instances of flashing images that the broadcaster cannot reasonably control. Ofcom takes decisions on Rule 2.12 on a case-by-case basis. In some circumstances, however, even if there is editorial justification for including flashing images, the intensity and duration of the flashing images means that the level of risk is so great that it would be very difficult for a broadcaster to show such material in this form and comply with Rule 2.12.

We note Sky’s assertion that Ofcom guidance to broadcasters on flashing images supported its view that there was editorial justification for broadcasting the material because it represented “real life”. This guidance states that “such potentially harmful [flashing] images occur only rarely during the course of programme material with scenes that appear natural or represent real life; examples include photographers’ flashlights or strobe lights in a disco”. Ofcom points out that the purpose of this wording is not to suggest that where potentially harmful flashing images occur in broadcast material of ‘natural’ scenes or of ‘real life’ broadcasters have an editorial justification for showing it. Its aim is to underline that potentially harmful flashing images rarely occur in such scenes. Where they do occur in such scenes, however, broadcasters are obliged to assess the intensity and duration of the flashing images (and so the potential risk to viewers with PSE) against any editorial justification for showing the material and means of mitigating the risk (like giving warnings or editing the material) in deciding how to comply with Rule 2.12.

Ofcom’s view was that in this case it was reasonably practicable to follow Ofcom’s PSE guidance because the material was pre-recorded and edited. We therefore went on to consider whether there was sufficient editorial justification in this case for the broadcast of this material. In Ofcom’s view there was insufficient editorial justification for including in this pre-recorded general entertainment programme flashing images that so clearly exceeded in intensity and duration the appropriate PSE standards. We noted the warning that was given at the start of the whole programme, but considered that this one warning alone was clearly insufficient taking into account the intensity and extended duration of the flashing images in this case.

The broadcast was in breach of Rule 2.12 of the Code.

Breach of Rule 2.12

In Breach

The Charity Show (Save Maryam charity appeal)

Ramadan TV, 3 August 2012, 21:00

Introduction

Ramadan TV was a channel broadcast on Sky channel 843, during the Islamic holy month of Ramadan from 20 July to 19 August 2012. After Ramadan, the channel changed its name to Samaa. The licence for this service is held by Up & Coming TV Limited (“UCTV” or “the Licensee”).

The Charity Show broadcast a five hour charity appeal for the Save Maryam campaign run by a charity called Mercy Mission UK (registered charity 1122922). The purpose of the Save Maryam campaign is to raise money to set up a Muslim TV channel and a religious helpline in Indonesia to prevent young Muslims from leaving Islam and converting to other religions, in particular Christianity.

A complainant contacted Ofcom because they were concerned that the charity appeal included “manipulative facts” to encourage viewers to make donations.

Ofcom noted that the programme was presented by an unnamed presenter and two guests, Brother Azim, Mercy Mission’s manager for the Save Maryam project, and Brother Asahad, from another charity¹.

The appeal asked viewers to call to make donations of £250 or £500 to fund the helpline for three and six months respectively, or to text to make a donation of £10. Calls were to a landline telephone number and text messages were to the free JustTextGiving text service number 70070.

At the beginning of the programme, and on several occasions throughout the programme, a video was shown telling the story of a Muslim woman called Shanti who had converted to Christianity after watching a Christian programme on television and then sending a text message to that programme’s prayer counselling service. A counsellor telephoned Shanti, listened to her problems and prayed for her. Shanti became a Christian and shortly afterwards her husband also converted to Christianity. The video ended by asking viewers to “*join hands with Mercy Mission Indonesia*” to set up an Islamic television channel and helpline in Indonesia.

The official Save Maryam campaign video was also shown several times during the programme. The video told the story of a fictional character called Maryam, a 16 year-old Indonesian Muslim. The video’s voiceover stated: “*In the next fifteen seconds she is going to leave Islam. This is why.*” The voiceover went on to state:

“Indonesia is the largest Muslim country in the world with over 200 million Muslims, but this is changing. Approximately two million people in Indonesia leave Islam for Christianity every year. Statistics from the International Crisis Group 2012 indicate that if the growth continues at its current rate, by 2035 it would cease to be a Muslim majority country.”

¹ The name of the other charity was not clear to Ofcom when it viewed the recording.

This was accompanied by an onscreen graphic of a mocked up International Crisis Group (“ICG”) report with the following extract of the report on the page in bold letters: **“IF THE GROWTH OF CHRISTIANITY CONTINUES AT ITS CURRENT RATE, BY 2035 INDONESIA WILL CEASE TO BE A MUSLIM MAJORITY COUNTRY.”** This was followed by a graph entitled *“Christianisation of Indonesia”*, which showed the numbers of Muslims decreasing and the numbers of Christians increasing, with the lines crossing in 2035².

The voiceover continued: *“This is an alarming situation and begs one to consider why is this the case? Why are people not satisfied with Islam? Why are they willing to abandon Allah?”*

The video went on to explain that many Indonesians do not have access to Islamic knowledge, while Christian missionaries are *“propagating their ideologies”* by operating television stations and helplines. The video then showed Maryam facing personal difficulties and being encouraged by her friends to convert to Christianity. The voiceover stated: *“Maryam is not just a person. Maryam symbolises a whole generation of Indonesians today. We need to save Maryam.”*

The video continued by setting out what the Save Maryam campaign wants to achieve: setting up an Islamic television channel aimed at young people, and a helpline. The video concluded by encouraging viewers to spread the campaign using social networking sites to share the video and also by word of mouth.

Posters shown during the video displayed the statistic: *“Approximately 2 million Muslims leave Islam every year.”*

During the five hour programme, the presenter occasionally explained to viewers that this charity appeal was their opportunity to help others, which would be seen as a good deed on the Day of Judgement, for example:

“Brothers and Sisters, tonight is your opportunity to save somebody from going to hell-fire. Tonight is your opportunity to save somebody from going into the path to hell-fire and entering them or helping them go to paradise. Tonight is your opportunity to save somebody from leaving Islam.”

“Imagine Brothers and Sisters, the potential reward on the Day of Judgement when we will stand in front of Allah...and we will be looking for our deeds, and we will be looking for any part of good deeds that we can try and grab. We will be seeking here, there and everywhere to try and increase our good deeds and a physical scale will be erected, and our good deeds will be placed on one side and our bad deeds placed on the other. That is the time where Brothers and Sisters you’ll remember opportunities like this, opportunities where you saved a soul from going to jahannam³. You saved a soul from going to the hell-fire. Why? Because every prayer that that person made,

² According to its website, the International Crisis Group is an “independent, non-profit, non-governmental organisation committed to preventing and resolving deadly conflict”. See: <http://www.crisisgroup.org/en/about.aspx>.

³ Arabic for “hell”.

every fast that that person fasted, every time that person gave sadaqah⁴, every time that person made dua⁵, not only are they giving that act of worship but so are you. You are achieving the reward for somebody else staying on this religion. And that's an amazing opportunity that presents itself to you."

During the programme, the presenter and Brother Azim explained the purpose of the charity appeal and took calls from viewers who either wanted to donate money or to share their views on the situation in Indonesia.

The presenter made claims about the number of people leaving Islam in Indonesia, including:

- *"The number of people leaving Islam in Indonesia are in their tens if not hundreds of thousands every month and a massive amount of people every year."*
- *"Whilst watching this programme, statistically hundreds of people are already leaving Islam in Indonesia every day and that statistic is not an imagination. That is a real statistic. That is the fact of what is happening on the ground and we need your help Insha'Allah⁶, to try and put a stop to that."*
- *"And this is mainly about the youth Brothers and Sisters. The statistics show us that of that two million or so people that are leaving Islam, the majority, around 70-80% of them, are between the ages of 13 and 18."*
- *"A million people or two million people each year are leaving Islam in Indonesia. That is a staggering amount of people."*

However, it became clear during the programme that there was some uncertainty over the exact number. Brother Asahad stated:

"There are questions about the number. Two million is on the Save Maryam campaign [video], but now I think that Mercy Mission is sort of trying to explain that in another edit and other videos. It is true, and everybody knows it, whether it is Muslim or non-Muslim, or whoever, they admit it that it is a fact that people, I mean Muslims are leaving Islam. That's a fact and you can dispute the rate of how many people are leaving Islam every day, every month, is debateable, but it is a real problem."

Later, a caller who was put through to the studio questioned the numbers which had been quoted:

"What I wanted to know was there was some numbers that some of the Brothers mentioned on the programme previously about how many people were leaving the religion. I just wanted to maybe understand how you came about those numbers and how you collated that information."

⁴ An Islamic term for giving to charity.

⁵ An Islamic term for a personal prayer.

⁶ "Insha'Allah" is Arabic for "Allah willing".

The presenter explained that they would take one more call before he would pass over to Brother Azim to answer the question. The following response was given a few minutes later:

“A caller earlier mentioned that OK where did we get this number two million from, that why are two million people leaving Islam? And there’s a couple of things I want to say about this. The first thing is the fact that like Brother Ashari said earlier, who is here from Indonesia, that ultimately there are hundreds of thousands of people leaving Islam. Now in a country like Indonesia made up of nearly 18,000 islands, the thing that is clear, to get an exact statistic, no-one can really do. Mercy Mission can’t do it, the UN can’t do it, the Government of Indonesia can’t do it, to get an exact statistic, because of the geographical spread of the fourth largest country in the world. Let’s be conscious of that. The second thing is, if anybody wants to have a detailed understanding of where we came to the conclusions that approximately two million people are leaving Islam, please visit the website savemaryam.com and on the home page, just underneath the video, you will see it very clearly explained how we got to two million. The full calculations are there and the reference that we have used to get there. So the short answer is, just visit the website, you can see the detailed working. But I guess the final point to realise Brothers and Sisters is just as we can’t be 100% sure that there are that many people leaving, we just can’t be sure that that many people aren’t leaving. It’s a disputed statistic. But the one thing that is unanimous, agreed by every single stakeholder in this situation, is that hundreds of thousands of people are leaving Islam every month, or every couple of months. So literally thousands of people a day are leaving Islam. Now if that’s adding up to one million to 1.96 million, to 2.4 million or as the Harvest Report says, three million people a year, this is under dispute, but the fact is there are too many people leaving Islam and that’s our concern.”

After this, the presenter continued to refer to the statistic of two million, for example:

“On average two million people are leaving Islam every year for another faith.”

“To change that statistic of two million people leaving Islam every year Brothers and Sisters. It is a major amount of people that are leaving Islam.”

The complainant was concerned that the charity appeal used “manipulative facts” to encourage viewers to make donations. In particular, the complainant pointed to the following:

- i) each year two million people are leaving Islam for Christianity; and
- ii) statistics from International Crisis Group 2012 indicate that Indonesia will cease to be a Muslim majority country by 2035.

The complainant alleged that the claim that each year two million people are leaving Islam for Christianity contradicts census data, and that the ICG has published a statement that Mercy Mission UK “seriously misrepresents” one of the ICG reports⁷.

⁷ See: <https://www.facebook.com/whoismaryam/posts/165945196874750>.

Ofcom noted that the following statement was posted on Save Maryam's 'Who is Maryam' Facebook page by the ICG on 30 July 2012:

"The video on the savemaryam.com website⁸ seriously misrepresents an International Crisis Group report, and we request that you remove all references to our organization immediately.

Nowhere does our November 2010 report, Indonesia: "Christianisation" and Intolerance, list the number of Indonesian Muslims being converted each year, let alone make predictions about the future. It appears that you have taken one footnote, with statistics from one city where the population of Christians relative to Muslims had risen slightly, partly through in-migration of workers from elsewhere in the country, and extrapolated those numbers to the whole country."

As a result, the complainant considered that viewers were misled by the information provided during the charity appeal on Ramadan TV and donated money when they may not have done so if they had been presented with the correct information during the appeal.

Ofcom considered the material raised issues warranting investigation under Rule 2.2 of the Code, which states:

"Factual programmes or items or portrayals of factual matters must not materially mislead the audience."

We therefore asked UCTV for its comments on how the content complied with Rule 2.2.

In addition, Ofcom considered that the programme met the Code's definition of a religious programme because it consisted of a charity appeal, the aim of which was to raise money which would be used to engage with young Muslims and prevent them converting to Christianity⁹. We therefore considered the material raised issues warranting investigation under Rule 4.1 of the Code, which states:

"Broadcasters must exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes."

Ofcom did not consider it necessary to seek the Licensee's comments on how the content complied with Rule 4.1 before reaching its Preliminary View on the matter.

Response

Rule 2.2

UCTV stated that the programme made it clear that the number of Muslims leaving Islam each year was "up to 2 million", was "an approximate" figure, and that the presenters "were happy to be challenged" on the figure.

⁸ The same video which was broadcast during the charity appeal on Ramadan TV.

⁹ Section Four of the Code defines a religious programme as "a programme which deals with matters of religion as the central subject, or as a significant part, of the programme".

The Licensee said that the figure “was one that the national body of non-resident Indonesians were happy to consider as one that was a fair reflection of the situation as per their official statement”¹⁰.

UCTV submitted that “many commentators on the situation highlight there are people converting [to Christianity] in mass [sic], and that the number could be millions”. The Licensee provided weblinks to articles by Time Magazine¹¹ and the BBC¹² to support this submission.

The Licensee said that the above reasons and the charity’s commitment that it was happy to be challenged on the figure “gave [it] the confidence to run their appeal and support their effort to improve faith-based education in Indonesia”.

The Licensee submitted that it had asked the charity to explain how it came to the figure of two million Muslims leaving Islam each year. UCTV provided the charity’s response to Ofcom. In summary, the charity stated that it had taken projections from 2009 from both mainstream Christian and mainstream Muslim sources as well as from an “official account of an ICG interview with the Indonesian religious ministry”. It also stated that it started with the Indonesian census figure from the year 2000 that Indonesia’s population included 8.7% Christians: “[We] applied the respective growth rates per World Bank data on Indonesian yearly growth rates. Then we averaged the increase in the rise in the Christian population over 9 years from 4 of the best estimates that we could find till the year 2009 – and that was from the International Crisis Group report.”

The charity had stated that “a very basic projection of the numbers showed us that around 2 million (+/- 1.5% to cater for non-Muslim converts to Christianity and immigration) was a decent estimate of the number that were converting to Christianity every year”.

Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives. These include: that “generally accepted standards” are applied so as to provide adequate protection for members of the public from the inclusion of harmful material; and that “broadcasters exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes”. These objectives are contained in Sections Two and Four of the Code.

Rule 2.2

This rule states that “[f]actual programmes or items or portrayals of factual matters must not materially mislead the audience”.

Ofcom noted that during the Save Maryam campaign video which was broadcast several times throughout the programme, the following statement was made in voiceover and onscreen text:

¹⁰ See: <http://www.kibar-uk.org/2012/09/05/kibar-indonesian-islamic-society-of-great-britain-statement-regarding-savemaryam/>.

¹¹ See: <http://www.time.com/time/magazine/article/0,9171,1982223,00.html>.

¹² See: <http://www.youtube.com/watch?v=HzqKOCwa6xw>.

“Indonesia is the largest Muslim country in the world with over 200 million Muslims, but this is changing. Approximately 2 million people in Indonesia leave Islam for Christianity every year. Statistics from the International Crisis Group 2012 indicate that if the growth continues at its current rate, by 2035 it would cease to be a Muslim majority country.”

Ofcom also noted that the video included an onscreen graphic of a mocked up ICG report with the following extract of the report on the page in bold letters: **“IF THE GROWTH OF CHRISTIANITY CONTINUES AT ITS CURRENT RATE, BY 2035 INDONESIA WILL CEASE TO BE A MUSLIM MAJORITY COUNTRY.”** This was followed by a graph entitled “Christianisation of Indonesia”, which showed the numbers of Muslims decreasing and the numbers of Christians increasing, with the lines crossing in 2035.

Ofcom noted that the ICG did publish a policy briefing entitled “Indonesia: “Christianisation” and Intolerance” on 24 November 2010¹³. However, this report did not include the statement **“IF THE GROWTH OF CHRISTIANITY CONTINUES AT ITS CURRENT RATE, BY 2035 INDONESIA WILL CEASE TO BE A MUSLIM MAJORITY COUNTRY”**.

Ofcom noted that four days before the date of the broadcast charity appeal, the ICG had publicly stated on Save Maryam’s ‘Who is Maryam?’ Facebook page:

“The video on the savemaryam.com website¹⁴ seriously misrepresents an International Crisis Group report, and we request that you remove all references to our organization immediately.”

It therefore appeared to Ofcom that UCTV had broadcast a video during this charity appeal which inaccurately attributed the figure of two million to the ICG.

Ofcom also noted that during the programme the presenters stated that there was uncertainty over the exact number of Muslims converting to Christianity each year.

Brother Asahad stated:

“There are questions about the number. Two million is on the Save Maryam campaign [video], but now I think that Mercy Mission is sort of trying to explain that in another edit and other videos. It is true, and everybody knows it, whether it is Muslim or non-Muslim, or whoever, they admit it that it is a fact that people, I mean Muslims are leaving Islam. That’s a fact and you can dispute the rate of how many people are leaving Islam every day, every month, is debateable, but it is a real problem.”

Brother Azim stated:

“[T]o get an exact statistic, no-one can really do. Mercy Mission can’t do it, the UN can’t do it, the Government of Indonesia can’t do it, to get an exact statistic, because of the geographical spread of the fourth largest country in the world. Let’s be conscious of that. The second thing is, if anybody wants to have a detailed understanding of where we came to the conclusions that

¹³ See: <http://www.crisisgroup.org/~media/Files/asia/south-east-asia/indonesia/B114%20Indonesia%20-%20Christianisation%20and%20Intolerance>.

¹⁴ The same video which was broadcast during the charity appeal on Ramadan TV.

approximately two million people are leaving Islam, please visit the website savemaryam.com and on the home page, just underneath the video, you will see it very clearly explained how we got to two million. The full calculations are there and the reference that we have used to get there. So the short answer is, just visit the website, you can see the detailed working. But I guess the final point to realise Brothers and Sisters is just as we can't be 100% sure that there are that many people leaving, we just can't be sure that that many people aren't leaving. It's a disputed statistic. But the one thing that is unanimous, agreed by every single stakeholder in this situation, is that hundreds of thousands of people are leaving Islam every month, or every couple of months. So literally thousands of people a day are leaving Islam. Now if that's adding up to one million to 1.96 million, to 2.4 million or as the Harvest Report says, three million people a year, this is under dispute, but the fact is there are too many people leaving Islam and that's our concern."

Ofcom noted that after these statements the figure of "two million" or "approximately two million" continued to be given to viewers by the presenters, and the Save Maryam campaign video, which also included it, was repeated. For example, the presenter stated: "On average two million people are leaving Islam every year for another faith"; and "To change that statistic of two million people leaving Islam every year Brothers and Sisters. It is a major amount of people that are leaving Islam". The Save Maryam video stated: "Approximately two million people in Indonesia leave Islam for Christianity every year. Statistics from the International Crisis Group 2012 indicate that if the growth continues at its current rate, by 2035 it would cease to be a Muslim majority country."

Ofcom took into account that the Licensee had asked the charity to explain how it came to the figure of two million Muslims leaving Islam each year. We noted that the charity stated that it had taken projections from 2009 from both mainstream Christian and mainstream Muslim sources, as well as the Indonesian census figure from the year 2000 that Indonesia's population included 8.7% Christians. According to the Licensee, the charity had stated: "[We] applied the respective growth rates per World Bank data on Indonesian yearly growth rates. Then we averaged the increase in the rise in the Christian population over 9 years from 4 of the best estimates that we could find till the year 2009 – and that was from the International Crisis Group report."

It is not a matter for Ofcom to determine the accuracy of the statistics given in this broadcast. There is no requirement under the Code for due accuracy in programmes of this type. Ofcom's published guidance accompanying this rule makes clear that it is not designed to deal with issues of inaccuracy in non-news programmes. However, under Rule 2.2, the portrayal of factual matters must not materially mislead the audience. The guidance states that, whether a programme is "materially" misleading depends on a number of factors such as the context, the editorial approach taken in the programme, the nature of the misleading material and, above all, either what the potential effect could be or what actual harm or offence has occurred.

In this case, the figure of two million Indonesians leaving Islam each year for Christianity, and the claim that Indonesia would cease to be a Muslim majority country by 2035, were quoted numerous times in this charity appeal as the basis on which viewers were being encouraged to donate money to the appeal. Some mention was made by the presenters that the two million figure was debatable, as set out above.

Ofcom considered that the charity's explanation of the how it came to the figure could only be described as the most basic estimate which was clearly subject to significant

error and should not have been presented in the programme as fact. Despite the discussion in the programme that the figure was debatable, overall, the programme presented this figure on numerous occasions as fact. Ofcom noted the Licensee's submission that "many commentators on the situation highlight there are people converting [to Christianity] in mass [sic], and that the number could be millions". The Licensee provided weblinks to articles by Time Magazine¹⁵ and the BBC¹⁶ to support this submission. Ofcom did not consider that these articles could be considered to substantiate the figure of two million Muslims converting to Christianity each year.

It was clear to Ofcom from the Licensee's representations, and from other evidence available¹⁷, that there was insufficient substantiation for these figures. Therefore, in Ofcom's view, the repeated subsequent inclusion in the programme of the same figures as a matter of fact, as set out above, carried the risk that viewers may have been persuaded to donate money to the charity when they would not otherwise have done so. Ofcom also took into account that the appeal was encouraging viewers to donate significant sums of money (ranging from £10 to £250 and £500). As such, Ofcom was of the view that the portrayal of factual matters in this programme had the potential to materially mislead the audience so as to cause significant financial harm. The programme was therefore in breach of Rule 2.2 of the Code.

Rule 4.1

This rule states that "[b]roadcasters must exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes".

Section Four of the Code sets out that a "religious programme" is one "which deals with matters of religion as the central subject, or as a significant part, of the programme". In Ofcom's opinion this programme was clearly a religious programme because it consisted of a charity appeal, the aim of which was to raise money which would be used to prevent Muslims converting to Christianity.

Broadcasters can transmit programmes taking a critical view of a particular religion, provided they do so with a proper degree of responsibility. However, Rule 4.1 requires licensees to exercise a proper degree of responsibility to protect the audience from improper exploitation and abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination.

As detailed above, Ofcom acknowledged that the Licensee had asked the charity to explain how it came to the figure of two million Muslims leaving Islam each year. However, Ofcom considered that the charity's explanation of how it came to the figure could only be described as the most basic estimate which was clearly subject to significant error and should not have been presented in the programme as fact. Overall, the programme presented this figure on numerous occasions as fact.

During this five hour programme, the presenters also referred to the act of making donations as a good deed that Allah would look favourably upon on the Day of Judgement, for example: "*Tonight is your opportunity to save somebody from going into the path to hell-fire and entering them, or helping them go to paradise*"; and

¹⁵ See footnote 11.

¹⁶ See footnote 12.

¹⁷ See footnote 7.

“Imagine Brothers and Sisters, the potential reward on the Day of Judgement when we will stand in front of Allah”.

Where a religious programme is referring to an act in such a way, and where it is dependent on viewers making a significant financial donation, there is a particular onus on the broadcaster to ensure that any facts presented as the basis for making such donations are not in any way materially misleading. Ofcom did not consider that the broadcaster took appropriate steps in this case (for example, by seeking its own independent substantiation of the figures) to ensure that it exercised the proper degree of responsibility with respect to the content of this religious programme. It was therefore in breach of Rule 4.1.

Breaches of Rules 2.2 and 4.1

In Breach

Anglia Mowers' sponsorship of Weather

North Norfolk Radio, from 5 September 2011, various times

Introduction

North Norfolk Radio is a commercial radio station providing a news, music and information service for listeners in North Norfolk. At the time of the complaint detailed below the station was owned and operated by Tindle Radio Limited ("Tindle" or "the Licensee").

The station's weather bulletins were sponsored by Anglia Mowers. The sponsorship credit, which had been broadcast 87 times each week since 5 September 2011, stated:

"Weather with Anglia Mowers – the only dedicated garden machinery dealer in North Norfolk."

North Norfolk Garden Machinery – a competitor of the sponsor – contested Anglia Mowers' claim to be *"the only dedicated garden machinery dealer in North Norfolk"*. The competitor claimed there were at least five such dealers in North Norfolk.

Ofcom considered that the material raised issues warranting investigation under the following Code rule:

Rule 10.7 "Commercial references in programming must comply with the advertising content and scheduling rules that apply to radio broadcasting."

The advertising content and scheduling rules that apply to radio broadcasting are set out in the BCAP Code¹. Ofcom therefore considered that the material also raised issues warranting investigation under the following BCAP Code rules:

Rule 3.1 "Advertisements must not materially mislead or be likely to do so."

Rule 3.9 "Broadcasters must hold documentary evidence to prove claims that the audience is likely to regard as objective and that are capable of objective substantiation. The ASA may regard claims as misleading in the absence of adequate substantiation."

Rule 3.38 "Advertisements that include comparisons with unidentifiable competitors must not mislead, or be likely to mislead, consumers. The elements of the comparison must not be selected to give the advertiser an unrepresentative advantage."

¹ The Advertising Standards Authority ("ASA") and Broadcast Committee of Advertising Practice ("BCAP") regulate the content of broadcast advertising, under a Memorandum of Understanding with Ofcom. Specifically, BCAP supervises and reviews the codes that govern the regulation of broadcast advertising. The regulation of commercial references on radio, including sponsorship credits, remains with Ofcom, as such references form part of radio broadcasters' editorial content (i.e. they are not spot advertisements).

Tindle told Ofcom that North Norfolk Radio had obtained clearance of the sponsorship credit from the Radio Advertising Clearance Centre (“RACC”) – the radio industry body that approves radio advertising before broadcast. We therefore asked RACC, the sponsor and the Licensee for their comments on how they considered the sponsorship credit complied with Rule 10.7 of the Code and Rules 3.1, 3.9 and 3.38 of the BCAP Code.

Response

RACC provided the substantiation it had obtained in September 2011, before it approved the sponsorship credit copy for broadcast. This comprised a statement from the sponsor, which listed eight competitors and confirmed that “none of them were solely in the business of selling garden machinery” (RACC’s summary). It also stated that Anglia Mowers were “specialists in garden machinery and garden machinery only”. RACC noted that its approved scripts are valid for only six months after clearance.

Anglia Mowers described the history of its business and listed 10 garden machinery suppliers based in North Norfolk, each of which it claimed sold “garden machinery alongside other products.” It described North Norfolk Garden Machinery (the complainant) as a “Garden Machinery & Mobility Centre” and provided a photograph of a small roadside billboard that pointed to and advertised what appeared to Ofcom to be two businesses: “North Norfolk’s Garden Machinery” and “Holt Mobility Centre”.

Tindle referred to the substantiation originally submitted to RACC, adding that it did not consider its listeners had been misled by the sponsorship credit, as “the businesses highlighted in the statement from [the] Advertiser were known to staff at North Norfolk Radio and were known to sell, either online or in their relevant retail outlets, products or services relative to a wider business category than garden machinery”.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including “that generally accepted standards are applied to the contents of...radio services so as to provide adequate protection for members of the public from the inclusion in such services of...harmful material” and “that the inclusion of advertising which may be misleading, harmful or offensive in...radio services is prevented”.

This is reflected in, among other rules:

- Rule 10.7 of the Code, which requires that commercial references in radio programming comply with the advertising content and scheduling rules that apply to radio broadcasting;
- Rule 3.1 of the BCAP Code, which states that advertisements must not materially mislead or be likely to do so;
- Rule 3.9 of the BCAP Code, which requires broadcasters to hold documentary evidence to prove claims that the audience is likely to regard as objective (and that are capable of objective substantiation); and

- Rule 3.38 of the BCAP Code, which requires that advertisements including comparisons with unidentifiable competitors must not mislead, or be likely to mislead, consumers.

Ofcom noted that RACC's clearance of the sponsorship credit had expired. However, we also noted that central copy clearance was not required under the BCAP Code, as neither the sponsor nor the products it sold were 'special category' advertising².

On radio, a sponsorship credit is a form of commercial reference, as set out in Section Ten of the Code. In this instance, Ofcom noted that RACC, the sponsor and the Licensee each appeared to consider that the claim, "*Anglia Mowers – the only dedicated garden machinery dealer in North Norfolk*", told listeners that Anglia Mowers was the only dealer in North Norfolk that dealt solely in garden machinery.

Ofcom disagreed. In this instance, the word "*dedicated*" could have been understood to mean a level of expertise and/or service on the part of Anglia Mowers. Further, there appeared to be other garden machinery dealers in the area and the sponsor's claim to be "*the only dedicated garden machinery dealer in North Norfolk*" therefore distinguished Anglia Mowers in some way from such businesses. However, the sponsorship credit failed to clarify precisely how the sponsor was different from them. It is not for Ofcom to adjudicate on whether Anglia Mowers is the only business in North Norfolk that deals solely in garden machinery or to consider the substantiation submitted in support of such a claim.

However, Ofcom notes that the sponsorship credit attempted to convey a comparison with unidentified competitors, but failed to clarify precisely what any difference was. We consider this created an ambiguity that was likely to mislead listeners and the sponsorship credit was therefore in breach of Rule 3.38 of the BCAP Code. Further, we considered that, having heard the sponsorship credit, some listeners were likely to select Anglia Mowers, above other businesses, as their garden machinery dealer of choice in the area. Such listeners would have been materially misled, in breach of Rule 3.1 of the BCAP Code.

As the sponsorship credit was in breach of Rules 3.1 and 3.38 of the BCAP Code, it was a commercial reference that did not comply with advertising content rules applicable to radio broadcasting, in breach of Rule 10.7 of the Broadcasting Code.

Breaches of Rule 10.7 of the Code
Breaches of Rules 3.1 and 3.38 of the BCAP Code

² A list of the special categories can be found in Section 1 (Compliance) of the BCAP Code, at: <http://www.bcap.org.uk/Advertising-Codes/Broadcast-HTML.aspx>.

Resolved

Live Formula One: Abu Dhabi Grand Prix

BBC 1, 4 November 2012, 12:10

Introduction

Ofcom received a complaint about offensive language broadcast during the above programme. On reviewing the broadcast, we noted the following sequence from the interviews conducted on the winners' podium immediately after the Grand Prix. As part of a live broadcast feed provided to various broadcasters by Formula One Management ("FOM"), the presenter David Coulthard interviewed one of the winning drivers, Sebastian Vettel, at approximately 15:05:

David Coulthard: *"Well, your name is up there as a double world champion. Do you now feel that you've got your hand on one side of the cup for a third world title?"*

Sebastian Vettel: *"Um, I think there's still two races to go so obviously we see how quickly things can change. Yesterday was a surprise for us. I think would we have start from third it would have been a different race but, yeah, it was obviously a chance to fuck it up and we didn't do that."*

After concluding the interview with Sebastian Vettel, David Coulthard addressed the audience:

David Coulthard: *"OK, well, Sebastian, thank you for those words, and we should just remind our audience that he is speaking in his second language. We apologise for the choice of words that you had."*

This was followed a few minutes later by a further apology from the BBC's Jake Humphrey:

Jake Humphrey: *"And yeah, apologies for up on the podium – colourful language for a colourful race."*

Ofcom considered the material raised potential issues warranting investigation under Rule 1.14 of the Code, which states:

"The most offensive language must not be broadcast before the watershed (in the case of television).]"

We therefore requested comments from the BBC as to how the content complied with this rule.

Response

While recognising their obligation to ensure compliance with the Code, the BBC explained that the post-race interviews were part of a live feed provided to all rights-

holding broadcasters by FOM. The material in question was therefore transmitted simultaneously on other channels carrying the race, including Sky Sports F1¹.

The BBC expressed regret for any offence caused by the broadcast on its own service, and pointed to the on-air apologies given by the FOM's David Coulthard and the BBC's Jake Humphrey referred to above in the Introduction.

In addition, the BBC quoted from the personal apology published later the same day on Sebastian Vettel's website: "I'm terribly sorry for using the wrong word on the podium and I'm sorry if I have offended anyone who was watching. In the heat of the moment, I didn't use the right words and I apologise."

The BBC said that incidents such as this were "one of the hazards of live broadcasting", but that they had acted as soon as possible to apologise, and had also ensured that the material in question was removed from the version of the programme available on the BBC iPlayer. The BBC added that the head of its coverage had discussed the matter with FOM. FOM had undertaken that in future before post-race interviews were conducted it would ensure drivers would be warned not to use offensive language.

In addition to the action taken by FOM, the BBC said the International Automobile Federation ("FIA"), the governing body for motorsport as a whole, had written to the teams and driver representatives to remind them of their responsibilities in this area. According to the BBC: "While recognising that emotions can run high in the adrenalin-fuelled atmosphere of Formula 1, the FIA stressed in its letter that *"such language has no place during media events"* and a spokesman suggested that any future incidents could lead to disciplinary action."

The BBC considered that under the circumstances appropriate steps were taken by its programme team to properly acknowledge and promptly apologise for the incident. The BBC further hoped that the potential for offence had been mitigated by the non-aggressive context in which the offensive language had been used.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, which include ensuring that "persons under the age of eighteen are protected". This is reflected in Section One of the Code.

Rule 1.14 of the Code states that "the most offensive language must not be broadcast before the watershed". Ofcom research on offensive language notes that the word "fuck" and its derivatives are considered by audiences to be amongst the most offensive language². The use of the word "fuck" in this programme broadcast before the watershed was therefore a clear breach of Rule 1.14.

¹ See pp.76-77.

² *Audience attitudes towards offensive language on television and radio, August 2010*, <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>.

However, Ofcom noted that the broadcaster had acted swiftly to apologise (in addition to the on-air apology given by FOM's David Coulthard), removed the material as soon as practicable from the iPlayer, and discussed the matter directly with FOM to help avoid similar incidents in future. Taking all these factors into account, Ofcom considers the matter resolved.

Resolved

Resolved

Abu Dhabi Grand Prix

Sky Sports F1, 4 November 2012, 11:30

Introduction

In the course of investigating a complaint about offensive language broadcast during coverage of the Abu Dhabi Grand Prix on BBC 1¹, Ofcom became aware that the same content had been transmitted by Sky Sports F1. This is a channel specialising in Formula One racing, whose licence is held by British Sky Broadcasting Limited (“BSkyB” or “the Licensee”).

On reviewing the broadcast we noted the following sequence from the interviews conducted on the winners’ podium immediately after the Grand Prix. As part of a live broadcast feed provided to various broadcasters by Formula One Management (“FOM”), the presenter David Coulthard interviewed one of the winning drivers, Sebastian Vettel, at approximately 15:05:

David Coulthard: *“Well, your name is up there as a double world champion. Do you now feel that you’ve got your hand on one side of the cup for a third world title?”*

Sebastian Vettel: *“Um, I think there’s still two races to go so obviously we see how quickly things can change. Yesterday was a surprise for us. I think would we have start from third it would have been a different race but, yeah, it was obviously a chance to fuck it up and we didn’t do that.”*

After concluding the interview with Sebastian Vettel, David Coulthard addressed the audience:

David Coulthard: *“OK, well, Sebastian, thank you for those words, and we should just remind our audience that he is speaking in his second language. We apologise for the choice of words that you had.”*

This was followed a few minutes later by a further apology from Sky’s Simon Lazenby:

Simon Lazenby: *“Well, perhaps the most uncouth podium we’ve had so far this season. Once again apologies for the choice of language up there.”*

Ofcom considered that the material raised potential issues warranting investigation under Rule 1.14 of the Code, which states:

“The most offensive language must not be broadcast before the watershed (in the case of television)[.]”

¹ See pp.73-75.

We therefore requested comments from Sky as to how the content complied with this rule.

Response

Sky explained that the post-race interviews were part of a live feed provided to all rights-holding broadcasters by FOM. David Coulthard was the official presenter on channels carrying this feed, and Sky pointed to the broadcast apologies made by both David Coulthard and Simon Lazenby. In its representations to Ofcom, the Licensee again expressed its regret for any offence caused by the broadcast.

Sky said that it was “difficult to prevent such incidents at live events”, but that it had issued guidance to production staff intended to minimise any recurrence and ensured that the material in question was edited out of all repeats of the programme.

The Licensee said: “The drivers are aware that they should not use swear words while live on air but clearly emotions can run high immediately after the race and while on the podium.” Sky also hoped that the potential for offence had been mitigated by the non-aggressive context in which the offensive language had been used.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, which include ensuring that “persons under the age of eighteen are protected”. This is reflected in Section One of the Code.

Rule 1.14 of the Code states that “the most offensive language must not be broadcast before the watershed”. Ofcom research on offensive language notes that the word “fuck” and its derivatives are considered by audiences to be amongst the most offensive language². The use of the word “fuck” in this programme broadcast before the watershed was therefore a clear breach of Rule 1.14.

However, Ofcom noted that the licensee had acted swiftly to apologise (in addition to the on-air apology given by FOM’s David Coulthard), issued guidance to production staff about the issue, and edited the offensive material out of any repeats of the programme. Taking all these factors into account, Ofcom considers the matter resolved.

Resolved

² *Audience attitudes towards offensive language on television and radio*, August 2010, <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>.

Advertising Scheduling Findings

In Breach

Advertising break pattern

Extreme Sports, 30 and 31 October 2012, 22:00

Introduction

Rule 17 of the Code on the Scheduling of Television Advertising (“COSTA”) stipulates the maximum number of advertising breaks programmes may contain:

Scheduled duration of programme (on non-PSB channels)	Number of breaks
< 26 minutes	One
26 – 45 minutes	Two
46 – 65 minutes	Three
66 – 85 minutes	Four
86 – 105 minutes	Five
106 – 125 minutes*	Six

*for every additional 20 minutes of programming, a further break is permitted.

Rule 16 of COSTA lists the following exceptions (amongst others) to the restrictions on the insertion of advertising breaks:

- “f) in programmes of live events, more breaks may be taken than are indicated...provided that:
- i) the timing of the event and its constituent parts are outside the control of the programme provider; and
 - ii) there would not be sufficient time within the number of permitted breaks which are also natural breaks to schedule the permitted amount of advertising.”

During monitoring, Ofcom identified two instances when Extreme Sports, which is owned and operated by Chello Zone (“Chello Zone” or “the Licensee”), had included more advertising breaks than permitted by Rule 17 of COSTA during its coverage of World Extreme Cagefighting (WEC).

On 30 October 2012, Extreme Sports included seven internal breaks, exceeding the number of breaks permitted by Rule 17 of COSTA for a programme with a scheduled duration of 114 minutes. On 31 October 2012, Extreme Sports included eight internal breaks, exceeding the number of breaks permitted by Rule 17 of COSTA for a programme with a scheduled duration of 127 minutes.

As set out above, Rule 16(f) of COSTA allows the broadcast of live events to feature more internal advertising breaks than indicated in Rule 17. However, in this case these programmes contained recordings of sports events and as such were not permitted to feature more than the number of internal breaks stipulated in Rule 17.

Ofcom therefore sought comments from the Licensee as to how the content complied with Rule 17 of Costa.

Response

The Licensee explained that it receives WEC programmes in a larger number of parts than it requires, and in order to comply with COSTA it builds break pattern templates in its scheduling system to join programme parts at appropriate points and ensure they comply with both the number of permitted internal breaks and that commercial minutage in each clock hour is compliant.

The Licensee said that these break patterns are applied by the programming team, and checked with the compliance team to ensure the resultant number of commercial breaks is COSTA compliant, but that on this occasion “a new member of the commercial traffic team thought they were “being pro-active” by redistributing commercials to introduce a commercial break between programme parts, rather than the relevant programme parts immediately following another”. The Licensee explained that this unauthorised intervention was not highlighted by the automated checks as the commercial minutage in each hour remained compliant.

The Licensee said it had updated its training procedures so that new members of staff do not have access to live broadcast systems until they have received appropriate compliance training. In addition, it is also investigating the possibility of additional automated COSTA checks to count the number of programme parts against the scheduled duration so that a non-compliant schedule could not be released for transmission regardless of any manual changes.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content which it considers are best calculated to secure a number of standards objectives. One of these objectives is that “the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with”.

Articles 20 and 23 of the EU Audiovisual Media Services (AVMS) Directive set out strict limits on the amount and scheduling of television advertising. Ofcom has transposed these requirements by means of key rules in COSTA. Ofcom undertakes routine monitoring of its licensees’ compliance with COSTA.

In this case, Ofcom found that the amount of advertising broadcast by Extreme Sports was in breach of Rule 17 of COSTA on two occasions.

Ofcom noted that it had previously recorded breaches of Rule 4 (relating to advertising minutage) and Rules 16(a) and 17 (relating to advertising break patterns) of COSTA by Chello Zone channels CBS Action, CBS Drama, CBS Reality, Horror Channel and Extreme Sports in Broadcast Bulletins 169, 179 and 186¹.

¹ Issue 169 of Ofcom’s Broadcast Bulletin, 8 November 2010, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb169>; Broadcast Bulletin 179, 4 April 2011, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb179>; and issue 186 of Ofcom’s Broadcast Bulletin, 18 July 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb186/obb186.pdf>.

While we note Chello Zone's assurances on the steps that it has taken to ensure COSTA compliance, Ofcom is particularly concerned that these breaches occurred as a result of staff not being properly trained.

Ofcom will continue to monitor the Licensee's compliance with COSTA. Should similar compliance issues arise, Ofcom may consider further regulatory action.

Breaches of Rule 17 of COSTA

Fairness and Privacy cases

Not Upheld

Complaint by Mr Gary Radford

Police Interceptors, Channel 5, 23 January and 3 May 2012

Summary

Ofcom has not upheld this complaint by Mr Gary Radford that he was unjustly or unfairly treated in the programme and that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

The programme was part of a series which followed the operations of a number of high-speed mobile police units. This edition showed footage of Mr Radford being stopped in his car on a public highway and arrested for stealing petrol. He was also shown at the police station. In the broadcast footage Mr Radford's face was obscured by pixellation.

Mr Radford's solicitors, Howells LLP, complained to Ofcom on his behalf that he was treated unjustly or unfairly in the programme and that his privacy was unwarrantably infringed in connection with the obtaining of the material in the programme and in the programme as broadcast.

Ofcom found that:

- The broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of the complaint) were not presented, omitted or disregarded in a way that portrayed Mr Radford unfairly.
- Mr Radford had a legitimate, albeit considerably limited, expectation of privacy in the circumstances in which he was filmed and in the subsequent broadcast of that footage. However, in the particular circumstances of this case, the public interest in filming and subsequently broadcasting footage showing the work of the police outweighed the intrusion into Mr Radford's privacy. Therefore, Mr Radford's privacy was not unwarrantably infringed in connection with the obtaining of material included in the programme or in the programme as broadcast.

Introduction

On 23 January 2012, Channel 5 broadcast an edition of its reality series *Police Interceptors*, which followed the work of a police interception unit¹ in Derbyshire. The programme was repeated on 3 May 2012.

The programme showed police officers investigating reports of a "suspected petrol thief". The programme's narrator later referred to the police officers "hunting a fuel thief who has been hitting the local garages". One of the police officers, PC Nick Lovatt, said:

¹ A police interception unit is a high-speed mobile police response team.

“We’ve put an operation together to try and identify and detain the driver and the vehicle that’s responsible for over 37 recorded bilkings, making off without payment for fuel...Thousands of pounds worth of fuel that he’s had from service stations.”

The programme’s narrator then said:

“The petrol pilferer uses a variety of crafty disguises when at the pumps but always drives the same blue Volvo.”

Another police officer was shown following a blue Volvo as it left a petrol station. The vehicle was eventually surrounded by police officers and the man driving the Volvo was shown being arrested and taken to a police station. Later in the programme, PC Lovatt said:

“He’s been elusive for quite a while and he’s been cocky in the fact that he thought he could get away with it, to the point that he’s been giving the finger to cashiers that have realised what vehicle he’s in and decided not to serve him.”

Footage was also shown of the driver at the police station, together with footage of his vehicle. The face of the driver and the vehicle’s registration plate were obscured in the programme as broadcast by pixellation. The driver of the vehicle was Mr Gary Radford.

The part of the programme featuring Mr Radford concluded by showing footage of Mr Radford (with his face obscured by pixellation) being taken to a police station, shots of Mr Radford’s blue Volvo leaving the petrol station, and shots of the interior of his car, including footage of a wooden stick and a hat, a wig and sunglasses, over which the commentary said:

“The driver was charged with 22 offences of making off without payment, one charge of carrying an offensive weapon and one charge of going equipped to steal.”

Following the broadcast of the programme, Howells LLP, Mr Radford’s solicitors, complained to Ofcom on Mr Radford’s behalf that he was treated unjustly or unfairly in the programme as broadcast and that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

Summary of complaint and broadcaster’s response

Unjust or unfair treatment

Howells LLP complained on Mr Radford’s behalf that he was treated unjustly or unfairly in the programme as broadcast in that:

- a) Mr Radford was portrayed unfairly in that:
 - i) He was referred to several times as a “petrol thief” and the programme incorrectly said that he was suspected of being involved in 37 incidents of making off without payment and stealing thousands of pounds worth of fuel. Mr Radford had not appeared in court in relation to his arrest when the programme was broadcast on 23 January 2012.

In response Channel 5 said that it was not Mr Radford himself that the police and the programme were referring to as a “*petrol thief*”, but the “*suspect*” the police were looking for, and any statements in relation to the driver of a blue Volvo, such as statements that he was suspected of involvement in 37 such offences and had stolen thousands of pounds worth of petrol, were simply statements of the facts as the police understood them at the time. Channel 5 said that Mr Radford was referred to throughout as the “*suspect*”, that Mr Radford was always filmed from a position from which his face was not visible, or if it was visible then steps were taken to obscure his face with pixellation, and that Mr Radford was never actually named or identified.

Channel 5 also said that the part of the programme involving Mr Radford ended with a piece of commentary making it clear that the suspect was actually charged with only 22 offences of theft.

Channel 5 said that Mr Radford had pleaded guilty to 11 offences of petrol theft at Derby Crown Court on 23 March 2012, including the offence of making off without payment on 22 October 2011 in regard to which he was filmed. Channel 5 said that on 17 April 2012 Mr Radford received a Community Sentence Order of 100 hours unpaid work.

Channel 5 said these convictions were a matter of public record. In the event that viewers were able to directly link Mr Radford to the events in the programme, the claim that he was suspected of 37 offences of petrol theft would not be likely to have affected viewers’ understanding of Mr Radford in a way that was unfair to him.

- ii) The police officer said Mr Radford had started to get “*cocky*” and had stuck two fingers up at staff at petrol stations when driving off.

Channel 5 in response said that Mr Radford was neither named nor identified and that the comments complained of were made about the suspect the police were looking for. Channel 5 stated that in view of the fact that Mr Radford had subsequently pleaded guilty to 11 offences of petrol theft it did not consider that such comments would be likely to have affected viewers’ understanding of Mr Radford in a way that was unfair to him.

- iii) The programme showed the police pointing out items found in the car, including a “*baseball bat*”, which was, in fact, a martial arts stick.

Channel 5 reiterated that Mr Radford was not identified in the programme and said that a martial arts stick and a “*baseball bat*” were both capable of being used for sport or as an “*offensive weapon*” and that it did not consider that referring to the item as a baseball bat rather than a martial arts stick would be likely to have affected viewers’ understanding of Mr Radford in a way which was unfair to him. In response to an allegation in the complaint that the “*baseball bat*” had been moved “for show”, Channel 5 said that the programme makers would not have entertained the thought of interfering with evidence in such a way, nor would the police officers have allowed anyone to do so.

- b) Mr Radford was not given an appropriate and timely opportunity to respond to the allegations made in the programme.

Channel 5 responded that the programme had not identified Mr Radford, and that even if it had, the charges faced by Mr Radford were a matter of public record. Channel 5 also referred to the restrictions placed upon broadcasters by the law of contempt once criminal proceedings become active.

Unwarranted infringement of privacy

- c) Howells LLP complained on Mr Radford's behalf that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that he was filmed being taken from his car and transported to a police station. Howells LLP said that Mr Radford had asked the police what the camera crew were there for and was told that it was filming for *Police Interceptors*. He was not asked for his permission for filming, which he would have refused.

In response, Channel 5 stated that the programme makers were filming openly, with the police's permission, and that Mr Radford had subsequently pleaded guilty to the offence for which he was arrested when filmed.

Channel 5 said that Mr Radford did not have a legitimate expectation of privacy in the circumstances, particularly once he had been cautioned, and that even if he did, that was outweighed by the public interest in filming the police engaged in this type of work, and the broadcaster's right to freedom of expression. Channel 5 said that it did not consider that Mr Radford was in a "vulnerable position", noting that he was "*not drunk or injured or being questioned by police*". Channel 5 said that steps had been taken to obscure Mr Radford's identity, but stated that even if Mr Radford's privacy had been infringed, it was warranted to do so.

- d) Howells LLP also complained on Mr Radford's behalf that his privacy was unwarrantably infringed in the programme as broadcast in that he was filmed in a vulnerable position and he was shown in the programme as a shaven-headed man wearing distinctive clothing. Also, his car was described and, although his face was obscured, the pixellation was poor and, consequently, he was identifiable.

By way of background, Howells LLP said on behalf of Mr Radford that no crime had been proven against him at the time of the first broadcast, and in particular the charge of carrying an offensive weapon had been dropped.

In response, Channel 5 said that by the time of the first broadcast on 23 January 2012 the charges Mr Radford was facing were a matter of public record, in addition to which Mr Radford's identity had not been revealed because his face had been obscured. Channel 5 stated that, for the reasons outlined under c) above, it did not consider Mr Radford to be in a "vulnerable" position and that even if his privacy had been infringed, the infringement was warranted.

Representations on Ofcom's Preliminary View

Ofcom prepared a Preliminary View that Mr Radford's complaint should not be upheld. In commenting on that Preliminary View, Mr Radford's main points and those of Channel 5 (in so far as they were relevant to the complaint entertained by Ofcom) were, in summary, as follows:

Unjust or unfair treatment

In relation to head a) ii), Howells LLP stated that while the part of the programme in which Mr Radford was described as being “cocky” and having stuck up two fingers to a petrol station cashier by a police officer may have been a correct representation of the police officer’s understanding of the facts at the time, his comments were, nevertheless, inaccurate and thus unfair to Mr Radford.

Howells LLP also stated, in relation to head a) iii) that a baseball bat was more likely to be associated with violence than a martial arts stick. Describing the object found by the police in Mr Radford’s car as a baseball bat and an offensive weapon was also inaccurate and thus unfair to Mr Radford.

With regard to the second broadcast of the programme on 3 May 2012, Howells LLP stated that they understood from the Preliminary View that Ofcom “conceded” that Mr Radford’s position had altered by the time of the second broadcast and the more serious charge of carrying an offensive weapon had been dropped. Howells LLP said that, consequently, this aspect of the programme was also inaccurate in a way that was unfair to Mr Radford and that the commentary to the programme should have been updated to reflect the accurate position at the time of broadcast.

Channel 5 made no representations in relation to Ofcom’s Preliminary View of the complaint of unjust or unfair treatment. However, in relation to the second broadcast of 3 May 2012, Channel 5 stated that as documentaries were a “snap shot of what happened at the time of filming”, it would place an “impossible burden” on the broadcaster to require it to update continually such documentaries each time they were repeated after first transmission. Channel 5 stated that had Mr Radford contacted the broadcaster to notify it of the change in his circumstances, then it would have considered editing the programme to reflect the new circumstances.

Unwarranted infringement of privacy

Howells LLP reiterated the points made in the complaint that: Mr Radford had been filmed in a vulnerable and sensitive situation; the non-consensual filming of Mr Radford had seriously infringed his right to privacy; Mr Radford’s identity had not been completely obscured and that it was his right to choose whether or not his friends and family had been able to see him in the footage; and the public interest in the filming and broadcasting of the footage featuring Mr Radford was not so great as to justify identifying Mr Radford to his friends and family.

In addition, Howells LLP stated that *Police Interceptors* was an entertainment programme and thus less entitled to rely on a public interest justification than a programme that addressed “serious issues”. Howells LLP said that the broadcaster could have covered the work of the police differently, in a way that did not infringe Mr Radford’s privacy, and said that the “backyard” of a police station was not in the public domain.

Channel 5 also made representations with regard to Ofcom’s Preliminary View.

It stated that not only did it regard Mr Radford as having no legitimate expectation of privacy after he was cautioned, but it did not (because of the public nature of the places in which Mr Radford was filmed and the open nature in which the filming was conducted) regard Mr Radford as having a legitimate expectation of privacy in the circumstances in which he was filmed.

Channel 5 also stated that it did not agree with the way in which Ofcom had applied the “test” for privacy. Channel 5 stated that Ofcom should have asked itself whether in the circumstances Mr Radford had a legitimate expectation of privacy, but that instead Ofcom had asked itself the question: to what extent could Mr Radford legitimately have expected that he would not have been filmed, and to what extent could he have expected that the footage of his involvement with the police would not have been broadcast without his consent? As explained above, Channel 5 said that it did not believe that Mr Radford had a legitimate expectation of privacy in these circumstances. In support of this, Channel 5 highlighted the facts that the programme makers were filming openly on a public highway for some of the filming, and pointed to the public nature of the charges against Mr Radford and the fact that the criminal justice process is a public process. In addition, Channel 5 reiterated that it did not consider that Mr Radford was in a “vulnerable state”, noting that he was not “ill, injured or drunk” and that instead he appeared “calm and cooperative”. Channel 5 acknowledged that being arrested “must be an unpleasant experience”, but argued that it was not an activity that is of such a private or sensitive nature that it would normally give rise to a legitimate expectation of privacy, particularly in view of the fact that an arrest and any subsequent charges are “usually very publicly dealt with”.

In response to Howells LLP’s comments on Ofcom’s Preliminary View, Channel 5 did not agree that it needed Mr Radford’s consent to film or broadcast the footage complained of for the reasons outlined above. Channel 5 reiterated that the criminal justice system is a public process and noted that Mr Radford’s charge and subsequent guilty plea were matters that were referred to in open court. Channel 5 also disputed Howells LLP’s suggestion that the “backyard” of a police station was not a public place and submitted that, in any event, the footage disclosed nothing private about Mr Radford. In addition, Channel 5 added that the only reason it had obscured Mr Radford’s identity was because of its obligations under the law of contempt, not because of concerns over privacy.

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 unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes 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 carefully considered all the relevant material provided by both parties. This included a recording and transcript of the programme as broadcast, and both parties’ written submissions.

Ofcom also took careful account of the representations made by Howells LLP and Channel 5 in response to Ofcom’s Preliminary View on this complaint. Ofcom concluded that the further points raised by Howells LLP did not raise any substantive points which affected Ofcom’s Preliminary View not to uphold the complaint for the reasons outlined below.

Ofcom considered that the further points raised by Channel 5 in relation to the manner in which Ofcom considered the complaints of unwarranted infringement of privacy (see heads c) and d) of the complaint) merited that these heads of complaint be revised by Ofcom to some extent.

Unjust or unfair treatment

When considering this part of the complaint, Ofcom had regard to whether the portrayal of Mr Radford was consistent with the broadcaster's obligation to avoid unjust or unfair treatment of individuals in programmes, as outlined in Rule 7.1 of the Code. Ofcom had regard to this Rule when reaching its decision on this head, and individual sub-heads, of the complaint detailed below.

- a) Ofcom considered the complaint that Mr Radford was portrayed unjustly or unfairly in the programme as broadcast.

By way of background, Ofcom noted that the programme set out to demonstrate the work of police officers who pursue and intercept offenders on motorways and highways of the UK and the offences and incidents they tackle. In addition to the material featuring Mr Radford, this particular episode also featured police officers involved in a high-speed motorway pursuit, a highway police patrol detaining an illegally modified vehicle, a police helicopter following a disqualified driver and the pursuit and arrest of a shoplifter.

The programme makers took measures to prevent Mr Radford's identity being revealed other than to those who knew Mr Radford well, knew about the case, or were able to identify him from the footage of his blue Volvo (despite the number plates being obscured). In Ofcom's view, the majority of viewers of this programme would therefore not have known that the individual featured in the programme was Mr Radford.

In considering this head of complaint and the individual sub-heads of complaint below, Ofcom had regard to whether reasonable care was taken by the broadcaster to satisfy itself that material facts had not been presented, disregarded or omitted in a way which was unfair to Mr Radford (as outlined in Practice 7.9 of the Code).

In reaching its Preliminary View, Ofcom considered each of the sub-heads of Mr Radford's complaint separately in order to reach an overall view as to whether or not he was portrayed unfairly in the programme as broadcast.

- i) Ofcom considered the complaint that Mr Radford was referred to several times as being a "*petrol thief*" and that he was incorrectly said to have been suspected of 37 incidents of making off without payment, and stealing thousands of pounds worth of fuel.

The part of the programme in which Mr Radford appeared followed a police interceptor unit as it attempted to find and detain a prolific petrol thief. Ofcom noted that at the beginning of this part of the programme PC Lovatt stated:

"We've put an operation together to try to identify and detain the driver and the vehicle that are responsible for over 37 'bilkings' – making off without payment for fuel – something in the region of thousands of pounds worth of fuel he's had, gone."

The programme then reported that a blue Volvo car had been spotted by another police officer, PC Scott Jefferys, leaving a petrol station. PC Jefferys was shown following the blue Volvo, which was subsequently stopped on a public highway by police officers in a number of patrol vehicles.

At this point in the programme, Mr Radford was depicted sitting in the driving seat of the blue Volvo, and then being detained by the police officers at the side of the blue Volvo. Subsequently, Mr Radford was taken away in a marked police car and then shown being led by officers into a police station.

Ofcom noted that on each of the occasions in which Mr Radford was seen facing the camera during the programme his face was obscured by pixellation. At no point was Mr Radford referred to by name, but was referred to variously as *“the Volvo driver”*, *“the suspect”*, an *“alleged petrol thief”* and *“the driver”*.

The part of the programme featuring Mr Radford concluded with the following commentary:

“The driver was charged with 22 offences of making off without payment, one charge of carrying an offensive weapon and one charge of going equipped to steal.”

Ofcom acknowledged that the 37 incidents of suspected theft referred to by PC Lovatt at the beginning of this part of the programme was a considerably larger number than the 22 offences of theft that Mr Radford was said in commentary to have been finally charged with, and that Mr Radford had not yet been tried in court in relation to his arrest when the programme was first broadcast. However, we took the view that the statement regarding the *“37 ‘bilkings’ – making off without payment for fuel”* made in the programme was a statement of the facts as the police officer understood them at the beginning of the operation. Although PC Lovatt originally stated the number of suspected theft offences to be *“37”*, the programme’s commentary made it clear to viewers that the person who had been arrested was only charged with *“22 offences”* of theft.

Ofcom also considered that following the arrest, the programme’s narration referred to the individual as the *“suspect”* and the *“alleged petrol thief”* and that the police needed to gather evidence in order to charge the individual. Ofcom noted that the individual was eventually charged with 22 offences of making off without payment in relation to petrol theft. Therefore, Ofcom considered that the description of the individual shown being arrested in the programme as a suspected *“petrol thief”* was a fair one and one that did not present, disregard or omit material facts in such a way as to be unfair to Mr Radford.

Taking the above factors into account, Ofcom considered that the context in which the statement by the police officer regarding *“37 ‘bilkings’”* was made would have been clear to viewers, and in any event, the programme’s commentary explicitly clarified that Mr Radford was actually charged with only *“22 offences”*. We also considered that the use of the term *“petrol thief”* fairly reflected the nature of the offence for which the individual was arrested and featured in the programme. In Ofcom’s view, these statements in the programme were unlikely to have materially and adversely affected viewers’

understanding of the circumstances surrounding the offences for which Mr Radford was arrested in a way that was unfair to him.

- ii) Ofcom next considered the complaint that Mr Radford was portrayed unfairly in that the police officer said that he had started to get “cocky” and had stuck two fingers up at the staff at petrol stations.

In a sequence immediately after the beginning of the second part of the programme, PC Lovatt stated:

“Obviously he [the petrol thief]’s been elusive for quite a while and he’s been cocky at the fact he thought he could get away with it, to the point where he’s been giving the finger to cashiers that have realised what vehicle he’s in and have decided not to serve him.”

The first part of the programme had concluded with Mr Radford being arrested by the side of his car and subsequently being detained at a police station.

In Ofcom’s view the comments by the police officer that the petrol thief had been “cocky” and had “*been giving the finger to cashiers*” were statements of the background facts as the police officer understood them at the time. The comments made in the programme were clearly presented in the programme as being the view of PC Lovatt and were given in the context of that particular police officer’s personal opinion of the petrol thief’s behaviour in relation to the alleged offences. In this respect, Ofcom considered that the police officer’s comments were presented as being based on his own experience in dealing with the case of the petrol thief, and that the “*finger*” gesture to staff of petrol stations would be understood by viewers to have been behaviour reported to the police involved in the investigation.

Given all these factors, Ofcom considered that the inclusion of these comments would have been unlikely to have materially and adversely affected viewers’ understanding of Mr Radford in a way that was unfair to him.

Ofcom noted Howells LLP’s representations on the Preliminary View that, although the comments made by PC Lovatt about Mr Radford in the programme may have been a correct representation of his understanding of the facts at the time, the comments were inaccurate and thus unfair to Mr Radford.

It is important to note that Ofcom’s remit is to consider and adjudicate on complaints of unjust or unfair treatment and as such it is not required to resolve conflicts of evidence as to the nature or accuracy of particular accounts of events but to adjudicate on whether the complainant has been treated unfairly in the programme as broadcast. Ofcom was clear in its Preliminary View that it considered that PC Lovatt’s comments were presented as being his personal view of the petrol thief’s behaviour as he understood it at the time. Also, Ofcom considered that PC Lovatt’s comments were made in the context of a programme which had included footage of Mr Radford driving away from a petrol station without paying for fuel and subsequently being arrested. Given that Mr Radford was subsequently charged with 22 charges of making off without payment, a fact that was reflected in the programme, Ofcom did not take the view that PC Lovatt’s remarks that Mr Radford had been “cocky” and that he had stuck two fingers

up at a petrol station cashier, even if inaccurate, would materially and adversely affect the way in which viewers (and in particular those who would have been able to identify him through the material broadcast in the programme) would have perceived him. Consequently, for this reason, Ofcom considered that Howells LLP's representations did not alter its decision that there was no unfairness to Mr Radford in this element of the complaint.

- iii) Ofcom then considered the complaint that Mr Radford was treated unfairly because a martial arts stick in his car was incorrectly described of as a *"baseball bat"*.

Ofcom noted that the part of the programme complained of included footage of the interior of the blue Volvo car which showed a hat, sunglasses, a wig and a wooden stick. The accompanying commentary from a police officer involved in the search of the car stated:

"There's also an offensive weapon, a baseball bat, and that's just what was visible from the vehicle."

The part of the programme featuring Mr Radford ended with the following commentary:

"The driver was charged with 22 offences of making off without payment, one charge of carrying an offensive weapon and one charge of going equipped to steal."

Ofcom noted Channel 5's submission that describing the item shown in the car as a *"baseball bat"* was no more pejorative than describing it as a martial arts stick, as both can be used for sport or as an offensive weapon. Ofcom accepted that the item shown in the car may not have been a *"baseball bat"* as described in the programme, and that the item shown may well have been a stick used in martial arts. However, Ofcom considered that the reference to the item was intended to illustrate to viewers what the police had found in Mr Radford's car when searched and the item leading to Mr Radford being charged for carrying an offensive weapon.

Ofcom considered that, in this context, the description of the item as a *"baseball bat"* rather than a martial arts stick would in itself have been unlikely to have materially and adversely affected viewers' understanding that an item found in Mr Radford's car led to him being charged with carrying an offensive weapon in a way that was unfair to the complainant. In these circumstances, Ofcom considered that the reference to a *"baseball bat"* in the programme did not result in any unfairness to Mr Radford.

Ofcom noted Howells LLP's representations on the Preliminary View that the description of the object found in Mr Radford's car as a *"baseball bat"* and an offensive weapon was inaccurate and thus unfair to Mr Radford.

As already mentioned in head a) ii) above of this Decision, Ofcom's role is not to resolve conflicts of evidence as to the nature or accuracy of particular accounts of events but to adjudicate on whether the complainant has been treated unfairly in the programme as broadcast. Ofcom's Preliminary View made it clear that the item found in Mr Radford's car may not have been a baseball bat as described in the programme and that the reference was clearly attributed to the police officer who had recounted his recollection of the

items found in the search. Also, Ofcom considered that the police officer's comments were made in the context of a programme which made its viewers aware that Mr Radford was subsequently charged with carrying an offensive weapon (although this particular charge was later dropped) and was charged with 22 offences of making off without payment. In any event, Ofcom took the view that even if it had been inaccurate to describe the item found in the car as a "*baseball bat*" rather than a martial arts stick, the fact remained that an item was found in the car that the police officer believed at the time of making his comments to be an offensive weapon. Ofcom considered that this description would have been unlikely to have materially and adversely affected the way in which viewers (and in particular those who would have been able to identify him through the material broadcast in the programme) would have perceived Mr Radford in a way that was unfair to him. Consequently, for this reason, Ofcom considered that Howells LLP's representations did not alter its decision that there was no unfairness to Mr Radford in this element of the complaint.

Having considered each of the sub-heads of complaint that the programme as broadcast portrayed Mr Radford unfairly, Ofcom concluded that, overall, the broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of complaint above) were not presented, omitted or disregarded in a way that portrayed Mr Radford unfairly. Ofcom considered that the broadcaster had presented the incident involving Mr Radford as it happened and that the summary of the offences that Mr Radford (though he was not identified) had been charged with fairly represented the position at the time the programme was first broadcast on 23 January 2012. In this respect, Ofcom found no unfairness to Mr Radford.

Unfair and Unjust Treatment: The Second Broadcast on 3 May 2012

With regard to the second broadcast of the programme on 3 May 2012, Ofcom acknowledged Howells LLP's submission in its representations on Ofcom's Preliminary View that the facts of Mr Radford's circumstances had changed between the first transmission of the programme on 23 January 2012 and the repeated broadcast on 3 May 2012, in that the more serious charge against Mr Radford of possessing an offensive weapon had been dropped before Mr Radford's court appearance on 23 March 2012.

Ofcom noted Channel 5's submission in response to Ofcom's Preliminary View that a documentary is a "*snapshot of what happened at the time of filming*" and that an obligation on broadcasters to update programmes continually would be an "*impossible burden*".

Having regard to Rule 7.1 ("[b]roadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes") and Practice 7.8 ("[b]roadcasters should ensure that the re-use of material...originally filmed or recorded for one purpose and then used in a programme for another purpose or used in a later or different programme, does not create unfairness"), Ofcom considers it to be a broadcaster's responsibility to ensure, in a proportionate way, that the content of a repeated broadcast does not create unfairness to individuals because, for example, the facts and circumstances that pertained at the time of the original broadcast have since materially changed.

Ofcom does not agree with Channel 5's submission that because documentaries are, as Channel 5 puts it, a "snapshot of what happened at the time of filming", a

requirement to review repeated material in a proportionate way in order to avoid potential unfairness would impose an “impossible burden” on broadcasters.

However, in this case, Ofcom considered that the reference in the commentary to Mr Radford having been charged with the offence of carrying an offensive weapon was not factually inaccurate (although this charge had been dropped by the time of the second broadcast), and that, having regard to all the circumstances, the broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of the complaint above) were not presented, omitted or disregarded in a way that portrayed Mr Radford unfairly. Ofcom therefore concluded that the fact that the reference in the commentary to Mr Radford being charged with carrying an offensive weapon was not removed, or that it was not mentioned in the commentary that this charge had been dropped, was unlikely to have materially and adversely affected the way in which viewers would have perceived Mr Radford in a way that was unfair to Mr Radford. Ofcom concluded therefore that there was no unfairness to Mr Radford in this respect.

- b) Ofcom next considered Mr Radford’s complaint that he was not given an appropriate and timely opportunity to respond to the allegations made in the programme.

In considering this particular head of complaint Ofcom took into account Practice 7.11, which states that if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

As already mentioned under head a) above, Ofcom noted that throughout the relevant part of the programme the programme makers had taken steps to obscure Mr Radford’s identity: by not naming him, and pixellating his face and the car registration number plate. We noted too that the purpose of the programme was to demonstrate the work of the police officers who pursue and intercept offenders and to inform viewers of any action taken as a result of the offending. It was in this context that Ofcom considered the complaint that Mr Radford had not been given an opportunity to respond.

Mr Radford was filmed being arrested for petrol theft, and the part of the programme relating to Mr Radford ended with the following commentary:

“The driver was charged with 22 offences of making off without payment, one charge of carrying an offensive weapon and one charge of going equipped to steal.”

Ofcom considered that the comments made by the police officers along with those contained in the programme’s commentary as set out in the above sub-heads could be reasonably understood to be “allegations” of wrongdoing. However, in the circumstances of this particular case, Ofcom took the view that while Mr Radford was the individual shown in the programme, his identity was not revealed to the wider viewing audience. Ofcom also considered that the programme showed Mr Radford being arrested on a public highway by the police in the course of their duties and that the charges Mr Radford faced were matters of public record. In these circumstances, we did not consider that it was incumbent on the broadcaster to offer Mr Radford an opportunity to respond. Ofcom concluded therefore that there was no unfairness to Mr Radford in this respect.

Unwarranted infringement of privacy

As stated above, Ofcom considered that the further points raised by Channel 5 in relation to the manner in which Ofcom considered the complaints of unwarranted infringement of privacy (see heads c) and d) of the complaint) merited that these heads of the complaint be revised by Ofcom to some extent.

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.

- c) Ofcom considered Mr Radford's complaint that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that he was filmed being taken from his car and transported to a police station without his consent.

Ofcom took into consideration Practice 8.5 of the Code which requires that any infringement of privacy in the making of a programme should be with the individual's consent, or be otherwise warranted. We also took account of Practice 8.8 to the extent that it requires broadcasters to obtain permission from individuals filmed in sensitive places, such as police stations, separately for the filming stage, and again for the broadcast stage.

In considering whether or not Mr Radford's privacy had been unwarrantably infringed in connection with the obtaining of material included in the programme, Ofcom first considered the extent to which Mr Radford had a legitimate expectation of privacy in the particular circumstances in which he was filmed.

Ofcom distinguished here between the two different places and situations in which Mr Radford was filmed (being detained and arrested on the public highway; and later being escorted by a police officer from an external area of a police station, i.e. a police station car park, into the police station itself).

With regard to the footage of Mr Radford being detained and arrested, having reviewed the material complained of, Ofcom noted that the footage included in the programme appeared to have been filmed by the programme makers on a public highway; and that the programme makers had filmed openly and not concealed the fact that they were filming Mr Radford and his involvement with the police.

Ofcom recognises that there can be circumstances in which an individual can legitimately expect privacy even in a public place. In the particular circumstances of this case, Ofcom noted that Mr Radford was not a vulnerable person or in a distressed state as defined by the Code. Ofcom also noted Channel 5's comments that Mr Radford did not appear to be in a vulnerable state, in that he was not ill, injured or drunk, and its comment that the criminal justice process is an open process. Ofcom also noted that an individual's involvement in police investigations is not generally a matter of public record until a person has been

charged with a criminal offence and Ofcom considers being arrested to be a sensitive situation. In the particular circumstances of this case, Ofcom considered that, despite the public and open nature of the filming, the programme makers had filmed Mr Radford in a situation that could reasonably be regarded as sensitive (being arrested), and in which an individual may expect some degree of privacy. However, given the public and open circumstances in which Mr Radford was filmed, Ofcom considered that Mr Radford's expectation of privacy was limited considerably. Ofcom did not consider the fact of Mr Radford's cautioning to either increase or decrease Mr Radford's expectation of privacy in relation to manner in which the material was obtained.

Ofcom noted that Mr Radford was also filmed being escorted by a police officer from an external area of a police station (the police station car park) into the police station itself. Practice 8.8 of the Code cites police stations as potentially sensitive places and that separate consent should be obtained from individuals for both the filming and the broadcast stages of the production process. Consequently, Ofcom found that Mr Radford had a legitimate expectation of privacy in relation to the obtaining of the material in these particular circumstances. However, Ofcom found that Mr Radford's expectation of privacy was again considerably limited by the open nature in which the material was obtained.

Taking all the factors above into account and in the particular circumstance of this case, Ofcom considered that Mr Radford had had a legitimate, albeit considerably limited, expectation of privacy in relation to the circumstances in which he was filmed, in terms of his arrest and transport to the police station.

Ofcom then considered whether or not the programme makers had obtained Mr Radford's consent for the footage of him to be filmed in both of the circumstances detailed above. Ofcom noted from Channel 5's submission that it accepted that Mr Radford may have preferred not to have been filmed. Ofcom therefore took the view that the programme makers did not have Mr Radford's consent to film him.

Ofcom went on to assess whether the infringement of Mr Radford's limited expectation of privacy was warranted in the particular circumstances of this case. The Code makes it clear that: "If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy."

Ofcom noted that there was a conflict between Mr Radford's right to privacy (albeit limited) on the one hand, and on the other the broadcaster's competing right to freedom of expression, the need for broadcasters to have the freedom to gather information and film events in the making of programmes without undue interference and the audience's right to receive information and ideas without unnecessary interference.

Ofcom considered in particular whether there was sufficient public interest to justify the intrusion into Mr Radford's expectation of privacy as a result of the programme makers having filmed him in the circumstances they did, without Mr Radford's consent. In Ofcom's view there is a significant public interest in the work of the police being examined in broadcast programmes and in programmes which follow (as in this case) the police tackling vehicle-related crime. These programmes can demonstrate the illegal and potentially dangerous conduct in which some members of the public engage and the undesirable consequences of

such activities. They also help develop the public's understanding of the police's work in trying to tackle such conduct.

Ofcom has noted Howells LLP's submission in response to our Preliminary View that, because in their view *Police Interceptors* was an entertainment programme, it had less recourse to a public interest justification with regard to an infringement of privacy. In response, Ofcom's view is that a broadcaster may impart information in a popular and engaging format that is also in the public interest, and that whether any infringement of privacy is warranted in the public interest will depend on the circumstances of any particular case.

With regard to Howells LLP's comment that the broadcaster could have "*fulfilled its public interest without needing to reveal Mr Radford's identity*", Ofcom notes that its duty is to reach a decision on whether a broadcaster breaches a person's right to privacy based on the facts of a particular broadcast and the material contained in the broadcast in question.

In the circumstances of this case, Ofcom considered that the programme makers may not have been in a position to obtain Mr Radford's consent to filming, but there was a genuine and significant public interest in filming the material without having secured prior consent. Ofcom took the view that it would be an undesirable and disproportionate restriction of broadcasters' freedom of expression and editorial freedom if they were unable to film material in circumstances like those in the present case because they were required (but unable) to obtain consent from those involved prior to filming taking place (for example, while an arrest is happening). In these circumstances, Ofcom considers that what is important is that the broadcaster takes steps to ensure that the subsequent broadcast of material filmed in such circumstances does not result in an unwarranted infringement of privacy. This issue is dealt with at decision head d) below.

Having taken all the factors above into account (in particular the extent to which Mr Radford's legitimate expectation of privacy was considerably curtailed by the open manner in which the programme makers openly filmed him being arrested on a public highway), Ofcom considered that, on balance, the broadcaster's right to freedom of expression and the viewer's right to receive information and ideas without undue interference outweighed Mr Radford's limited legitimate expectation of privacy. Ofcom therefore found that there had been no unwarranted infringement of Mr Radford's expectation of privacy in connection with the obtaining of the footage included in the programme.

- d) Finally, Ofcom considered Mr Radford's claim that his privacy had been infringed by the programme as broadcast in that footage of him filmed in a vulnerable position was shown in the programme.

In assessing this part of the complaint, we took into account Practice 8.6 of the Code. This requires that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted. In considering whether or not there had been an unwarranted infringement of Mr Radford's privacy in the programme as broadcast, Ofcom analysed the extent to which Mr Radford had a legitimate expectation of privacy in relation to the footage of his involvement with the police as broadcast.

The programme included footage of Mr Radford being detained and arrested on a public highway and being put in a police car. Subsequently, Mr Radford was shown in the programme being escorted by a policeman from an external area of a police station into the police station. The complaint on Mr Radford's behalf stated that, despite the pixellation, Mr Radford's friends and family had said that they were still able to identify him. Channel 5 accepted that Mr Radford may have been identifiable to people who knew him well. Ofcom noted that Mr Radford's face was obscured in the programme and that he was not named, but observed that footage of him was nevertheless included in the programme. In Ofcom's view, this footage showed Mr Radford in a sensitive situation (being arrested) and that he therefore had a legitimate expectation of privacy in relation to the material of him as broadcast, albeit considerably limited, for the reasons noted above.

Ofcom then considered whether the broadcaster had sought Mr Radford's consent. It was not disputed that the broadcaster had not sought Mr Radford's permission prior to transmission.

Ofcom therefore went on to consider whether the infringement of Mr Radford's considerably limited expectation of privacy was warranted in the particular circumstances of this case. Regarding the broadcast of the footage, Ofcom noted that there was a conflict between Mr Radford's, albeit limited, right to privacy on the one hand, and on the other the broadcaster's competing right to freedom of expression, the need for broadcasters to have the freedom to broadcast information and material without undue interference and the audience's right to receive information and ideas without unnecessary interference.

Ofcom assessed the broadcaster's competing right to freedom of expression, the public interest in examining the work of the police and the audience's right to receive information and ideas without unnecessary interference. In this respect, Ofcom considered whether in the circumstances there was sufficient public interest to justify the intrusion into Mr Radford's considerably limited expectation of privacy.

In relation to this, Ofcom noted that by the time of the first broadcast of the programme on 23 January 2012, Mr Radford had been charged with 22 offences of making off without payment, one offence of going equipped to steal and one offence of carrying an offensive weapon, and that by the time the programme was repeated on 3 May 2012 Mr Radford had pleaded guilty to 12 criminal offences (11 of making off without payment, and one for going equipped). Consequently, Ofcom concluded that at the time at which each programme was broadcast the facts of his arrest and the offences with which he had been charged were already a matter of public record, and that by the time of the second broadcast, the fact that Mr Radford had pleaded guilty to 12 criminal offences was also a matter of public record².

In addition to this Ofcom, as noted above, considered that there is a significant degree of public interest in the work of the police being examined in broadcast programmes and in programmes which follow (as in this case) the police tackling vehicle-related crime. These programmes can demonstrate the illegal and

² Ofcom considers that the failure to remove the reference in the commentary to the more serious charge of carrying an offensive weapon in the programme as broadcast for a second time on 3 May 2012 is more appropriately dealt with above under the head of "Unjust and Unfair Treatment" and is considered under head a) above.

potentially dangerous conduct in which some members of the public engage and the undesirable consequences of such activities. They also help develop the public's understanding of the police's work in trying to tackle such conduct.

Ofcom found that there was sufficient public interest to justify the intrusion into Mr Radford's considerably limited expectation of privacy.

Consequently, Ofcom considered that neither the broadcast of the material complained of on 23 January 2012, nor the broadcast of the material complained of on 3 May 2012, infringed Mr Radford's privacy in a way that was unwarranted.

Accordingly, Ofcom has not upheld this complaint of unjust or unfair treatment and of unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the broadcast of the programme made by Howells LLP on behalf of Mr Radford.

Not Upheld

Complaint by Dr Arasaratnam Arasilango

UK Border Force, Pick TV, 17 January 2012

Summary

Ofcom has not upheld this complaint of unjust or unfair treatment in the programme as broadcast by Dr Arasaratnam Arasilango.

This programme focussed on the work of officers of the UK Border Agency (“UKBA”) and how they attempt to prevent immigrants illegally entering the UK through ports and airports. During the programme a Bangladeshi man was shown being stopped by Mr Tim Wetherall, a UKBA officer at Heathrow Airport passport control. The man, who was attempting to re-enter the UK on a student visa, was shown being questioned about the college he was intending to study at in the UK and those where he had previously studied. One of the colleges referred to in this exchange was the Westminster College of Computing, about which the officer stated that *“any degree obtained from Westminster College of Computing is completely bogus”*.

Dr Arasilango, the director of Westminster College of Computing Limited (“the College”), complained that the College was unfairly portrayed in the programme as broadcast.

Ofcom found that the broadcaster had taken reasonable care to satisfy itself that the material facts were not presented, omitted or disregarded in a way that portrayed the College unjustly or unfairly in the programme as broadcast.

Introduction

On 17 January 2012, Pick TV, the licence for which is held by British Sky Broadcasting Limited (“BSkyB”), broadcast an episode of *UK Border Force*, an observational documentary series about the UKBA and the work of its officers in controlling illegal immigration into the UK. This edition of the programme included the work of officers dealing with people trying to enter the UK illegally from Calais and through Heathrow Airport. The programme included footage of a married couple from Bangladesh being stopped at Heathrow passport control. The voiceover accompanying the footage stated that the husband had been living in the UK for six years as a student while attending four different colleges and that:

“...three out of four colleges are now known by the UK Border Agency to be bogus.”

The commentary then said that a UKBA officer, Mr Tim Wetherall, would investigate the case to ascertain whether or not the man’s qualifications were genuine. The programme said that Mr Wetherall had a thick file of evidence against the college that had issued his qualifications. Mr Wetherall stated that:

“We’ve encountered so many students from this particular college and at the end of the day most of them have just admitted that they have never actually studied there at all, they’ve never actually gone to any classes, some of them haven’t actually been to the college. They’ve just paid the money to get the certificate to get an extension of stay in the UK. Well, I’ve yet to encounter, personally, a

student who has actually been to the college and studied there. He may be the first, you never know, stranger things have happened, but I'm not holding out much hope in this case."

Mr Wetherall was then shown interviewing the husband and saying:

"We haven't just stopped you on a hunch here...We have a lot of information about yourself, about the college, and about the types of course."

When questioned, the man could only remember one module that he had studied at the college and was unable to remember the exams that he had taken. Mr Wetherall was shown with the file and said:

"I've got 45 pages there which prove to me that any degree obtained from Westminster College of Computing is completely bogus...Looking back though the colleges you've studied at, all of them are known to immigration for being problem colleges."

The husband mentioned to Mr Wetherall that he had attended another college. However, when Mr Wetherall named the college, the name was "bleeped" out. The voiceover then stated that the man was a "serial student of bogus colleges", and had said "nothing to convince officer Wetherall he is a genuine graduate".

This part of the programme ended with the man being granted temporary admission to the UK while he appealed the decision to refuse him entry. The man subsequently lost his appeal and was deported back to Bangladesh.

Following the broadcast of the programme, Dr Arasilango complained to Ofcom that the College was treated unjustly or unfairly in the programme as broadcast.

Summary of the complaint and broadcaster's response

Dr Arasilango complained that the College was treated unjustly or unfairly in the programme as broadcast in that it was wrong for the programme to include the comments that it was "bogus" and that degrees awarded by it were also "bogus". Dr Arasilango said that the College had never awarded degree certificates.

In response, BSkyB said that the material in the programme complained of had been reviewed by both the programme producer's legal adviser and BSkyB's compliance team at the time the programme was being made. It said that the producer's legal adviser had confirmed to BSkyB that a college called Westminster College of Computing was "included on a list maintained by the UKBA of institutions that were suspected of facilitating breaches of UK immigration control".

BSkyB also said that because the statements about the College were made by an immigration officer (who was being filmed in a real life situation investigating a particular case, and who referred, whilst being filmed, to paperwork which supported his statements) the broadcaster considered that the inclusion of the statement about the College was reasonable and justifiable in the circumstances known at the time of broadcasting the programme.

However, BSkyB said that, once it became aware of Dr Arasilango's concerns, the programme was reviewed again. An internet search was also conducted and numerous colleges with the same name were found. Consequently, BSkyB considered that there could be some confusion as to which college was actually in

question. Therefore, to avoid any further issues, it was decided to remove the name of the College from subsequent broadcasts of the programme.

Representations on Ofcom's Preliminary View

Ofcom prepared a Preliminary View in this case that Dr Arasilango's complaint should not be upheld.

In commenting on that Preliminary View in two emails to Ofcom, Dr Arasilango stated in an email of 20 December 2012:

"You do not understand the complaint well. Although the UKBA officers have documents about the college, the actual matter about the certificate is the big story."

In a second email of 23 January 2013, Dr Arasilango said that:

"Westminster College of Computing Limited has never been in breach of any UK laws...I am telling you again that Westminster College of Computing never awarded any degree. Then how can the statement made by the officer...be true?"

BSkyB did not make any representations on the Preliminary View.

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 unjust and unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes 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, consistent, and targeted only at cases in which action is needed.

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

When considering complaints of unjust or unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals or organisations, as set out in Rule 7.1 of the Code. Ofcom had regard to this Rule when reaching its decision on the complaint. It also had regard to Practice 7.9 of the Code which states that, before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

Ofcom considered Dr Arasilango's complaint that the College was unjustly or unfairly treated in the programme as broadcast in that the references to it being "*bogus*" and awarding "*bogus*" degrees portrayed it unfairly.

Ofcom noted that the statements made in the programme about the College related to information contained in travel documents held by a man from Bangladesh who was attempting to re-enter the UK to study. In relation to one of the colleges named in the man's travel documents, Mr Wetherall, the UKBA officer investigating the man's eligibility to enter the UK, stated:

"We've encountered so many students from this particular college and at the end of the day most of them have just admitted that they have never actually studied there at all, they've never actually gone to any classes, some of them haven't actually been to the college."

Mr Wetherall was then shown comparing the names of the colleges listed on the man's travel documents with information kept on file by the UKBA. Mr Wetherall said:

"I've got 45 pages there which prove to me that any degree obtained from Westminster College of Computing is completely bogus."

Ofcom noted the information provided by BSkyB, in particular that the programme producer's legal adviser had confirmed to BSkyB's compliance team that a college named the "Westminster College of Computing" was included on a UKBA list of "institutions that were suspected of facilitating breaches of UK immigration control". Ofcom noted Dr Arasilango's representations on the Preliminary View on this point and considered that he appeared to accept that the UKBA did "have documents about the college".

Ofcom also considered Dr Arasilango's representations on the Preliminary View that Mr Wetherall's use of the word "degrees", as opposed to the word "certificates", to describe the qualification awarded by the College, was crucial to the question of whether or not the College had been treated unfairly. Having carefully reviewed the material broadcast, Ofcom's view was that Mr Wetherall had used the word "degrees" as a generic term to denote academic awards or qualifications in general. Consequently, Ofcom does not consider the name given to the qualifications awarded by the College to be a material factor in Ofcom's consideration of whether or not the portrayal of the College in the programme as "bogus" resulted in unfairness. Ofcom considered that the issue was whether the College awarded academic qualifications, and whether or not any qualifications awarded were legitimate. The fact that the programme referred to them as "degrees" and not "certificates" did not, in Ofcom's view, affect the outcome of the Preliminary View not to uphold the complaint.

Ofcom also took account of the fact that BSkyB had decided to remove the reference to the College from the programme once it had become aware of Dr Arasilango's concerns and had discovered through an internet search that more than one "Westminster College of Computing" was in existence. Ofcom noted that BSkyB had taken this decision to avoid confusion as to which college was referred to, especially since three years had passed since the programme had been made. Ofcom took the view that BSkyB's decision, taken retrospectively, did not reflect adversely on the programme makers' original decision to include Mr Wetherall's comments in the programme.

Taking the above factors into account, and in particular that it was common ground between the parties that the UKBA did "have documents about the college", Ofcom considered that it was reasonable for the programme makers to have included Mr Wetherall's statements about the College in the programme. In Ofcom's view, it would have been clear to viewers that Mr Wetherall's comments reflected what he

understood about the College at the time and that his comments had been based on an official file compiled by the UKBA. Ofcom considered that Mr Wetherall's comments were made within the context of a programme which aimed to illustrate for viewers the work of the UKBA in policing the country's borders in the public interest and which showed one of Mr Wetherall's investigations as events happened at the time and that this was represented fairly in the programme as broadcast. Therefore, Ofcom considered that the broadcaster had taken reasonable care to ensure that material facts had not been presented in the programme in a way that was unfair or unjust to the College.

Accordingly, Ofcom has not upheld Dr Arasilango's complaint that the Westminster College of Computing was unjustly or unfairly treated in the programme as broadcast.

Other Programmes Not in Breach

Up to 28 January 2013

Programme	Broadcaster	Transmission Date	Categories
Rude Tube	E4	28/11/2012	Generally accepted standards
Sikh Youth Show	Sangat TV	04/11/2012	Religious/Beliefs discrimination/offence

Complaints Assessed, not Investigated

Between 15 and 28 January 2013

This is a list of complaints that, after careful assessment, Ofcom has decided not to pursue because they did not raise issues warranting investigation.

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
20 Most Outrageous Pop Videos	4Music	10/01/2013	Scheduling	1
4thought.tv	Channel 4	14/01/2013	Generally accepted standards	2
5 News	Channel 5	02/01/2013	Product placement	1
50 Greatest Wedding Shockers	E4	10/01/2013	Generally accepted standards	1
8 Out of 10 Cats	Channel 4	18/01/2013	Transgender discrimination/offence	1
A Beautiful Tragedy	Sky Arts 2	06/01/2013	Under 18s in programmes	1
A Good Year	Film 4	12/01/2013	Offensive language	1
Adam O'Neill	Capital FM	16/01/2013	Offensive language	1
Advertisements	ITV1, Channel 4 and Channel 5	n/a	Advertising scheduling	1
Advertisements	ZEE TV	27/12/2012	Advertising scheduling	1
Afternoon Drama	BBC Radio 4	18/01/2013	Generally accepted standards	3
Alan Carr's New Year Specstacular	Channel 4	31/12/2012	Offensive language	1
Animal Antics	BBC 1	19/01/2013	Animal welfare	5
Back to the Future	ITV2	20/01/2013	Offensive language	1
BBC News at One	BBC 1	16/01/2013	Outside of remit / other	1
BBC News at One	BBC 1	22/01/2013	Generally accepted standards	1
BBC News at Six	BBC 1	16/01/2013	Outside of remit / other	2
BBC News at Ten	BBC 1	18/01/2013	Violence and dangerous behaviour	2
BBC Radio 4	BBC Radio 4	21/01/2013	Generally accepted standards	1
Bombardier's sponsorship of Dave	Dave	21/01/2013	Gender discrimination/offence	1
Bombardier's sponsorship of Dave	Dave	24/01/2013	Generally accepted standards	1
Bombardier's sponsorship of Dave	Dave	n/a	Race discrimination/offence	1
Botched Up Bodies (trailer)	Channel 5	09/01/2013	Generally accepted standards	6
Botched Up Bodies (trailer)	Channel 5	10/01/2013	Generally accepted standards	1
Botched Up Bodies (trailer)	Channel 5	11/01/2013	Scheduling	1

Botched Up Bodies (trailer)	Channel 5	13/01/2013	Scheduling	2
Botched Up Bodies (trailer)	Channel 5	14/01/2013	Scheduling	4
Brainiac: Science Abuse	Challenge	09/01/2013	Gender discrimination/offence	1
Brainiac: Science Abuse	Challenge	16/01/2013	Gender discrimination/offence	1
Brainiac: Science Abuse	Pick TV	20/01/2013	Gender discrimination/offence	1
Breakfast	BBC 1	21/01/2013	Generally accepted standards	1
Breakfast	BBC 1	21/01/2013	Scheduling	1
Breakfast Show	Magic Radio	18/01/2013	Competitions	1
Bridezillas	Really	08/01/2013	Offensive language	1
Burn Notice	5*	23/01/2013	Offensive language	1
Calendar News	ITV1 Yorkshire	24/12/2012	Due accuracy	1
Capital Breakfast	Capital FM	18/01/2013	Offensive language	1
Capital Breakfast	Capital FM	26/01/2013	Offensive language	1
Capital Breakfast	Capital FM	28/01/2013	Offensive language	1
Capital Breakfast	Capital FM (East Midlands)	18/01/2013	Offensive language	1
Casualty	BBC 1	19/01/2013	Materially misleading	1
Celebrity Big Brother	Channel 5	12/01/2013	Generally accepted standards	98
Celebrity Big Brother	Channel 5	12/01/2013	Race discrimination/offence	3
Celebrity Big Brother	Channel 5	12/01/2013	Violence and dangerous behaviour	4
Celebrity Big Brother	Channel 5	13/01/2013	Generally accepted standards	1
Celebrity Big Brother	Channel 5	14/01/2013	Outside of remit / other	2
Celebrity Big Brother	Channel 5	16/01/2013	Generally accepted standards	3
Celebrity Big Brother	Channel 5	16/01/2013	Voting	4
Celebrity Big Brother	Channel 5	17/01/2013	Generally accepted standards	2
Celebrity Big Brother	Channel 5	17/01/2013	Outside of remit / other	1
Celebrity Big Brother	Channel 5	18/01/2013	Voting	2
Celebrity Big Brother	Channel 5	19/01/2013	Voting	1
Celebrity Big Brother	Channel 5	20/01/2013	Generally accepted standards	4
Celebrity Big Brother	Channel 5	20/01/2013	Race discrimination/offence	1
Celebrity Big Brother	Channel 5	20/01/2013	Voting	4
Celebrity Big Brother	Channel 5	21/01/2013	Generally accepted standards	112
Celebrity Big Brother	Channel 5	21/01/2013	Offensive language	1
Celebrity Big Brother	Channel 5	21/01/2013	Race discrimination/offence	1

Celebrity Big Brother	Channel 5	21/01/2013	Voting	3
Celebrity Big Brother	Channel 5	22/01/2013	Generally accepted standards	1
Celebrity Big Brother	Channel 5	22/01/2013	Voting	2
Celebrity Big Brother	Channel 5	23/01/2013	Outside of remit / other	7
Celebrity Big Brother	Channel 5	23/01/2013	Voting	3
Celebrity Big Brother	Channel 5	24/01/2013	Race discrimination/offence	1
Celebrity Big Brother	Channel 5	25/01/2013	Outside of remit / other	6
Celebrity Big Brother	Channel 5	25/01/2013	Voting	3
Celebrity Big Brother	Channel 5	n/a	Voting	5
Celebrity Big Brother's Bit on the Side	Channel 5	21/01/2013	Voting	1
Celebrity Big Brother's Bit on the Side	Channel 5	24/01/2013	Generally accepted standards	3
Chaal Sitaroon KI	DM Digital	09/12/2012	Materially misleading	1
Channel 4 News	Channel 4	03/01/2013	Due impartiality/bias	1
Channel 4 News	Channel 4	16/01/2013	Generally accepted standards	1
Channel promotion	Comedy Central	07/01/2013	Hypnotic and other techniques	1
Channel promotion	Comedy Central	24/01/2013	Hypnotic and other techniques	1
Charley Boorman's South African Adventure	Channel 5	16/01/2013	Offensive language	1
Charley Boorman's South African Adventure	Channel 5	23/01/2013	Religious/Beliefs discrimination/offence	1
Chat Girl TV	Adult Channel	11/01/2013	Participation TV - Harm	1
Chat Girl TV	Girl Girl	22/01/2013	Sexual material	1
ChatGirl TV	GirlGirl	20/01/2013	Sexual material	1
ChatGirl TV	GirlGirl	20/01/2013	Sexual material	1
Cherry's Parenting Dilemmas	Really	15/01/2013	Under 18s in programmes	1
Cloud 9 (trailer)	Zing	01/01/2013	Crime	1
Come Dine with Me	Channel 4	21/01/2013	Generally accepted standards	1
Comic Timing	On FM	06/01/2013	Scheduling	1
Cornwall with Caroline Quentin	ITV1	14/01/2013	Competitions	1
Coronation Street	ITV	23/01/2013	Materially misleading	8
Coronation Street	ITV	23/01/2013	Violence and dangerous behaviour	1
Coronation Street	ITV1	14/01/2013	Generally accepted standards	1
Country Greats	Vintage TV	26/12/2012	Generally accepted standards	1
Dancing on Ice	ITV	20/01/2013	Generally accepted standards	6
Dancing on Ice	ITV1	13/01/2013	Generally accepted standards	12

Dave's One Night Stand	Dave	11/01/2013	Generally accepted standards	1
Daybreak	ITV1	11/01/2013	Generally accepted standards	1
Daybreak	ITV1	16/01/2013	Generally accepted standards	1
Daybreak	STV	24/01/2013	Generally accepted standards	1
Dickinson's Real Deal	ITV1	18/01/2013	Competitions	1
Dingo: Wild Dogs at War	Eden	22/01/2013	Animal welfare	1
Don't Tell the Bride	BBC 3	16/01/2013	Race discrimination/offence	1
Don't Tell the Bride	BBC 3	23/01/2013	Generally accepted standards	1
Duncan Barks	LBC 97.3FM	23/01/2013	Race discrimination/offence	1
EastEnders	BBC 1	14/01/2013	Disability discrimination/offence	1
EastEnders	BBC 1	25/01/2013	Outside of remit / other	1
Embarrassing Fat Bodies	Channel 4	21/01/2013	Generally accepted standards	1
Emmerdale	ITV	17/01/2013	Offensive language	1
Emmerdale	ITV	17/01/2013	Scheduling	3
European Rugby Union	Sky Sports 2	16/12/2012	Violence and dangerous behaviour	1
Ever Decreasing Circles	Gold	n/a	Nudity	1
FA Cup Replay	ITV1	16/01/2013	Outside of remit / other	1
Father Brown	BBC 1	18/01/2013	Drugs, smoking, solvents or alcohol	1
First Time Farmers	Channel 4	11/01/2013	Offensive language	1
First Time Farmers	Channel 4	18/01/2013	Offensive language	1
Fleabag Monkeyface	CITV	16/01/2013	Generally accepted standards	1
Flip Side of Aisha	Fadak TV	01/11/2013	Religious/Beliefs discrimination/offence	1
Fool's Gold	Film4	19/01/2013	Offensive language	1
Football League: Tranmere Rovers v Mk Dons	Sky Sports 1	16/11/2012	Offensive language	1
Friends	Comedy Central	24/01/2013	Violence and dangerous behaviour	1
Ghostbusters 2	ITV2	26/12/2013	Offensive language	1
Glorious Recital with English	Inspire FM (Luton)	03/12/2012	Violence and dangerous behaviour	1
Granada News and Weather	ITV1 Granada	23/12/2012	Advertising/editorial distinction	1
Grants Whiskey's sponsorship of TV character on ITV4	ITV4	n/a	Generally accepted standards	1
Half Hour Hymns	BBC Radio 2	n/a	Outside of remit / other	1
Halfords' sponsorship of Top Gear	Dave	08/01/2013	Materially misleading	1

Hirsty's Daily Dose	Capital Yorkshire	16/01/2013	Sexual material	1
Hollyoaks	Channel 4	14/01/2013	Offensive language	1
Hollyoaks	Channel 4	18/01/2013	Offensive language	2
Hollyoaks	Channel 4	21/01/2013	Suicide and self harm	2
Hollyoaks	Channel 4	24/01/2013	Nudity	1
Hollyoaks	Channel 4	24/01/2013	Scheduling	1
Hollyoaks	E4	07/01/2013	Violence and dangerous behaviour	5
Hollyoaks	E4	17/01/2013	Generally accepted standards	1
Hollyoaks	E4	18/01/2013	Suicide and self harm	1
Hollyoaks	E4	23/01/2013	Nudity	1
Hot 10 Collaborations	MTV Base	16/01/2013	Race discrimination/offence	1
House Party	Channel 4	31/12/2012	Religious/Beliefs discrimination/offence	1
Inside Death Row with Trevor McDonald (trailer)	ITV1	24/01/2013	Scheduling	1
Inside Death Row with Trevor McDonald(trailer)	ITV1	24/01/2013	Generally accepted standards	1
Inside Out	BBC 1	21/01/2013	Offensive language	1
ITV News and Weather	ITV1	11/01/2013	Materially misleading	1
ITV News and Weather	ITV1	15/01/2013	Due impartiality/bias	1
ITV News at Ten and Weather	ITV1	14/01/2013	Gender discrimination/offence	1
ITV News at Ten and Weather	ITV1	16/01/2013	Due impartiality/bias	1
ITV sports promotion	ITV4	15/01/2013	Materially misleading	1
I've Never Seen Star Wars	BBC Radio 4	15/01/2013	Offensive language	1
Jeremy Vine	BBC Radio 2	11/12/2012	Under 18s in programmes	1
Jeremy Vine	BBC Radio 2	16/01/2013	Generally accepted standards	1
JK and Lucy	Heart South Coast	13/12/2012	Commercial communications on radio	1
Kangaroo Dundee	BBC 2	26/01/2013	Generally accepted standards	1
Lewis	ITV	14/01/2013	Product placement	1
Life, Death and Enormous Amounts of Money	BBC 1 Scotland	16/01/2013	Outside of remit / other	1
Lilla Årskrönikan	Kanal 5	17/12/2012	Under 18s in programmes	12
Little Man	Channel 5	13/01/2013	Offensive language	1
Lorraine	ITV	24/01/2013	Materially misleading	1
Love is the Drug!	1-2-1 Dating	22/01/2013	Sexual material	1
Magic 105.4	Magic 105.4	08/01/2013	Competitions	1
Mrs. Brown's Boys	BBC 1	19/01/2013	Offensive language	1

NASA's Greatest Missions	Quest	27/01/2013	Outside of remit / other	1
News programming	ITV1 and Channel 4	25/01/2013	Outside of remit / other	1
Newsnight	BBC 2	16/01/2013	Generally accepted standards	1
Newsnight	BBC 2	22/01/2013	Due impartiality/bias	1
Nick Ferrari	LBC 97.3FM	21/01/2013	Generally accepted standards	1
Nursing the Nation	ITV	17/01/2013	Materially misleading	1
Olympics 2012: 50 Greatest Moments	BBC 3	22/12/2012	Generally accepted standards	1
On the Verge of a Midlife Crisis with Sharon Horgan	Channel 4	09/01/2013	Generally accepted standards	3
Paddy's TV Guide	Channel 4	18/01/2013	Age discrimination/offence	1
Party Political Broadcast by the Conservative Party	BBC 1	23/01/2013	Outside of remit / other	7
Party Political Broadcast by the Conservative Party	BBC 2	23/01/2013	Outside of remit / other	9
Party Political Broadcast by the Conservative Party	ITV	23/01/2013	Outside of remit / other	22
Phones 4U's sponsorship of Films on 4	Channel 4	n/a	Generally accepted standards	1
Phones 4U's sponsorship of Films on 4	Film4	10/01/2013	Generally accepted standards	1
Phones 4U's sponsorship of Films on 4	Film4	n/a	Generally accepted standards	1
Pole to Pole	Prime	21/01/2013	Nudity	1
Privates	BBC 1	10/01/2013	Violence and dangerous behaviour	1
Programme trailer	Nicktoons	01/01/2013	Scheduling	1
Programming	BBC Radio 4 / BBC news programmes	n/a	Outside of remit / other	1
Programming	Various	n/a	Generally accepted standards	1
Programming	Various	n/a	Outside of remit / other	1
Q Weekend Cafe	Q102.9 FM	12/01/2013	Generally accepted standards	2
QI	n/a	12/10/2007	Outside of remit / other	1
QI XL	Dave	18/01/2013	Generally accepted standards	2
Question Time	BBC 1	24/01/2013	Outside of remit / other	1
Regional News and Weather	BBC 1	18/01/2013	Outside of remit / other	1
Ripper Street	BBC 1	30/12/2012	Violence and dangerous behaviour	1

Ripper Street	BBC 1	06/01/2013	Generally accepted standards	2
Sally Hudson	Capital FM (Manchester)	17/01/2013	Offensive language	1
Saturday Kitchen Live	ITV1	07/01/2013	Outside of remit / other	1
Sexcetera	Sky Living	20/12/2012	Generally accepted standards	1
Shades Blinds' sponsorship of Loose Women	ITV1	n/a	Gender discrimination/offence	1
Silent Witness	BBC 1	10/01/2013	Violence and dangerous behaviour	1
Silent Witness	BBC 1	24/01/2013	Violence and dangerous behaviour	2
Sky Broadband's sponsorship of ITV1 Showcase Drama	ITV1	n/a	Generally accepted standards	1
Sky News	Sky News	16/01/2013	Due impartiality/bias	1
Sky Poker	SkyPoker.com	09/01/2013	Undue prominence	1
Spartacus: Vengeance	Sky1	21/01/2013	Violence and dangerous behaviour	1
Splash!	ITV1	05/01/2013	Scheduling	1
Sports programming	Various	n/a	Outside of remit / other	1
Steve Allen	LBC 97.3FM	15/01/2013	Generally accepted standards	16
Steve and Karen Breakfast Show	Metro Radio	16/01/2013	Outside of remit / other	1
Subtitling	Various	n/a	Television Access Services	2
Suits	Dave	08/01/2013	Scheduling	1
Suits	Dave	18/01/2013	Offensive language	1
Sunday Politics	BBC 1	20/01/2013	Generally accepted standards	1
Sunrise	Sky News	10/01/2013	Disability discrimination/offence	1
Sunrise	Sky News	18/01/2013	Due impartiality/bias	1
Sunrise	Sky News International	19/01/2013	Generally accepted standards	1
Take Me Out	ITV	19/01/2013	Generally accepted standards	1
Tales of the Unexpected	Sky Arts 2	20/12/2012	Nudity	1
Teen Wolf	Channel 5	20/01/2013	Scheduling	4
Tennis	BBC 2	27/01/2013	Offensive language	1
The Alan Titchmarsh Show	ITV	21/01/2013	Violence and dangerous behaviour	1
The Alan Titchmarsh Show	ITV	24/01/2013	Animal welfare	39
The Horse Hoarder	Channel 4	07/01/2013	Crime	1
The Horse Hoarder	Channel 4	07/01/2013	Materially misleading	2
The Hotel	Channel 4	20/01/2013	Offensive language	5
The Human Centipede	SyFy	19/01/2013	Generally accepted standards	1

The Jeremy Kyle Show	ITV1	15/01/2013	Religious/Beliefs discrimination/offence	1
The Jeremy Kyle Show	ITV1	16/01/2013	Disability discrimination/offence	1
The Jonathan Ross Show	ITV	19/01/2013	Generally accepted standards	1
The Land Girls	Film 4	26/01/2013	Sexual material	1
The National TV Awards	ITV	23/01/2013	Animal welfare	1
The Polar Bear Family and Me	BBC 2	15/01/2013	Offensive language	1
The Simpsons	Channel 4	21/01/2013	Violence and dangerous behaviour	1
The Simpsons Movie	Channel 4	19/01/2013	Violence and dangerous behaviour	1
The Today Programme	BBC Radio 4	16/01/2013	Generally accepted standards	1
The Undateables	Channel 4	08/01/2013	Disability discrimination/offence	1
The Undateables	Channel 4	11/01/2013	Disability discrimination/offence	1
The Undateables	Channel 4	15/01/2013	Disability discrimination/offence	2
The Undateables (trailer)	More4	06/01/2013	Race discrimination/offence	1
The Wright Stuff	Channel 5	17/01/2013	Due impartiality/bias	1
The Wright Stuff	Channel 5	24/01/2013	Generally accepted standards	1
The X Factor Results Show	ITV1	09/12/2012	Flashing images/risk to viewers who have PSE	1
This Morning	ITV	17/01/2013	Due impartiality/bias	2
This Morning	ITV	22/01/2013	Materially misleading	2
This Morning	ITV	23/01/2013	Drugs, smoking, solvents or alcohol	1
This Morning	ITV1	22/01/2013	Generally accepted standards	3
Top Gear	BBC 2	27/01/2013	Violence and dangerous behaviour	2
UK Hot 40	Smash Hits	16/01/2013	Gender discrimination/offence	1
Various	ITV	n/a	Generally accepted standards	1
Walkers 'Deep Ridged' sponsorship of Epic Adventure on Discovery	Discovery	12/01/2013	Generally accepted standards	1
Waterloo Road	BBC 1	03/01/2013	Sexual material	1
Waterloo Road	BBC 1	10/01/2013	Generally accepted standards	1
Watson & Oliver	BBC 2	07/03/2012	Scheduling	1
What Happens in Kavos...	Channel 4	07/01/2013	Gender discrimination/offence	1
What Happens in Kavos...	Channel 4	07/01/2013	Generally accepted standards	2
What Happens in Kavos...	Channel 4	07/01/2013	Sexual orientation discrimination/offence	3

Wonders of Life	BBC 2	27/01/2013	Outside of remit / other	1
World's Craziest Fools	BBC 3	14/01/2013	Generally accepted standards	1
World's Most Dangerous Roads	BBC 2	09/01/2013	Generally accepted standards	1
You've Been Framed!	ITV	19/01/2013	Disability discrimination/offence	1
You've Been Framed!	ITV2	16/01/2013	Animal welfare	1

Investigations List

If Ofcom considers that a broadcast may have breached its codes, it will start an investigation.

Here is an alphabetical list of new investigations launched between 24 January and 6 February 2013.

Programme	Broadcaster	Transmission Date
Advertisements	Liverpool FC TV	20/12/2012
Channel 4 Racing	Channel 4	01/01/2013
Clinic Matters	Vox Africa	18/01/2013
ITV viewer competitions	ITV	Various
Jackpot247	ITV1	11/01/2013
Midsomer Murders	ITV	30/01/2013
This Morning	ITV1	02/01/2013
World Without End	Channel 4	26/01/2013

It is important to note that an investigation by Ofcom does not necessarily mean the broadcaster has done anything wrong. Not all investigations result in breaches of the Codes being recorded.

For more information about how Ofcom assesses complaints and conducts investigations go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>.

For fairness and privacy complaints go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>.